Plain Language: Changing the Lawyer's Image and Goals

Robert Eagleson

We can all have blindspots — motes in our eyes — that can lead us to dismiss the imperfect efforts of those who strive for a new approach to legal drafting. These blindspots can likewise lead us to miss the wider perspective. So Justice Frank Callaway of the Victoria Court of Appeal, toward the end of 1997, commented in a ruling:

> The provisions of the Corporations Law that include s.553C are, as I observed in the course of the argument, drafted in the language of the pop songs. Section 435A speaks of "maximis[ing] the chances" and s.435C of "[t]he normal outcome" and "the deed's administrator". Section 435C(3) begins with the word "However" and a comma, a style that, at least until recently, has been eschewed by good writers. I am aware, of course, that there are those who believe that a statute should be drafted like a notice to quit or even a novel: their distinguished predecessors were the draftsmen of the Code Napoleon, later called the Code Civil: but an Australian Stendhal would not refresh his spirit or purify his style by dipping into legislation where the quest for simplicity pays the price of vulgarity and ends in obscurity.[1]

Given my involvement on the Corporations Law Simplification Task Force, perhaps I should hasten to observe that Judge Callaway was referring to sections of the Corporations Law that we had not yet touched! Still, his remarks are revealing. He worries about what an Australian Stendhal would think of a newer drafting style. But he seems not to have contemplated what a renowned writer might think of traditional legal drafting.

Let's do just that: examine what literary writers have said about legal writing.

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[1] *G.M. & A.M. Pearce and Co. v. R.G.M. Australia Pty.*, 26 A.C.S.R. 639, 641 (1998).

Jonathan Swift, in *Gulliver's Travels*

In describing the culture of Brobdingnag, Jonathan Swift had Gulliver record in the account of his travels:

> No Law of that Country must exceed in Words the Number of Letters in their Alphabet; which consists only of two and twenty. But indeed, few of them extend even to that Length. They are expressed in the most plain and simple Terms, wherein those People are not Mercurial enough to discover above one Interpretation.[2]

This is a restrained and indirect assault on the prolixity of English legal language. The laws of Brobdingnag are short and expressed in plain terms. There can be only one interpretation, and the process of understanding them is not encumbered by precedents.

The full blast comes in the account of the voyage to the Houyhnhnms. There Swift describes English law directly for the benefit of the Master Horse.

> I SAID there was a Society of Men among us, bred up from their Youth in the Art of proving by Words multiplied for the Purpose, that *White* is *Black*, and *Black* is *White*, according as they are paid. To this Society all the rest of the People are Slaves.[3]

There is an unnerving modernity about this view of the legal profession. Even in the eighteenth century, lawyers were accused of "multiplying" words, of piling word on word, to confuse and to confound. Their motivation is to enmesh the population so they can make more money.

After some tilts at court procedures and a more acerbic denunciation of the status of precedents, Swift returns to the linguistic conventions of the English legal profession:

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[2] JONATHAN SWIFT, GULLIVER'S TRAVELS 104 (Richard Quintana ed., Modern Lib. 1958).

[3] *Id.* at 202.

> IT is likewise to be observed, that this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have wholly confounded the very Essence of Truth and Falsehood, of Right and Wrong; so that it will take Thirty Years to decide whether the Field, left me by my Ancestors for six Generations, belong to me, or to a Stranger three Hundred Miles off.[4]

The traditional language of the law — "legalese," as we pejoratively call it — is incomprehensible in the view of this man of letters. Worse, because of its obscurity, it deprives other members of society of their rights; it hinders them from understanding what they should and should not do, and even what they own.

The end result of lawyers' procedures and linguistic gymnastics is an abhorrence of lawyers in the community and a complete lack of status:

> HERE my Master interposing, said it was a Pity, that Creatures endowed with such prodigious Abilities of Mind as these Lawyers, by the Description I gave of them must certainly be were not rather encouraged to be Instructors of others in Wisdom and Knowledge. In Answer to which, I assured his Honour, that in all Points out of their own Trade, they were usually the most ignorant and stupid Generation among us, the most despicable in common Conversation, avowed Enemies to all Knowledge and Learning; and equally disposed to pervert the general Reason of Mankind, in every other Subject of Discourse, as in that of their own Profession.[5]

So Swift scathingly brings his description to a close. It has the ring of those modern surveys in which lawyers so often appear toward the bottom on the scale of professional image — along with politicians.

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[4] *Id.* at 203.

[5] *Id.* at 203–04.

Charles Dickens, in *Bleak House*

We might jump forward 125 years or so to that biting exposé of the English legal system in the nineteenth century, *Bleak House.* Remember its remarkably evocative opening:

> Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping and the waterside pollutions of a great (and dirty) city.[6]

Soon we are within the High Court of Chancery:

> On such an afternoon, if ever, the Lord High Chancellor ought to be sitting here — as here he is — with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon, some score of members of the High Court of Chancery bar ought to be — as here they are — mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be — as are they not? — ranged in a line, in a long matted well (but you might look in vain for Truth at the bottom of it), between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them.[7]

Let us recover some of his phrases:

- "an interminable brief"

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[6] CHARLES DICKENS, BLEAK HOUSE 5 (George Ford & Sylvere Monod eds., W.W. Norton & Co. 1977).

[7] *Id.* at 5–6.

- "tripping one another up on slippery precedents"
- "running their goat-hair and horse-hair warded heads against walls of words"
- "with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense"

A different century, a different author, but a strikingly similar image of lawyers and familiar descriptions of their drafting. The prolixity gets first billing, the precedents are listed — all the impossible words and the monstrous bulk. Even the charge of filthy lucre is there: "inherited [the case] from their fathers, who made a fortune by it." In this neat way Dickens consolidates his perception that the law is being manipulated for the benefit of those who practice it. It is a tragic view that should have startled the professional into remedial reaction.

Whether it's Swift or Dickens composing the satire, the butts are the same, and the expressions are notably parallel. The two authors have the same image of lawyers, and their perspective springs so much from the way lawyers use words. What is equally astounding is that their views are still being voiced regularly today by so many in the community.

James Joyce, in *Ulysses*

Other authors have turned from the scorn of satire to the mockery of parody to ridicule legal language and protest against it. There is that wonderful example in *Ulysses*:

> And whereas on the sixteenth day of the month . . . it came to pass that those learned judges repaired them to the halls of law. There master Courtenay, sitting in his own chamber, gave his rede and master Justice Andrews, sitting without a jury in the probate court, weighed well and pondered the claims of the first chargeant upon the property in the matter

> of the will propounded and final testamentary disposition *in re* the real and personal estate of the late lamented Jacob Halliday, vintner, deceased versus, Livingstone, an infant, of unsound mind, and another. And to the solemn court of Green street there came sir Frederick the Falconer. And he sat him there about the hour of five o'clock to administer the law of the brehons at the commission for all that and those parts to be holden in and for the county of the city of Dublin. And there sat with him the high sinhedrim of the twelve tribes of Iar . . . there being in all twelve good men and true. And he conjured them by Him who died on rood that they should well and truly try and true deliverance make in the issue joined between their sovereign lord the king and the prisoner at the bar and true verdict give according to the evidence so help them God and kiss the books.[8]

Here Joyce has finely sharpened the thrust by mingling undertones of inflated religious language with the language of the law. The purpose is unmistakable: it is stinging lampoon. Indulging in legalese, lawyers leave themselves exposed completely. They are fair game for a clever writer like James Joyce. That they are ready game simply reflects the cumbersome convolution and inelegant obfuscation of their drafting. How could Joyce resist:

- "And whereas"
- "weighed well and pondered the claims"
- "in the matter of the will propounded and final testamentary disposition *in re* the real and personal estate of . . ."
- "versus Livingstone, an infant, of unsound mind, and another"
- "the commission for all that and those parts to be holden in and for the county"

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[8] JAMES JOYCE, ULYSSES 265 (Hans Walter Gabler ed., Random House 1986).

- "they should well and truly try and true deliverance make in the issue"

As we read these words, we come to recognize that the boundaries between fact and fiction can be very misty indeed. What makes Joyce's parody succeed is the strong sense that it is not imagination running rampant, but reality polished and refined.

Groucho Marx, in *Animal Crackers*

More overt and closer to slapstick is Groucho Marx's endeavor to counterfeit a lawyer and legal correspondence. In the film *Animal Crackers*, he acts out the dictation of a letter:

> Honorable Charles D. Hungerdunger
> c/o Hungerdunger, Hungerdunger & McCormick
>
> Gentlemen?
>
> In re yours of the 5th inst. yours to hand and in reply, I wish to state that the judiciary expenditures of this year, i.e., has not exceeded the fiscal year — brackets — this procedure is problematic and with nullification will give us a subsidiary indictment and priority. Quotes, unquotes and quotes. Hoping this finds you, I beg to remain as of June 9th,
>
> Cordially, Respectfully, Regards[9]

This is written for laughs, so the follies of legal writing are exaggerated. But Groucho has not strayed too far from the truth; otherwise, we would not recognize the butt of the joke, and the jest would not work. And leaving aside the attempts to imitate dictation, the language is not too exaggerated, as the following letter from real life testifies:

16th February, 1987

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[9] ANIMAL CRACKERS (Paramount 1928).

Messrs.
Solicitors,
SYDNEY N.S.W. 2000

Dear Sirs,

Re: Mr. (Vendors)
Mr. (Purchasers)
Property:

We act for the Vendors herein and are informed by the relevant Agent in the sale that you act for the Purchasers.
Accordingly we furnish herewith:

Duplicate part Agreement for Sale of Land

for your perusal and upon approval, signature duly by your clients as Purchasers ancillary to your appointing in mutuality with us exchange of such Agreement for conforming original part of the instant Agreement signed duly by our clients, the Vendors.

We would be appreciative of your present acknowledgment hereof and then to be advised of your approval of the said Agreement in order that we might conveniently submit the same to our clients for their concurrence and due signature.

Yours faithfully

Little Red Riding Hood

It has continually puzzled me that lawyers could write so appallingly, especially given their brilliance in formulating intricate legal structures. What would have happened if they had composed our fairy tales — *Little Red Riding Hood*, for instance?

Once upon a time, and from time to time, and when, where, and so often as shall be, there was a person who, not being a boy pursuant to subsection 93(1)(B) of the Natural and Unnatural Persons Act, as amended, notwithstanding subparagraph 152(1)(b)(ii) of the same Act, was a girl

> described in the schedule thereto (hereinafter called Red Riding Hood pursuant to the Animal, Mineral, or Vegetable bylaw of the Province of British Fairyland).

[Let's speed up the story and leap forward to that part in which Red Riding Hood has entered the grandmother's house.]

> "What sharp teeth you have," was all that the heretofore mentioned granddaughter could gasp, struggling to think of something novel to say.
>
> "These are wolf's teeth," chortled the said wolf with glee, "all the sharper to gobble up little girls. I'm a wolf, you silly girl, not your grandmother." And with this the abovementioned wolf jumped out of bed pursuant to the provisions of the Aerobics and Other Tortures Act, ready to consume Red Riding Hood.
>
> "Stop," responded the same Red Riding Hood, "subject to section 905 XXX of the Domesticated and Rusticated Wild Animals Act, as amended, a wolf who is, or has been, a wolf to whom this section applies, shall not, either directly or indirectly, and either while he, she, or it is, or after he, she, or it has ceased to be, a wolf to whom this section applies, except in the performance of natural acts or with the consent, in writing, of the appropriate prescribed authority, make imitation of, counterfeit, copy, pretend to be, act the part of, masquerade as, impersonate, represent, forge, pass oneself off as, simulate, pose as, or dress up as a grandmother."

We laugh at this parody of legalese and gobbledygook. But there is a tinge of unease and embarrassment in our laughter because, to be effective, a parody must have close resemblances to the original. Consider section 87(2) of the Complaints (Australian Federal Police) Act, 1981:

> Subject to this section, a person who is, or has been, a person to whom this section applies, shall not, either directly or indirectly, and either while he is, or after he has ceased to be, a person to whom this section applies, except in the performance of his duties or with the consent, in writing, of the appropriate person, make a record of, or divulge or communicate, information acquired by him by reason of his being or having been a person to whom this section applies . . . .

Or behold this piece of tortuous prose from section 35H of our Marketing of Primary Products (citrus fruit) Act, 1973 (Victoria) (later repealed):

> The provisions of sections 43 and 48 shall with such modifications as are necessary extend and apply to and in relation to this Division and, without affecting the generality of the foregoing, in particular with the modifications that —
>
> (a) a reference to eggs or to eggs or egg pulp or to eggs and egg pulp shall be construed as a reference to citrus fruit.

With examples like these coming to light every day, it is little wonder that lawyers have such a poor image among writers of literature and the public in general. How can lawyers profess to respect the law, uphold its dignity, and promote its virtue in the community at large when they present the law in misshapen and disheveled language? The linguistic deeds of lawyers belie their avowals. If we hold something precious, we strive to present it in the finest of displays, not in rags that will be scorned.

Think of the constant flood of jokes at the expense of lawyers.

> Q: Why does New Jersey have more nuclear waste dumps while Washington has more lawyers?
> A: New Jersey got the first choice.
>
> Q: What is the difference between God and a lawyer?
> A: God never thinks He is lawyer.

Members of the community react this way because they feel that they are being cheated, that a grand deception is being played on them. Worse, they believe that lawyers defraud them deliberately because it is inconceivable to them that anyone with an ounce of literacy would produce such tangled, labyrinthine documents naturally. They see legalese as a shabby device to line legal pockets. This is the common perception.

A few years ago at Mallesons Stephen Jaques we produced a lease in plain language for a government agency. A senior manager in the agency rang a senior partner to be assured that the lease

offered the agency full protection. Questioned, the manager acknowledged that he could find no loopholes in it, but it was so clear that he wondered whether it was legal. This is sad. We have so conditioned the community that it doubts comprehensible language.

Tragically, lawyers are bringing not only themselves into disrepute through their shoddy writing, but also the law. Many in the community condemn it and are ready to dispense with it because they have suffered at the hands of its convoluted small print. It is grievous that lawyers should betray themselves and destroy what they are seeking to uphold. The community cannot appreciate what they are trying to do for it and how solidly based and wise their schemes are because they persist in clinging to such deplorable conventions of writing.

The wounding of the lawyer's image is all the more tragic because it is a self-inflicted wound. They do not have to write the way they do: the solution is to hand in plain English.

Does It Have to Be Like It Is?

To put flesh on this claim, let's look at another example. Section 25(3) of the Credit Act, 1984 (Victoria) is very appropriate because it confronts us with the notorious overlong sentence. Here are 345 words crammed into the one sentence. It requires perseverance and several rereadings to disentangle the constituents.

> Where, by reason of sub-section (1), a tied long contract is discharged when a contract of sale is rescinded or discharged —
>
> (a) the credit provider is liable to the buyer for the amount (if any) paid by the buyer to the credit provider under the tied loan contract to the extent that it is discharged;
>
> (b) the supplier is liable to the credit provider for —

> (i) the amount (if any) paid under the tied loan contract, to the extent that it is discharged, by the credit provider to the supplier;
>
> (ii) the amount paid under the tied loan contract, to the extent that it is discharged, by the credit provider to the buyer and paid by the buyer to the supplier; and
>
> (iii) the amount of the loss (if any) suffered by the credit provider by reason of the discharge of the tied loan contract, being an amount not exceeding the amount of the accrued credit charge under the tied loan contract; and
>
> (c) the buyer is liable to the credit provider for the amount (if any) paid under the tied loan contract, to the extent that it is discharged, to the buyer by the credit provider, other than amounts paid to the buyer and paid by him to the supplier
>
> and, where the contract of sale is a contract of sale of goods or services
>
> (d) if the goods are in the possession of the buyer
>
> (i) where, before the rescission or discharge of the contract of sale, there was not a mortgage relating to the tied loan contract, the buyer shall deliver the goods to the supplier; or
>
> (ii) where, before the rescission or discharge of the contract of sale, there was a mortgage relating to the tied loan contract to the extent that it is discharged, the buyer shall deliver the goods to the credit provider; and
>
> (e) if the goods are in the possession of the credit provider and no amounts are owed to the credit provider under paragraph (b), the credit provider shall deliver the goods to the supplier.

To scratch only the surface of the convolution, consider the structure of (d)(i). It begins with a subordinate clause:

> where, before the rescission . . . .

which follows immediately on another subordinate clause:

> If the goods are in the possession . . . .

which follows on a third subordinate clause:

> where the contract of sale . . . .

which is coordinated with a fourth subordinate clause, introduced some 200 words earlier at the beginning of the section:

> Where, by reason of . . . .

and which itself contains a subordinate temporal clause:

> when a contract of sale . . . .

The excessive complicatedness results from compressing too many ideas and qualifications into the one sentence. No one would speak like this; nor would anyone write like this spontaneously. The sentence would have come into being only after a lot of effort in manipulating several sentences into one. It is contrived — a product of time, not a lack of time.

There is no need for this artifice. If we go back to the ideas underlying paragraph (d), we see that they have the following form:

- What happens to the goods in a contract of goods or services?
- The buyer gives them to the supplier if there is no mortgage relating to the tied loan contract.
- The buyer gives them to the credit provider if there is a mortgage.

These ideas form a neat, coherent group. They could just as easily be expressed in a separate sentence:

> If the contract of sale is for goods or services, the buyer must deliver any relevant goods in his or her possession:
>
> (a) to the credit provider if there was a mortgage relating to the tied loan account; or
>
> (b) to the supplier in any other case.

This solution disentangles the conditional clauses from each other and relieves readers from having to hurdle a whole series of them. It would take much less time to write the ideas in this form than to merge them with the early part of 25(3). Moreover, the incorporation is unnecessary: there are a number of items in the revised version of (d) to tie it to the earlier part of 25(3), such as the definite article before *buyer*. The incomprehensibility, then, has nothing to do with the complexity of content or pressure of time, but with faulty notions of sentence structure and cohesion in texts. These are matters in the control of drafters. There is an alternative.

The Superfluity of Supercaution

Without disturbing our peace of mind too seriously, we might explore section 112 of the Mental Health Act, 1986 (Victoria):

> (1) A community visitor is entitled when visiting a mental health service to
>
> (a) inspect any part of the premises; and
>
> (b) see any person who is receiving treatment or other services unless that person has asked not to be seen; and
>
> (c) make enquiries relating to the admission, detention, care, treatment and control of patients or residents; and
>
> (d) inspect any document or medical record relating to any patient or resident if he or she has given informed consent in writing and any records required to be kept by or under this Act.

> (2) Where a community visitor wishes to perform or exercise or is performing or exercising any power, duty or function under this Act, the person in charge and every member of the staff or management of the mental health service must provide the community visitor with such reasonable assistance as the community visitor requires to perform or exercise that power, duty or function effectively.

Analyzed, subsection (2) amounts to:

> If a community visitor wants to do X, the staff must help the visitor when the visitor does X.

But the important message — the central message — that the staff must help the community visitor gets covered over in all this excess verbiage. The first clause repeats subsection (1) and the last clause repeats it again — to make sure that subsection (2) is linked to subsection (1). But of course subsection (2) is linked to subsection (1). It is part of Section 112! How else would we read it?

Subsection (2) could be reduced to:

> Members of the mental-health service must give any reasonable help that the community visitor requires to carry out these activities.

These words could not possibly be open to misinterpretation. What else could they be referring to other than the activities in subsection (1)? Rather than strengthening the message, the opening clause in the original only serves to hide the central idea of the subsection. Supercaution can be counterproductive.

It can also contribute to legal error, as this example shows. So concerned has the drafter been to forge every conceivable link that he or she has been distracted from the content. The location of subsection (2) within section 112 suggests that its concerns are restricted to the activities in subsection (1); but the use of the phrase *under this Act* suggests a wider application. Either subsection (2) should be moved elsewhere or this phrase should be changed.

Gobbledygook may cause us problems with law as well as with communication.

Plain language, then, offers not only great gains in clarity and readability, but also a considerable reduction in danger.

Precision Upheld by Clarity

It is critical to recognize that there is no difference in meaning, no loss in law, between these examples of legalese and the plain-language solutions I have offered in their place. Indeed, the plain-language versions have been subjected to close scrutiny by experts, who have confirmed their accuracy. Plain language does not place the law's precision in jeopardy. It does not seek as a matter of principle to change laws or policies or to tamper with their content.

What it challenges — and what the complaints against legalese challenge — is the quality of the current expression of laws and policies. Essentially, a plain-language project is concerned with communication and efficiency. It aims to produce documents that are written in such a way that their intended audience can read them easily and understand them readily. It touches most centrally on equity when the form of expression disadvantages and even disfranchises one of the parties.

This is not to say that the plain language is not concerned with matters of justice and fair play, that one would be content to have bad laws so long as they were written clearly. On the contrary, plain-language projects regularly lead to removing injustices and eliminating cumbersome and costly procedures. One project I worked on — a residential lease — exposed clauses that were so outrageously unfair that when the landlords saw them in plain language, even the landlords though the clauses had to be abandoned. When we rewrote Victoria's Takeovers Code in plain language, we uncovered errors in law, ambiguities, and

uncertainties, for example, in sections 16, 17, 18, 34, and 48.[10] There has hardly been a legal document I have worked on in the past 24 years in which we have not exposed mistakes.

Any properly conceived project to increase comprehensibility will begin with examining the underlying policy content. We cannot make an artificial division between content and language, for an overly intricate policy often lies behind an impenetrable publication. The trouble with many legal documents is that they retain provisions that are either obsolete or inapplicable. Sometimes we expect one contract to serve all purposes when it would be better to have two or more different types of contract, thereby enabling at least one of them to be simpler. At other times, several forms could satisfactorily be merged into one to reduce the burden on the public or on business. But the ultimate responsibility for these changes and simplification in content rests with the experts in the area because only they know what is necessary and what can be safely omitted.

This point must be emphasized: the thrust for plain English is concerned with communication, not with the law or policy as such. We are seeking to improve the quality of that communication. The central platform of the plain-language movement is the right of the audience — the right to understand any document that confers a benefit or imposes an obligation. This reminds us of the ethical dimension of writing: documents are not equitable if they cannot be understood by all parties who have to read and comply with them. In the past we have been content with just getting the message right. Now we embrace a more challenging task: not just accuracy, but also clarity. And it is only when we have both these qualities present that we display a proper mastery of and full competence in language.

Plain language will never reduce the scope of the law, but it will rescue the law's expression from the obscurantism and mumbo

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[10] LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW app. 2 (Plain English Rewrite — Takeovers Code, 1987).

jumbo in which it is often encased. Above all, plain language will help us come closer to a clarity of expression and an ease of comprehension that should be the goal whenever one human being speaks to another.

It intrigues me that I should have to give these assurances about the commitment of plain-language drafters to precision. Told that a document is in plain language, lawyers will stand on their heads to find a fault in it. They do not exercise the same stringency with traditional legal documents. Instead, there seems to be a blind, unthinking acceptance of them. It is a misplaced trust, as countless examples demonstrate.

For Lawyers Also, Not Just the Public

It should not be imagined, however, that plain language is valuable only for members of the public not trained in the law. On the contrary, it has equal — if not more — value for the legal profession.

In 1986 we conducted tests with lawyers in Melbourne. They were presented written problems that required consulting legislation to solve them. At times, the lawyers were given the original legislation, written in the traditional style; on other occasions, they had to deal with versions written in plain English. By and large, they managed to come up with the correct answers on both the versions, but when they could consult the plain versions they arrived at their solutions on average 30% more quickly.[11] This is a significant gain in reading efficiency and a great saving in costs for the community. We cannot afford to tie up our legal profession needlessly in legalese. Clearly, lawyers and judges are not so adept with it and do not find it so much easier than the rest of the community.

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[11] LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW 69–70 (1987; repr. 1990).

There is more to the value of plain language for lawyers than just efficiency. It can also save them from making errors and from advising their clients wrongly. A few years ago I was part of a team developing a plain lease that a major organization decided to introduce for its clients at the same time as it released innovations in its products. Clause 12 read:

> You must get our written consent before you can act as a handling agent for another [company]. We have absolute discretion in giving approval for this.

Two major legal firms responded angrily on behalf of their clients:

- This clause is absolutely unacceptable and should be deleted in its entirety.

- This would seem to be an unreasonable fetter. If a [company] wishes to act as a handling agent for another [company] what business is it of [the lessor]? Is there some industry problem of which I am unaware which has led [the lessor] to include this clause?

We politely reminded the lawyers of the corresponding clause 14 in the earlier version of the lease, which they had allowed their clients to sign each year for the past 20 years.

> Not to assign charge underlet or part with the possession of the demised premises or any part thereof nor to hold or occupy the demised premises or any part thereof whatsoever as trustee or agent or otherwise for the benefit of any other person without the written approval of [the lessor].

Both outstanding leases turned up signed without further comment! Whether the lawyers had just not noticed the original clause 14 or had not understood its cumbersome language must, I suppose, remain an open question. I suspect incomprehension rather than carelessness on the part of two major legal firms.

Whatever the cause, the episode illustrates that plain language is more effective than legalese for lawyers as well as for the rest of us.

Image and All That

A few years ago, I was conducting jointly with a senior judge a workshop for registrars on how to develop and communicate decisions, with an emphasis on plain language. We had supported each other admirably all day, but going down the lift at the end of the workshop, the judge commented: "What you said about writing plainly was excellent, but of course I cannot present my judgments like that. I have to appear erudite."

Unwittingly, in those closing words he put his finger on a major cause of difficulty and incomprehensibility in legal writing. Too often legal writers are concerned with establishing an image rather than concentrating on the needs of the audience. They become preoccupied with demonstrating that they know technical terms and arcane vocabulary — preoccupied with sounding like lawyers and learned people — and forget that the primary goal of lawyers is to convey a message to others.

It is baffling that for all their concern to impress, lawyers have not sought to consider what really impresses. They delude themselves that legalese and inflated language are the way. There are the comments of Swift, Dickens, and so many others that should have made them question their practices.

Friends in the profession are constantly sending me extracts of gobbledygook from commercial legal documents that they have received from other lawyers. Judges are frequently castigating the endeavors of legislative drafters. But these same lawyers and judges are equally guilty of producing legalese as they strive to impress us. They do not write the plain language that they want to read.

Joseph Kimble has collected a number of studies — and done studies of his own — to show that "readers strongly prefer plain language in public and legal documents, they understand it better

than legalistic style, [and] they find it faster and easier to use."[12] One of those studies, for instance, involved appellate documents — a brief and a petition for rehearing. The judges and lawyers read alternative versions of two different paragraphs, which were not labeled as "traditional legalese" and "plain language." The readers rated the passages in legalese to be "substantively weaker and less persuasive than the plain English versions."[13] Even more fascinating, they inferred that the writers of the plain-language versions came from more prestigious firms.[14]

When it comes to writing, so many are widely mistaken on what really impresses. As Dullah Omar, the South African minister of Justice, observed: "The use of language above the heads of the average citizen may swell the heads of its users, but it does little else."[15] It certainly does not create a good image.

Words, Words, Words

Lawyers need great help in language and communication. They know too little about them, and what they do know is frequently misguided or hopelessly outmoded.

This may seem an outrageous suggestion to make, given that lawyers often claim that they are wordsmiths and that words are the lifeblood of their activities. Yet if not ignorance about language, how else are we to explain the long, cumbersome sentences of 200, 300, even 800 words that still appear; the absence of coherent organization in documents; the misunderstanding about

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[12] Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 7 (1996–1997).

[13] Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301, 301 (1987).

[14] *Id.* at 301–02.

[15] Dullah Omar, *Plain Language, the Law and the Right to Information*, CLARITY, July 1995, at 13.

punctuation; the attachment to so-called "settled terms" no matter how ill-chosen they might be?

Lawyers have a great fear of departing from terms whose meanings they imagine have been determined by a court. It is a debilitating fear.

Let me illustrate from the recent experience of a friend who heads a communications and public-relations section within a large organization. Since her section tried to practice plain language in their documents, she thought it only proper that the contracts they entered into with freelance writers, designers, and photographers should be in plain language. She set about amending the standard contract and then sent it to the firm's legal section for checking. She had modified clause 1 as follows:

> 1. This Agreement shall ~~commence~~ start on 20 January 1992 and ~~expire~~ finish on 23 December 1992.

The legal section responded:

> Clause 1
>
> We would prefer to retain the words "commence" and "expire" rather than "start" and "finish". The words retained are quite clear and have accepted meanings in law whereas the words "start" and "finish" do not yet have established meanings, although we concede they would be unlikely to cause concern.

The craven dread that is expressed here is too sad: how could *start* possibly get the lawyer into trouble? But worse, the response is so erroneous. Lawyers are too concerned with how courts have ruled on certain words in the past. They do not ask whether the courts should have had to rule in the first place. If a word needs interpretation, then perhaps it was the wrong word to choose originally. What we could have is a deficiency in drafting. Rather than clinging to a faulty term because a court has ruled on it, we should be getting rid of it altogether. If not, everyone is being asked to be aware of the court's ruling to interpret their documents

aright. We are maintaining a patched-up precision rather than striving for a pristine precision.

In passing, it is worth recording that in our experience in Australia plain-language documents have led to less litigation. We need have no fear of going down the path of rethinking our terminology and of making new solutions.

Not Wordsmiths — Only Lawyers

Let me return to the remarks of Justice Callaway with which I began this paper. In the midst of them is the comment:

> Section 435C(3) begins with the word "However" and a comma, a style that, at least until recently, has been eschewed by good writers.

How does he come to hold such an idea? I know that some benighted teachers used to teach this as a rule, but surely Justice Callaway is not harking back to his distant school days. Surely he has read more widely since then and listened intently. *However* has never had a fixed place in the English sentence: it has always been mobile, and this characteristic has enabled us to achieve different emphases. What of the practice of Shakespeare and Burke? Are they poor stylists because they placed *however* first on occasions? Why do we have to be so hidebound? *However* may be more effective as a signal of contrast or qualification in the initial position in a clause. God gave us language as a liberating, enriching gift so that we could communicate with each other and share ideas. It is not an arbitrary, burdensome yoke under which we should be enslaved. Yet it is on the foundation of unenlightenment — of poor learning rather than a true knowledge of language — that Justice Callaway mounts his condemnation of plain language.

Because a limited and uncertain knowledge of language — but not of law — is the central cause of incomprehensible legal documents and lest it be thought that I am constructing this argument on flimsy evidence, let me cite one other instance from the many that may be quoted. We have ignored this deficiency for

too long; we need to become alive to it, not to despise lawyers but to help them.

Justice Tadgell of the Victoria Court of Appeal has an aversion to the replacing *shall* by *must* in legislation and legal documents generally. In a ruling in 1995 he devoted some three pages to berating the change, even calling on Queen Elizabeth I to uphold him. While virtually every line of the ruling gives us ammunition, I want to quote portions that are particularly telling for our present discussions:

> Positive obligations are expressed in the Act, in some instances understandably, by force of "must", rather than by means of "shall". This practice makes the questionable assumptions, first, that "shall", in order to be understood, needs to be fixed and absolute in meaning and, secondly, that the average reader is incapable of perceiving that it need not . . . . Even those who do not tolerate much history might admit that there are places where "must" carries its own stamp of absurdity; and that "must not", when ill-used, is even worse. There are several examples of the latter in the Planning and Environment Act 1987. One is to be found in s.100(2), which proclaims that "The amount paid under this section must not exceed 10% of the amount of compensation which would have been payable except for this section". Again, s.180 provides that "An agreement must not require or allow anything to be done which would breach a planning scheme or a permit". Who in these two cases is enjoined? Who "must not"? Is there any sanction? What if that which "must not" happen does happen? Is it to be treated as a nullity? Is the blow of the blunt instrument to be as effective as the senseless thunderbolt? Even more grotesque is s.122(4), which asserts that "A person must not be convicted of an offence against any other section of this Act if . . ." Who is being prohibited here?[16]

Justice Tadgell could replace *must* with *shall* in each of the sections he referred to, he could even print *shall* in block letters and bold, and he would still not remove the imprecision he complains of. It is not an issue of *shall* or *must* but of passive or quasi-passive voice structures. He has missed the point completely,

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[16] *Halwood Corp. v. Roads Corp.*, No. 6596, slip. op. at 10–12 (Vict. Sup. Ct. June 30, 1997).

and all he has done is to expose an ignorance of quite elementary grammatical matters. He and numbers like him should be far less confident of their linguistic knowledge. He would be better served sticking to the law, in which he has some qualifications.

There is no need for us to go searching for these embarrassing pronouncements of lawyers on language. Lawyers continually confirm by their actions that they have little understanding of language and little appreciation of how readers tackle texts and what they find congenial.

Write the Speech

The misconceptions and myths that lawyers have about language manifest themselves predominantly in the domain of writing. Most lawyers speak clearly and plainly. Time and again lawyers with whom I am rewriting documents answer with admirable lucidity my requests to explain the law underpinning a document. We need to help them carry over the plainness of their spoken words appropriately into their written words. Because they use words to express the law, they need more training about words. I am thinking of effective, professional programs that develop a knowledge of the reading strategies of audiences, of the knowledge they bring to a text, and of the language they use; that promote understanding that one structure in language may be equivalent to another; and that foster a recognition that many of the conventions that lawyers currently revere emerged in a time when they were paid by the word and have to do with economic factors and not legal accuracy. As well, just as other specialists freely call on lawyers for their expertise, so lawyers need to be encouraged to combine more willingly, freely, and respectfully with other writing specialists so that lawyers can broaden their linguistic competence and elevate their performance.

Many Lawyers Misunderstand Plain Language

The flimsy quality of lawyers' knowledge about language was exhibited dramatically when plain language began to be advocated. While some lawyers shared the vanguard in the plain-language movement, many recoiled from the concept. Amazingly, it seemed too horrendous to contemplate, too inconceivable, almost too unreasonable. Many confused plain with simple, and that trailed off into simpleminded. They imagined that they were being asked to write a reduced form of English, a kind of basic English. They did not grasp that plain is not the opponent of rich but of convoluted, obscure, tangled. They overlooked that literature is plain as well as rich. If we pause when reading Shakespeare, Les Murray, or Judith Wright, it is because of the richness of the language, not its obfuscation.

Others confused a plain document with a simplified one. Because they saw many documents becoming shorter, they falsely concluded that important elements were being omitted. Yet a plain document contains all the essential elements; what it eliminates is verbiage and the unnecessary.

Some lawyers also concocted the false notion that there could be only one form of plain English. How this could be, given the stress on audience in plain-language projects, is a mystery. Plain language is varied and flexible. It has many shapes and forms. It must in order to meet the needs of different audiences.

Plain language is not confined to a small number of words or to one style, but it can range freely: it all depends on whether a passage will communicate its message successfully and easily.

The Benefits of Plain Language

Plain-language legal documents have now been in use for 24 years in Australia. They have not led to the disasters predicted for them, but have continued to notch up impressive gains.

- They have reduced the number of invalid claims in many enterprises.

- There has been much less litigation over them than over the former legalese versions.

- They save lawyers from making mistakes. (For example, with the pre-1995 Family Court form, 25% of divorce-application forms submitted by lawyers were rejected. Within one month after the new plainer form was introduced, the error rate had almost halved to 14%.)[17]

- They save lawyers time. (While brevity as such is not the goal of a plain-language project, it is regularly the result because verbiage is eliminated. I have just been converting a contract that we have reduced from 12 to 3 pages — while including extra items.)[18]

But most significantly, plain legal language upholds the law and promotes respect for it and for lawyers. Rather than concealing the law in mumbo jumbo and confounding understanding with humbug, it communicates the law and illuminates the minds of clients. Rather than bespeaking a low professionalism and a limited competence in language, it evidences an expertise in subject and a mastery of words.

There is an even higher gain than respect for the law and lawyers in writing plainly. Because its overarching goal is the understanding of the audience, it is the one style that enables us to serve others. And service to others is the quintessence of living. It enables lawyers to reach out from the confines of the law to use

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[17] GORDON MILLS & MARK DUCKWORTH, CENTRE FOR PLAIN LEGAL LANGUAGE, CENTRE FOR MICROECONOMIC POLICY ANALYSIS & LAW FOUNDATION OF NEW SOUTH WALES, THE GAINS FROM CLARITY v, 26–27 (1996).

[18] *See also* Kimble, *supra* note 12 (summarizing 25 studies showing that plain language saves time and money for everyone).

their legal qualifications for the advantage of their clients and the well-being of the community. It constrains them to put their skills at the disposal of the community for the benefit of the community, rather than the elevation of themselves. It does not turn the clients into lawyers: they need training for that. But it does foster a greater sense of comfort in and serenity with the law. The principles of plain language suffuse the law and lawyers with a human and a humane sensitivity.