PLAIN ENGLISH DRAFTING

PLAIN ENGLISH LEGAL DRAFTING

A paper prepared for the Commonwealth Secretariat by Mark Adler, Solicitor, of CLARITY, a movement for the simplification of legal English

The problem

The language used by lawyers is often wordy and difficult to understand. The disadvantages are:

- the writer and his or her staff spend longer than necessary writing and amending;
- the reader spends longer than necessary reading and deciphering the meaning and may give up in despair or boredom;
- mistakes (by writer and reader) are more likely;
- many lay people think us unapproachable.

Some technicalities are essential; everyday English does not have words for all legal concepts. But we should restrict our specialist vocabulary to those essentials (explaining them clearly to lay people) and otherwise use ordinary language.

What is plain English?

Robert Eagleson, Professor of English at the University of Sydney and a leading expert on legal language, says:

> "Plain language" is the opposite of obscure, convoluted, entangled language. It's the opposite of language that takes a lot of effort and energy to understand and unravel. Plain language should not be equated with "simple" in the sense of simple minded ... (nor) in the sense of "childish" or "broken" language - a kind of pidgin. Nor should it be equated with "simple" in the sense of a reduced document that only gives part of the message.
>
> Plain language, on the contrary, makes use of the full resources of the language. It's good, normal language that adults use everyday ... It lets the message come through with the greatest of ease.

Here is a typical clause from a commercial lease:

> Not to use or permit or suffer to be used the demised premises or any part thereof or any buildings or erections at any time hereafter erected thereon or on any part thereof as and for all or any of the purposes of a brewery or a club (whether proprietory or members) or a public house or other licensed premises or otherwise for the preparation manufacture supply distribution or sale whether wholesale or retail and whether for consumption on or off the premises of all or any alcoholic liquors of any description and not without the previous consent in writing of the Landlord to carry on or permit upon the demised premises any trade business or occupation other than that of a retail shop for the sale of X

This could be rewritten:

> Not to make or sell alcoholic drinks in the shop or (without the landlord's written consent) to use it except for the retail sale of X.

The irony is that the drafter must have started with something like the shorter version in mind. What did the client say he wanted? That the premises be used as a shop, with the landlord retaining a reasonable say in what was sold, with an absolute bar on strong drink. Why then did the solicitor so painstakingly construct that elaborate paragraph? It adds nothing and the tenant's solicitor - and those acting over the years for prospective purchasers - would have to translate it back to extract the meaning. So would the parties and their advisers if any query arose in future.

Why do lawyers write as they do? I suspect that it begins as role-playing and becomes a habit. Articled clerks and pupils want to sound like solicitors or barristers and copy (with their encouragement) the verbal mannerisms of their seniors; later, under the pressure of work, they write as they have become accustomed, uncritically repeating their usual phrases.

Here is an extract from a letter written by a solicitor to a client:

> I have been looking into the situation relating to the term of the Lease in the light of indications given with regard to the X Housing Association's standard Form of Covenant. As you know, no Deed of Covenant was required from you at the time of your acquisition, but it appears that arrangements were in hand at one time for the term granted by the Lease which you have acquired to be extended to 999 years. At present you have a term in excess of 70 years remaining on the Lease which is perfectly satisfactory, and if you were to consider moving during the course of the next few years you would have no difficulty in disposing of the Lease. Ultimately, however, difficulties can arise and it may be to your advantage to consider taking a Variation to extend the term. I have now received confirmation that the X Housing Association will be willing to agree such an arrangement, but any such Variation will probably entail the introduction of the need for a Deed of Covenant to be provided by the Purchasers at the time of assignment of the Lease. Please give the matter some consideration and let me know your requirements. I anticipate that you will be expected to bear the costs of obtaining such a Variation.
>
> I await hearing from you both with regard to the above and with your cheque as previously requested.

Most solicitors write like this. Amongst the faults:

> The long paragraph is hard on the reader; it looks too boring to read, and many will start to skim before they reach the end.
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> There are many words and phrases which might not be understood by a lay reader.
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> The writer had not organised his or her thoughts; the text rambles from point to point and it is not always clear (even to another solicitor) what was intended.
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> The style is dull and repetitive, with many inappropriate capital letters.
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> It omits important information which the client would need to make the decision for which her solicitor is asking:
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> - how many years it will be before the value of the lease is affected;

- how much it will cost to put right;
- what commitments will be expected from a future purchaser;
- what sort of "requirements" the solicitor thought the client might have.

My interpretation of what the writer was trying say is:

> Your lease has just over 70 years to run. At the moment that is long enough but in (an unspecified time) it will become difficult to sell.
>
> The Housing Association is willing to extend the lease (to 999 years?) to solve this problem for you, but you will probably have to pay their (unspecified) costs and agree to (unspecified) terms.
>
> Please tell me if you want to accept.

Current attitudes

England

Plain language has always had its champions but the campaign for its use by lawyers began only in the 1970s. The Plain English Campaign (founded in 1979 by non-lawyers) has had a considerable influence on the civil service but none on the profession. CLARITY - a lawyers' pressure group - was formed in 1983. Most of its 300 members are solicitors in private practice in England and Wales but it has also attracted barristers, academics, students, local government practitioners, civil servants and overseas lawyers. It has no members yet in Scotland (where there is significant room for improvement) or Northern Ireland.

Of these few reformers, some are restricted by pressure from unsympathetic superiors or others involved in the drafting process. Even eminent authors admit to toning down the reforms in their precedent books because the climate of opinion has not been right. The overall impact has so far been small. The rest of the profession, outnumbering us by about 150 to 1, has remained largely unaware of our views.

Reactions to plain English documents have been mixed: occasionally conservative colleagues say they dislike the style, though most accept without protest and many are enthusiastic. However, there is widespread fear of changing long-established forms for what they consider is experimental, although many do not mind if their opponent takes the risk: plain documents attract few amendments. Some corporate clients prefer their solicitors to use traditional language but most lay people are delighted to receive documents they can understand.

CLARITY is quite widely supported at The College of Law, through which many English solicitors must pass during training. Model documents supplied to the students have improved gradually through the 1980s and in the last couple of years short courses on plain English drafting have been well received by staff and students. Meanwhile, many commercial seminars have appeared to promote legal plain English.

The civil service and the minister responsible for it, encouraged by the Prime Minister, support the campaign, and since 1982 have made enormous improvements in the design and wording of forms and leaflets.

Some improvement has been made in the drafting of legislation but there is room for much more. The prevailing style is to squeeze as much detail as possible into one sentence or sub-section, with unnecessary repetition and inadequate "white space". The sense may be precise but can be difficult to extract. Considerable improvement is possible without risk to the meaning by breaking sentences into smaller parts, re-arranging the text to avoid repetition and adjusting the layout. A moderate example of these faults comes from the Protection from Eviction Act 1988:

> 27. - (1) This section applies if, at any time after 9th June 1988, a landlord (in this section referred to as "the landlord in default") or any person acting on behalf of the landlord in default unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises.
>
> (2) This section also applies if, at any time after 9th June 1988, a landlord (in this section referred to as "the landlord in default") or any person acting on behalf of the landlord in default -
>
> (a) attempts unlawfully to deprive the residential occupier of any premises of his occupation of the whole or part of the premises, or
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> (b) knowing or having reasonable cause to believe that the conduct is likely to cause the residential occupier of any premises -
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> (i) to give up his occupation of the premises or any part thereof, or
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> (ii) to refrain from exercising any right or pursuing any remedy in respect of the premises or any part thereof,
>
> does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence,
>
> and, as a result, the residential occupier gives up his occupation of the premises as a residence.

One encouraging example is s.1 of the Torts (Interference with Goods) Act 1977, which says "Detinue is abolished." Perhaps this is the only Act whose main clause is shorter than its short title. Unfortunately, the style lapsed after this auspicious beginning, including a "hereby" in clause 12.

The regulations originally made by statutory instrument under the Enduring Powers of Attorney Act 1985 bound solicitors to follow the exact - and difficult - form of the draft provided, with the penalty that the document would otherwise be ineffective. Happily, that form has now been recast in plainer English, but for a time we were compelled to give our clients badly drafted documents which they couldn't understand.

In 1988 The Law Society began to take an interest and has since been collaborating with CLARITY. In the last few weeks this has taken a higher profile with the launch of the Society's national conveyancing protocol, whose documents have been drafted in plain English. This style, and CLARITY's role in the preparation, have been brought to the attention of the whole profession and will be stressed in the public campaign scheduled for March. For the first time, UK lawyers are being told that plain English drafting is not the whim of an eccentric fringe but a skill valued by the ruling body. Meanwhile, CLARITY is writing a drafting textbook for solicitors and is talking to The Law Society about publishing it under their auspices.

The Solicitors Complaints Bureau reports that most of the very many complaints it receives relate to a breakdown in communication between solicitor and client. It supports the use of plain English as one way of reducing the problem. However, the profession remains unaware of the 1983 decision in Socpen Trustees v Wood Nash & Winters, by which damages of £95,000 were awarded to a client who had not understood a letter of advice from his solicitors.

The European single market will encourage the use of plain English, as continental lawyers object to incomprehensible documents.

Other English-speaking jurisdictions

Some are well ahead of us and their experience should encourage us to follow. I have not had the time to carry out a comprehensive survey and I apologise for presenting a rather fragmented picture in the notes below.

Australia

The insurance industry (which has also been at the forefront in New Zealand and North America) produced plain English policies in 1976.

The Australian Government has adopted a plain language policy for official documents and has arranged for training in clear drafting.

The High Court of Australia severely censured legalise in a recent ruling about the Regulations under the Student Assistance Act 1973. Mr Justice Stephen commented:

> Amended on more than 40 occasions in their 6 years of existence, these Regulations now represent an administrative scheme of great intricacy and much ambiguity. No applicant is likely to gain from them any clear impression of his entitlement to a benefit and this case suggests that even those who have to administer the scheme have great difficulty in understanding it ...

As a result of the judgement, the Regulations are being redrafted in plain English by a team consisting of policy, legal and language specialists.

The Law Reform Commission of Victoria has published several volumes on plain English. Its "simplified" version of the state Takeover Code, an exceptionally complex document, is little more than half the length of the original and "vastly more clear"; it has been enthusiastically received by lawyers and others involved in the industry.

The rewriting of summonses and court forms in plain English is saving an estimated $600,000 a year in staff time.

New Zealand

The policy of the ruling Labour Party is to "simplify laws to make them as readily understandable as possible and to reduce the total number of statutes and regulations."

The Public Trust Office leads New Zealand with its plain language precedents and a number of statutory forms and business documents have been translated into plain English, to the general approval of those concerned. Some major law firms have hired plain language.

One of the functions of the Law Commission is to "advise on the ways in which the law can be made as understandable and accessible as it practicable". The Commission has made suggestions for improving the form and style of legislation but these were buried in an unrelated report and forgotten. It has also sponsored visits by Robert Eagleson to work with groups interested if using plain English.

The judges of the Court of Appeal have supported the development of plain English, although most judgments are still written in legal English.

Some years ago nearly 25% of the country's lawyers took part in seminars on clear drafting run by the Law Society. But this has not been followed up and despite the various initiatives described above there has been little change or interest in the use of clear language. Perhaps this will change with the welcome appointment of Geoffrey Palmer as Prime Minister.

Canada

Canada was slow to take up the use of plain language but is now making up for lost time.

Drafting conventions have been formulated to improve the language of statutes, although the attitude to plain English is not the same in all territories. One simple but useful development has been the adoption of the present tense. The regular revision of all statutes and annual meetings of senior legislative counsel have effected considerable improvements. The Yukon Territory has adopted plain English for its legislative drafting and reported on its experience to the Uniform Law Conference in 1988.

A Plain Language Centre has been set up by the Canadian Law Information Centre and has designed a major project to teach plain language legal drafting.

Private practice has lagged behind, although the Canadian Bar Association is now promoting the use of plain English throughout the profession. It has also undertaken a joint venture with the Canadian Bankers Association for the simplification of legal forms.

The United States

President Carter ruled in 1978 that "regulations be as simple and clear as possible" and in 1979 that government forms "should be as short as possible and should elicit information in a simple and straightforward fashion". This initiative lapsed under his successor, but nevertheless there has been a dramatic improvement in legal language over the last 10 years or so.

Statutes requiring the use of plain English in certain types of contract have been passed in a number of states; they have not been much used by litigants (persons because the remedy will often not be worth the risk and trouble of proceedings) but they have been widely obeyed and are therefore worthwhile. A number of the largest corporations report the success of their plain English policies. For instance, when Southern Californian Edison simplified their request for payments to a fund, contributions went up by 40%.

There are plenty of legal books promoting plain English drafting and the many seminars on the subject are over-subscribed. The law colleges are emphasising the need for clear drafting and are taking time to teach the mechanics. Practising lawyers and judges have adopted the style.

A couple of years ago the Board of Governors of the California Bar passed a resolution pressing the 117,000 lawyers under its jurisdiction to simplify their language. A 1987 survey conducted by the Los Angeles Times found that appellate judges preferred briefs written in plain English.

Jersey and the Cayman Islands

Isolated CLARITY members report no progress towards plain English in the profession.

Summary of proposals

1. The principles of good drafting should be taught to all law students and the use of "legalese" strongly discouraged. Seminars should be available for those already qualified.

The editing facilities of word-processors should be emphasised against the use of standard clauses, and text-editing computer programs should be better developed.

2. Parliament and the courts should encourage simple expression; in particular, if forms are prescribed a special effort should be made to write them in plain English.

3. The language and layout of legislation should be improved. The latter could usefully be investigated as a Commonwealth project.

4. The professional bodies should encourage the use of plain English. In particular, they might make rules of conduct imposing a duty on lawyers to express themselves intelligibly.

5. Specialists in each field should work with plain English draftsmen to recast standard forms and precedents.

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