

## **PLAIN ENGLISH FOR LAWYERS**

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### **Introduction**

Like medicine and other professions, law has, over the centuries, developed its own language. Legal terminology and expressions are just as foreign to the lay person as the terminology and expressions used by the medical profession. For example, students enter medical school referring to a heart attack as a 'heart attack' and a mini stroke as a 'mini stroke'. However, a few years later they graduate referring to a heart attack as a 'myocardial infarction', and a stroke as a 'trans-ischemic attack'. Law students undergo the same transformation. They enter law school using words such as 'court case' and 'on the face or it', but leave using words such as 'hearing de novo' and 'prima facie'.

These transformations can be attributed to the influence of a senior practitioner over a graduate. Graduates learn by observing senior practitioners and by adopting the way they practice. Indeed, it can be said that "each generation of lawyers trains the next to follow its ingrained habits".<sup>2</sup> Some graduates will differentiate between good habits and bad habits of senior practitioners. A few may not. They may think that this is just how it's done, or fear losing their approval or being wrong if they decide to do things differently. For example, graduates rely heavily on precedents and adopt the language that was used by the practitioner who drafted them, even if it was drafted 20 or 30 years earlier and is clearly beyond the comprehension of its readers.<sup>3</sup>

This paper discusses the need for lawyers to adopt plain English in their everyday practice. Although plain English has some limitations, it is argued that the benefits of using plain English outweigh the potential disadvantages. Practical examples are provided of how plain English can be used in communicating with clients, with other lawyers, and in drafting legal documents. Practitioners will be able to develop basic skills in using plain English in their legal practice by considering the principles of plain English and the practical examples provided in this paper. First, the evolution of the English language is briefly outlined.

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<sup>2</sup> Garner, Bryan A. 2001. *Legal Writing in Plain English*. University of Chicago Press, USA, p. xvii.

<sup>3</sup> Yeo Hwee Ying. 1996. "Plain English for Lawyers". *Singapore Academy of Law Journal*. Vol. 8, p. 303.

## The evolution of the English language

English is one of the most widely spoken and written languages in the world.<sup>4</sup> It is estimated that English is the official language in almost 60 sovereign states in the world,<sup>5</sup> and its vocabulary expands at the rate of 8,500 words per year, currently containing over 1 million words.<sup>6</sup>

Linguists continually analyse language changes. They say that language is produced by behavioural conventions and when behaviour changes so does language.<sup>7</sup> For instance, personal letters from the beginning of the 15<sup>th</sup> century show changing patterns of communication and expressions of politeness.<sup>8</sup> Phrases such as ‘I beg of you’ or ‘If it please you’ were common in both personal and professional communications.<sup>9</sup> Today we simply say ‘please’. Language change such as this one is often first observed in casual spoken language and occurs in written language some time later.<sup>10</sup> Therefore, people may have gradually ceased saying ‘If it please you’ in everyday speech, but would continue using the expression in written communications for some time.

Modern language constantly evolves through daily usage and technological advances. The legal language, however, has not kept pace. It remains “conservative and static”.<sup>11</sup> We continue to see archaic phrases and Latin terminology in lawyer’s verbal and written communications. For example, although the expression ‘May it please you’ is redundant in everyday speech, lawyers use it every day when announcing their appearance in court.

Linguists have identified legalese, or officialise, as a distinctive dialect in legal documents. Legalese has its roots in Latin, reliance on precedents, and lawyer’s general preference to attain professional distinction.<sup>12</sup> Legalese has been criticised for making the law mysterious and unintelligible to those whom it affects.<sup>13</sup> This led to the emergence of the Plain English Movement which encourages the use of simple and ordinary language, or plain English. It

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<sup>4</sup> Legall, Debbie. 2008. “English for lawyers”. *International Bar News*, December, p. 57.

<sup>5</sup> Wikipedia, “English language”, accessed 28 February 2015, [http://en.wikipedia.org/wiki/English\\_language](http://en.wikipedia.org/wiki/English_language).

<sup>6</sup> Wikipedia, “English language”, accessed 28 February 2015, [http://en.wikipedia.org/wiki/English\\_language#Number\\_of\\_words\\_in\\_English](http://en.wikipedia.org/wiki/English_language#Number_of_words_in_English).

<sup>7</sup> Keyes, John M. 2001. “Plain Language and the Tower of Babel: Myth or Reality?” *Legal Ethics* 4(1), p. 15.

<sup>8</sup> Nevala, M. and Palander-Collin, M. (2005) “Letters and letter writing”. *European Journal of English Studies* 9(1) p. 3.

<sup>9</sup> *Ibid*, p. 4.

<sup>10</sup> *Ibid*, p. 4.

<sup>11</sup> Legall, p. 59.

<sup>12</sup> Yeo Hwee Ying, *Op Cit*, pp. 303-307.

<sup>13</sup> Assy, Rabeea. 2011. “Can the Law Speak Directly to its Subjects? The Limitation of Plain Language”. *Journal of Law and Society* 38(3), p. 377.

has now gained the support of a large number of academics, practitioners, and some of our judiciary, as will be seen in the following discussion.

### What is plain English?

Plain English is ordinary English. It promotes the use of plain language in legal writing to demystify the law and make it intelligible to the public at large.<sup>14</sup> It also encourages using plain English to help people without specialist training understand what is being said. It does not mean that lawyers must speak and write in a way that absolutely every person in society understands. It means that lawyers should speak and write in a way that makes it easier for people to understand.<sup>15</sup> The objective is to improve the way lawyers communicate, and not to “revolutionise” the legal system.<sup>16</sup>

Plain English discourages the use of legalese, legal jargon, and Latin expressions in favour of simple terminology. There are many archaic words which lawyers rarely use because they are almost redundant, such as ‘ab initio’ or ‘bona fide’. However, it is not this type of legalese that lawyers are encouraged to avoid. It is the legal jargon which forms part of a lawyer’s everyday speech, such as ‘herein’ and ‘forthwith’.<sup>17</sup>

The Law and Justice Foundation of New South Wales published a list of some 200 examples of plain English words that should be used instead of legalese.<sup>18</sup> For instance, it encourages to use:

- ‘*about*’ instead of ‘*as to*’;
- ‘*sue*’ instead of ‘*bring an action against*’;
- ‘*in this*’ instead of ‘*herein*’;
- ‘*at least*’ instead of ‘*not less than*’;
- ‘*before*’ instead of ‘*prior to*’;
- ‘*under*’ instead of ‘*pursuant to*’;
- ‘*after*’ instead of ‘*subsequent to*’;
- ‘*later*’ instead of ‘*thereafter*’;
- ‘*good faith*’ instead of ‘*bona fide*’;

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<sup>14</sup> Ibid, p. 376.

<sup>15</sup> Keyes, Op Cit, p. 16.

<sup>16</sup> Ibid.

<sup>17</sup> Garner, Op Cit, p. 35.

<sup>18</sup> Stern, George. (2008). “From Officialese to Plain English”. *Centre for Continuing Education; The Australian National University*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/app/&id=/93A4792C9FE55AD7CA25714C000AD7C6>.

- ‘*from the beginning*’ instead of ‘*ab initio*’;
- ‘*prevented*’ instead of ‘*estopped*’;
- ‘*immediately*’ instead of ‘*forthwith*’;
- ‘*if*’ instead of ‘*in the event that*’;
- ‘*no effect*’ instead of ‘*null, void and no effect*’;
- ‘*until*’ instead of ‘*until such time*’;
- ‘*to*’ instead of ‘*for the purpose of*’; and
- ‘*enough*’ instead of ‘*sufficient number*’.<sup>19</sup>

Some expressions such as ‘aforesaid’, ‘hereby’, ‘the said’, and ‘abovementioned’ should not be used at all.<sup>20</sup> A legal practitioner may consider legalese to be more precise than ordinary English. However, linguists disagree and argue that they are no more precise than ordinary words.<sup>21</sup> One of the advocates of plain English, a past Justice of the High Court of Australia, agrees, as is evident in the following section.

### **Ten principles of plain English**

The Honourable Michael Kirby, a past Justice of the High Court of Australia, has been an advocate for plain English for some time. He observed that “it is not always easy for lawyers to write and speak plain language”, and recalls his campaign during his service on the High Court for his colleagues to drop the expression ‘*lex loci delicti*’ in favour of ‘the law of the place of the wrong’.<sup>22</sup> His explanation of why he failed is that, perhaps

*those who conceive of themselves as members of an expert priestly caste, prefer a dead language because it conveys the mystery of technicality. English, after all, is a very mixed up tongue. And clients may be more willing to pay more for Latin.*<sup>23</sup>

However, he was also of the opinion that it is not that difficult for a lawyer to improve legal expression, and created ten principles which he says will make a lawyer’s legal language “much more direct, simple and vigorous”.<sup>24</sup> These principles are:

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<sup>19</sup> Garner, Op Cit, p. 35; Nevala and Palander-Collin, Op Cit, p. 4.

<sup>20</sup> Nevala and Palander-Collin, Op Cit, p. 4.

<sup>21</sup> Garner, Op Cit, p. 350.

<sup>22</sup> The Hon Michael Kirby. 2010. “Ten commandments for plain language in law”. *Australian Bar Review* 33(1), p. 10.

<sup>23</sup> Ibid, p. 12.

<sup>24</sup> Ibid, p. 14.

1. Begin complex statements of fact and law with a summary (the issue, crucial facts and answer) to let readers know where they are going.
2. Break up long sections and paragraphs and order them in a logical sequence. Group related materials together in a sequence that will appear logical.
3. Pay careful attention to the layout (font, font size, white space, indenting). Format with plenty of headings and subheadings to identify the progression of ideas.
4. Use vertical lists to convey detailed information. Number the items for later reference.
5. Choose short and medium length sentences. A sentence should not exceed 20 words.
6. Have continuity between sentences by repeating some idea from the previous sentence in the new sentence. End sentences forcefully by putting the strongest point last.
7. Choose the active voice instead of the passive voice. The passive voice should only be used if the agent is unknown, or if attention needs to be placed on the object of the action instead of the agent.
8. Prefer verbs to noun phrases e.g. '*consider*' instead of '*give consideration to*'.
9. Use familiar words that are simple, direct, and human. Avid potboilers such as '*whereas*', and banish '*shall*' wherever possible.
10. Avoid unnecessary detail and words such as prepositional phrases e.g. say '*a court order*' instead of '*an order of the court*', and '*the landlord's duty*' instead of '*the duty of the landlord*'.<sup>25</sup>

These principles indicate that plain English includes more than just the use of plain words. In order to maximise the reader's comprehension of letters and other legal documents the style of drafting and formatting is also important. The style and format, such as the structure of sentences and paragraphs, and the order in which information is presented, must be simplified.<sup>26</sup>

Consider the following examples of re-drafting sentences according to the above principles:

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<sup>25</sup> Ibid, p. 14; Garner, Op Cit, pp. 37-39.

<sup>26</sup> Kiernan, Felicity. 1995. "Comprehending Legal Documents". *Law and Justice Foundation of New South Wales*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/print/D5E768DA468FBE2CCA25714C0009A914.html>.

1. “A trial by jury was requested by the defendant” should be changed to: “The defendant requested a jury trial”.<sup>27</sup>
2. “The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues which were vital” should be changed to: “The trial judge’s ruling was prejudicial error because it cut off cross-examination on vital issues”.<sup>28</sup>
3. “In many instances, insofar as the jurors are concerned, the jury instructions are not understandable because they are too poorly written” should be changed to: “Often jury instructions are too poorly written for the jurors to understand”.<sup>29</sup>
4. “The fact that the defendant was young may have influenced the jury” should be changed to: “The defendant’s youth may have influenced the jury”.<sup>30</sup>
5. “While the trial was in progress, the judge excluded photographers from the courtroom” should be changed to: “During the trial, the judge excluded photographers from the Courtroom”.<sup>31</sup>
6. “The conclusion which has been reached by my client is that if there is a continuation of your insistence on this position, the termination of the contract will be taken into serious consideration by her” should be changed to: “My client has concluded that if you continue to insist on this position, she will seriously consider terminating the contract”.<sup>32</sup>
7. “The ruling was made by the trial judge that the accused is guilty” should be changed to: “The trial judge ruled that the accused is guilty”.<sup>33</sup>

In each of the above examples the sentences become shorter and clearer by removing verbose word clusters, using strong verbs, and using the active voice instead of the

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<sup>27</sup> Wydick, Richard. 1978. “Plain English for Lawyers”. *California Law Review*. 66, p. 729.

<sup>28</sup> Ibid, p. 730.

<sup>29</sup> Ibid, p. 731.

<sup>30</sup> Ibid, p. 732.

<sup>31</sup> Ibid, p. 733.

<sup>32</sup> Ibid, p. 745.

<sup>33</sup> Ibid, p. 746.

passive.<sup>34</sup> Re-drafting sentences this way will result in the entire letter being clearer. For example, compare the following two letters:

1. Formal letter with legalese:

*Dear Mr Smith,*

*We refer to your letter of even date and confirm your instructions to commence proceedings forthwith.*

*In that regard please find enclosed herein a draft application and affidavit of yourself. Please peruse the documents carefully and advise us of any amendments that you require to be made.*

*As soon as we are in receipt of your confirmation that the draft documents are to your satisfaction we will attend to filing the application in court.*

*We also request that you return the executed client agreement at your earliest convenience and deposit the sum of \$1,000 into our trust account.*

*In the interim, if you have any queries, please do not hesitate to contact us.*

2. Re-drafted letter in plain English:

*Dear Mr Smith,*

*I received your letter where you ask me to take your matter to court immediately.*

*I enclose the draft court documents. Please let me know if there is anything in the documents that you would like to change.*

*I will then file the documents in court.*

*Please send the signed client agreement to me when you can and deposit \$1,000 in the firm's trust account.*

*If you have any questions please contact me.*

Most practitioners will agree that the first letter is too formal. However, they may also dislike the second letter because it appears to lack eloquence and precision. Other practitioners will prefer the second because it is plain and direct. Plain English advocates encourage lawyers to depart from the conventional style adopted in the first letter, and to use the style adopted in the second.<sup>35</sup> They claim that in addition to making the law easier to understand, adopting plain English has many other benefits. These benefits are analysed next.

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<sup>34</sup> Garner, Op Cit, pp. 37 to 39.

<sup>35</sup> Thomas, Gary. 2008. "Letter writing". *BRIEF* 35(3), p. 28; Watson-Brown, Anthony. 2009. "Defining 'Plain English' as an Aid to Legal Drafting". *Statue Law Review* 30(2), p. 91; Keyes, Op Cit, p. 16; Assy, Op Cit, p. 379; Garner, Op Cit, pp. 37 to 39.

## Benefits of using plain English

There are many benefits of using plain English. It makes the law easier to understand, reduces legal costs, minimises litigation, and strengthens the relationship between the lawyer and the client.

Dr Stern, a consultant lecturer in Linguistics at the Australian National University, is of the opinion that using plain English saves a lot of syllables and is much easier on the reader. He says that plain English “gives the reader less to read for the same amount of information”.<sup>36</sup> This, in turn, saves clients costs. Clients pay less for drafting letters and documents because they are shorter, and contact their lawyer less frequently for explanations because they are easier to understand.<sup>37</sup>

Further, studies have shown that people who understand the agreements they enter into are more likely to fulfil their obligations under the agreement and less likely to commence litigation when an issue arises.<sup>38</sup> Similarly, clients who understand their lawyer’s advice are less likely to say “my lawyer never told me that”. The client may have been properly advised, but did not understand what was being communicated. To them, therefore, the lawyer never gave the advice. In fact, a common complaint made by clients is that the lawyer failed to communicate adequately with them.<sup>39</sup> Using plain English, therefore, minimises misunderstandings and reduces the likelihood of litigation.

Finally, using plain English also strengthens the lawyer-client relationship. Clients appreciate receiving simple and logical explanations. Using language that clients understand ultimately results in higher client satisfaction. It is a given that some clients are more sophisticated than others and may understand formal letters and complex legal documents. A practitioner will need to determine the level of sophistication of their client and adopt their language accordingly. Otherwise, it is recommended that practitioners use plain English in all instances. The following section provides some practical examples of how plain English principles can be adopted in everyday practice.

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<sup>36</sup> Stern, Op Cit.

<sup>37</sup> Yeo, Op Cit, p. 308; Austen et al. 2001. “Plain English – an Ethical Issue?” *Legal Ethics* 4(1), p. 5.

<sup>38</sup> Ibid, p. 309.

<sup>39</sup> Lauchland Kay A. and Le Brun, Marlene J. 1996. *Legal Interviewing: Theory, Tactics and Techniques*. Butterworths. p. 40; The Law Society of New South Wales (2009) *When a client’s capacity is in doubt: A Practical Guide for Solicitors*, p. 1; Lauchland and Le Brun, Op Cit, p. 39.

## Practical examples

The following examples are provided in this section:

1. How to use plain English in written communications with clients;
2. How to use plain English in written communications with other lawyers; and
3. How to use plain English when drafting legal documents.

### 1. How to use plain English in written communications with clients

Written communications with clients include email communications. Although this paper does not provide specific examples of plain English in verbal communications with clients, the same principles apply. It is recommended that practitioners adopt the same language with clients whether communicating verbally or in writing.

Consider the following formal letter to a client:

*Dear Mr Smith,*

*We refer to our previous communications and advise that we are in receipt of the Plaintiff's Reply to the Defence filed on your behalf by your previous solicitors. We enclose the Reply herein. Please peruse the Reply and revert to us with your further instructions.*

*We further advise that the Plaintiff is correct in asserting that the Defence filed on your behalf contains several deemed admissions. Our perusal of the Defence indicates that several paragraphs were improperly pleaded pursuant to the Uniform Civil Procedure Rules of Queensland. Pursuant to the Rules applicable in this jurisdiction we cannot simply amend and file the Amended Defence but must first seek leave to withdraw the deemed admissions. Once leave is granted we can then seek to file and serve an Amended Defence on your behalf.*

*We enclose the relevant excerpts from the Rules for your information herein. Please familiarise yourself with these and contact the writer to provide your further instructions.*

*We look forward to hearing from you.*

On the surface there appears to be nothing wrong with the letter. However, the client may be confused about who the plaintiff is, and who the defendant is. The letter also contains many words a lay person may not understand such as 'revert', 'deemed admissions', and 'pleaded'. They may not understand that 'leave' means 'permission'. They may understand what 'peruse' means, but they don't use the word in everyday speech. Instead, they would say 'read'. Similarly, most people will not say 'grant', but 'give', and instead of saying they are 'in receipt' of something, they will say that they 'received it'.

Replacing the legal jargon with everyday words will change the above letter this way:

*Dear Mr Smith,*

*I received Mr Black's Reply to your Defence.*

*I enclose the Reply. Please read it.*

*Mr Black is correct in saying that the Defence contains several deemed admissions. This means that some paragraphs in the Defence were incorrectly written. I cannot simply re-write the incorrect paragraphs and re-file your Defence. I must first ask the court's permission to do so. If the court gives its permission I can then ask to file another Defence.*

*I enclose the relevant parts of the Uniform Civil Procedure Rules about deemed admissions. Please read them and contact me to discuss the next step.*

*I look forward to hearing from you.*

This letter is much simpler. It refers to parties by names and removes many unnecessary words. The writer is referring to himself/herself rather than the entire firm, because there is no evidence of any benefit of saying 'we' instead of 'I'. The relevant terminology should still be explained to the client. For example, what it means to amend a pleading, to withdraw a deemed admission, and how this type of an application is made. In fact, it is prudent that the practitioner provides this information in writing, in plain English. The letter would be longer, but may be necessary given the possible consequences to this client. The purpose of this brief letter is to demonstrate that complex letters can be re-drafted in plain English.

## **2. How to use plain English in written communications with other lawyers**

Written communications with other lawyers also include email communications. Some practitioners would argue that plain English is not necessary when communicating with other lawyers. After all, they are legally trained and understand legal terminology. It must be remembered though that letters are written with the client's instructions, and aimed at the other party and not their lawyer. Therefore, they must be written simply so that the clients (and parties) understand what is being said.

Consider the following excerpt from a letter from one lawyer to another in a property settlement dispute:

*Thank you for your correspondence of 25 April 2014 and attachments contained therein. We have now had an opportunity to peruse the documents as disclosed by your client, as far as they take us, and to obtain our client's further instructions. In that respect we note that there has been still no disclosure as to any material relating to the sale of the inherited property, or for that matter any disclosure as to what other assets your client might have received from the relevant estate. It seems on the face of certain of the material disclosed your client may have received in addition a cash*

*sum (or sums) from the estate over and above the sale proceeds for the home and consequentially could you please ensure your client produces, prior to Monday, all contract documents regarding the sale of the property and all documentation relating to the estate of his late mother.*

This paragraph contains grammatical errors and some sentences are too long. Many words are unnecessary. It can be re-drafted in plain English without changing its meaning. For example, consider this alternative:

*Thank you for your letter dated 25 April 2014 and the attachments. I reviewed the documents and obtained my client's instructions. Your client has still not disclosed any documents relating to the sale of the inherited property or the assets he received from the estate. The material previously disclosed indicates that your client may have received additional cash from the estate. Please make sure that your client produces, by Monday:*

- 1. All contract documents regarding the sale of the property; and*
- 2. All documents relating to the estate of his later mother.*

Re-drafting the paragraph this way makes it shorter and more explicit. It is sharp and to the point. It removes any ambiguity and makes the purpose of the letter, the disclosure of further documents, distinctly clear. Using indentation and numbering the documents to be produced is visually effective. The request for further disclosure is not lost in one long paragraph as in the first letter. By using effective formatting, proper grammar, and simple sentence structure, the second letter demonstrates the writer's professionalism and competence.

### **3. How to use plain English when drafting court documents**

Most lawyers rely on precedents when drafting court documents. However, just because a particular excerpt of a document was always drafted in a particular way does not mean that it cannot be changed. Lawyers should not be afraid to simplify excerpts of, or the entire court document, to make it easier to read.

For example, consider the warrant for possession of real property frequently ordered by the Federal Circuit Court of Australia:

*To the Marshall of the Court, to all officers of the Federal Police and to all officers of the Police Force of the State of New South Wales:*

*Whereby by an order of this Court made at Sydney on 12 February 2014 it was ordered by the Court that Mr Smith should, on or before 12pm on Tuesday, 20 February 2014, vacate the matrimonial home, being the property situate at and known as 100 Unknown Street, in the State of New South Wales, and whereas the Court is satisfied that the said Mr Smith has failed to comply with such order, you are hereby directed for the purpose of giving effect to the said order at such time with such assistance as you may require, and if necessary by force, to enter the land described being Lot 1 in the Parish of Virginia, in the State of New South Wales*

*and cause the wife, Mrs Smith, to have vacant possession of it, and to cause the husband, Mr Smith, to vacate the said land.*<sup>40</sup>

The warrant is confusing. The paragraph consists of one sentence which contains 146 words. It is too long. Without punctuation it is difficult to understand. A lay person would need to read it several times to grasp its meaning. More importantly, the purpose of the warrant is lost. It also contains unnecessary words such as ‘whereby’ and ‘whereas’.

The warrant can be effectively re-drafted in plain English without changing its meaning by breaking the paragraph into shorter sentences and using tabulation. For example:

*To the Marshall of the Court, to all officers of the Federal Police and to all officers of the Police Force of the State of New South Wales:*

*On 12 February 2014 this Court ordered that Mr Smith, on or before 12pm on Tuesday, 20 February 2014, vacate the home at 100 Unknown Street in the State of New South Wales. The Court is satisfied that Mr Smith failed to comply with the order. You are directed to:*

- 1. enter the property at 100 Unknown Street, in the State of New South Wales;*
- 2. cause Mr Smith to vacate the property with such assistance as you may require, and if necessary by force; and*
- 3. cause Mrs Smith to have vacant possession of the property.*

The warrant is still formal and uses phrases such as “cause Mr Smith to vacate” and “with such as assistance as you may require”. The Courts may be reluctant to change these expressions into simpler terms, considering them to be more precise. However, by formatting and simplifying other expressions the warrant can still be re-drafted in plain English.

Another example of an overly formal court document containing much legal jargon is the following excerpt from a commercial deed:

*In the event that by reason of any change in applicable law or regulation or in the interpretation thereof by any governmental authority charged with the administration, application or interpretation thereof, or by reason of any requirement or directive of any governmental authority, occurring after the date hereof: (i) the Bank should, with respect to the Agreement, be subject to any tax, levy, impost, charge, fee, duty, deduction, or withholding of any kind whatsoever, or (ii) any change should occur in the taxation of the Bank with respect to the principal or interest payable under the Agreement, or (iii) any reserve requirements should be imposed on the commitments to lend; and if any of the above-mentioned measures should result in an increase in the cost to the Bank of making or maintaining its Advances or commitments to lend hereunder or a reduction in the amount of principal or interest received or receivable by the Bank in respect thereof, then upon notification and demand being made*

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<sup>40</sup>Yang & Gian (No. 2) [2013] FamCA 251. The names of the parties, the date, and the addresses have been changed.

*by the Bank for such additional cost or reduction, the Borrower shall pay to the Bank, upon demand being made by the Bank, such additional cost or reduction in rate of return.<sup>41</sup>*

This clause is poorly drafted. It is convoluted and unnecessarily repetitious. It consists of one sentence that is almost 200 words long. There is an excessive use of commas and semi-colons. Further, the use of ‘thereof’ and ‘hereof’ complicates the sentence. Any person, whether a professional or lay, would struggle to understand the meaning of this clause unless they regularly deal with such deeds. Traditionally, clauses in commercial deeds were often drafted this way. However, in more recent times, commercial deeds are drafted more clearly to avoid ambiguity and potential future disagreements.

Re-drafting the above clause in Plain English would appear like this:

### *Borrower's Obligations*

*The Borrower must, on demand, pay the Bank additional costs or reductions in rates of return if the conditions of (1) and (2) are met:*

- (1) the law or governmental directive, either literally or as applied, changes in a way that:
 
  - (a) increases the Bank's costs in making or maintaining its advances or lending commitments; or*
  - (b) reduces the principal or interest receivable by the Bank; and**
- (2) any of the following occurs:
 
  - (a) the bank becomes – with respect to the Agreement – subject to a tax, levy, impost, charge, fee, duty, deduction, or withholding of any kind whatsoever;*
  - (b) a change occurs in the Bank's taxes relating to the principal or interest payable under the Agreement; or*
  - (c) a reserve requirement is imposed on the commitments to lend.<sup>42</sup>**

Effective formatting makes the clause easier to read and understand. The introduction of a heading gives notice of what the clause is about. Unnecessary words such as ‘hereof’ and ‘thereof’ are removed. Finally, the meaning and intention of the clause remains unchanged.<sup>43</sup>

Although there are many benefits of adopting plain English in communicating with clients, with other lawyers, and when drafting letters and court documents, plain English has some limitations. The following section briefly addresses the limitations of plain English.

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<sup>41</sup> Garner, Op Cit, p. 100.

<sup>42</sup> Ibid, p. 101.

<sup>43</sup> Ibid.

## Limitations of plain English

Critics of plain English argue that it has limitations. For instance, they argue that plain English cannot make complex aspects of the law sufficiently intelligible to lay persons so as to enable them to utilise it effectively without legal assistance.<sup>44</sup> This is a valid argument. Using plain English does not make a lay person a lawyer, just as increasing health awareness does not make a person their own doctor.<sup>45</sup> Indeed, replacing 'writ' with 'claim' does not mean that the person will understand its concept. A lawyer will still need to explain what a claim is and the procedure of making one.<sup>46</sup>

Critics of plain English also argue that re-drafting legal documents in simple, everyday terms may be well intentioned, but there is a risk that they may become too vague and dangerous for those who depend on precise meanings.<sup>47</sup> In addition, they are of the view that re-drafting contracts in simpler terms will be costly, not only in the need to obtain new forms, but in court when parties dispute the intended meaning of the agreement.<sup>48</sup> If plain English continues to be adopted by legal practitioners and institutions, and if these concerns become a reality, they will no doubt be written about. To date, no evidence has been published about plain English being detrimental in this way.

For the time being, caution must be exercised when replacing words or phrases that have been interpreted in case law, or defined in legislation. Replacing a defined word may change its meaning and this can be dangerous. For example, 'injury' has a specific meaning in the *Workers Compensation and Rehabilitation Act 2003* (Qld).<sup>49</sup> Being 'injured at work' should not be replaced with being 'hurt at work'. Another example is the use of 'offer', 'acceptance', 'consideration', and 'frustration' in the law of contract. Changing these words may change their meaning. Finally, changing 'ex parte' to 'without notice' in legislation can be inappropriate because in some instances an ex parte application does require notice, as in the Canadian Federal Court Rules.<sup>50</sup> Therefore, lawyers should never change their language unless they wish to change its meaning.<sup>51</sup>

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<sup>44</sup> Assy, Op Cit, pp. 376 and 382; Keyes, Op Cit, p. 15; Tanner, Edwin. 2000. "The Comprehensibility of Legal Language". *Griffith Law Review* 9(1): p. 53.

<sup>45</sup> Assy, Op Cit, p. 384.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> American Bar Association Journal. (1978). "*Plain English Law Cloudy, Say New York Lawyers*", November, vol. 64, p. 1644.

<sup>49</sup> Schedule 6.

<sup>50</sup> Keyes, Op Cit, p. 16.

<sup>51</sup> Aitken, Ken. 1998. "Plain English – flexibility". *Law Institute Journal* 7(8), p. 50; Staughton, Christopher. 1999. "Plain English for Lawyers". *Bracton Law Journal*. Vol. 31, p. 87.

Finally, there are also some legal phrases which are considered terms of art, and which some will argue should never change. For example, *'forum shopping'*, *'piercing the corporate veil'* and *'cause of action'*, refer to a legal rule, practice or concept. They lie outside their linguistic meaning and are used frequently by lawyers and the judiciary.<sup>52</sup> Clients, however, may not understand the meaning of terms of art, and plain English should be used. For instance, when conferencing less sophisticated clients, a Mareva injunction should be referred to as a freezing order, and an Anton Piller order as a search and seizure order. Ultimately it is up to the practitioner to use their judgment when conferencing clients and using such terms of art.

Although plain English may have its limitations, the benefits of using plain English when communicating with clients, other lawyers, and when rafting court documents, far outweigh those limitations.<sup>53</sup> Practitioners are encouraged to actively promote and implement the use of plain English in their daily practice.

## **Conclusion**

There is "beauty and elegance" in simple expression.<sup>54</sup> This beauty and elegance can be extended to lawyer's everyday legal practice. Whether communicating with clients, with other lawyers, or drafting documents, plain English will allow the practitioner to provide a better service to their clients. Their advice will be easier to understand, the clients will save costs, and the lawyer will minimise any potential complaints of unprofessional conduct that could be made later.

Hesitant practitioners are encouraged to start using plain English in all communications with their clients. Being conscious of the terminology used will enable them to avoid legal jargon and speak to their clients in simple terms.<sup>55</sup> Plain English can then be adopted in all correspondence written by the practitioner. Finally, every practitioner should progress to using plain English in drafting court documents and legal agreements.

The Plain English Movement is intensifying. In the near future there will be a clear distinction between the modern lawyer who uses plain English, and the traditional lawyer who uses

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<sup>52</sup> Assy, Op Cit, p. 401.

<sup>53</sup> Ibid, p. 396.

<sup>54</sup> The Hon Michael Kirby, p. 10.

<sup>55</sup> Watson-Brown, Op Cit, p. 93

language that few clients understand. It is in the lawyer's best interests to start using plain English now.

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## Bibliography

Aitken, Ken. 1998. "Plain English – flexibility". *Law Institute Journal* 7(8): 50.

*American Bar Association Journal*. 1978. "Plain English Law Cloudy, Say New York Lawyers", November (64): 1644.

Assy, Rabeea. 2011. "Can the Law Speak Directly to its Subjects? The Limitation of Plain Language". *Journal of Law and Society* 38(3): 376-404.

Austen Lesley, Gilbert Bryony and Mitchell Robert. 2001. "Plain English – an Ethical Issue?" *Legal Ethics* 4(1): 5-7.

Centre for Plain Legal Language. 1993. "Designing your document". *Law and Justice Foundation*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/print/51817CF3AC4EFB3DCA25714C0006BF83.html>.

Garner, Bryan A. 2001. *Legal Writing in Plain English*. University of Chicago Press, USA.

Grayden, Ralph and Sorenses, Emma. 2009. "Write like a pro". Law Society of New South Wales. Accessed 20 February 2015 at <http://www.lawsociety.com.au/ForSolicitors/CareerHub/EssentialSkills/CareerSkills/Articles/Writelikeapro/index.htm>.

Keyes, John M. 2001. "Plain Language and the Tower of Babel: Myth or Reality?" *Legal Ethics* 4(1): 15-17.

Kiernan, Felicity. 1995. "Comprehending Legal Documents". *Law and Justice Foundation of New South Wales*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/print/D5E768DA468FBE2CCA25714C0009A914.html>.

Lauchland, Kay A. and Le Brun, Marlene J. 1996. *Legal Interviewing: Theory, Tactics and Techniques*. Butterworths.

Legall, Debbie. 2008. "English for lawyers". *International Bar News*, December: 57-59.

Nevala, Minna and Palander-Collin, Minna. 2005. "Letters and letter writing". *European Journal of English Studies*, 9(1): 1-7.

Rodney, Peter. 2001. "Plain English and the Law". *Legal Ethics*: 4(1): 18-19.

Shaw, Mark. 2012. *Copywriting*. 2nd ed. Laurence King Publishing. ProQuest ebrary. Accessed 20 February 2015.

Staughton, Christopher, J. 1999. "Plain English for Lawyers". *Bracton Law Journal*. 31, p. 86-90.

Stern, George. (2008). "From Officialese to Plain English". *Centre for Continuing Education; The Australian National University*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/app/&id=/93A4792C9FE55AD7CA25714C000AD7C6>.

Tanner, Edwin. 2000. "The Comprehensibility of Legal Language". *Griffith Law Review* 9(1): 52-72.

The Hon Michael Kirby. 2010. "Ten commandments for plain language in law". *Australian Bar Review* 33(1): 10-15.

The Law Society of New South Wales. 2009. *When a client's capacity is in doubt: A Practical Guide for Solicitors*.

Thomas, Gary. 2008. "Letter writing". *BRIEF* 35(3): 28-30.

Watson-Brown, Anthony. 2009. "Defining 'Plain English' as an Aid to Legal Drafting". *Statue Law Review* 30(2): 85-96.

Wikipedia, "English language", accessed 28 February 2015 at [http://en.wikipedia.org/wiki/English\\_language](http://en.wikipedia.org/wiki/English_language).

Wikipedia, "English language", accessed 28 February 2015 at [http://en.wikipedia.org/wiki/English\\_language#Number\\_of\\_words\\_in\\_English](http://en.wikipedia.org/wiki/English_language#Number_of_words_in_English).

Wikipedia, "*Nod (gesture)*". Accessed 1 March 2015 at [http://en.wikipedia.org/wiki/Nod\\_\(gesture\)](http://en.wikipedia.org/wiki/Nod_(gesture)).

Wydick, Richard. 1978. "Plain English for Lawyers". *California Law Review*. 66, p. 727-765.

Yeo Hwee Ying. 1996. "Plain English for Lawyers". *Singapore Academy of Law Journal*. 8: 303-322.