Too polite, scared or Tory to write plainly?

By **Andrew Gormly**, Solicitor, Mallesons Stephen Jaques

Sir Humphrey Appleby would no doubt turn in his grave at how hard it is to escape the plain language movement these days. From its birth a few decades ago as part of an increased focus on consumer protection, it has now arrived in nearly every industry and profession – and the law is no exception.

Most modern law firms understand the importance of clarity to their clients. Their marketing statements bear this out: Allens Arthur Robinson recently adopted "Clear thinking", while Blake Dawson Waldron has previously used "Ideas → clarity → results". It may have taken time, but firms now realise that clients are hesitant to use lawyers to whom their last phone call began, "Thanks for your letter. So, if I understand you right, what you're really saying is..." It may mean another billable unit (or five) for the call, but it's unlikely to be the kind of service that wins them repeat business in an increasingly tight and competitive market.

To ensure that their new recruits follow their policies about clarity, many major law firms invest substantial resources in educating their graduates. Some make hours of internal plain language training compulsory for their articled clerks – sometimes even with a test! Others enrol their junior lawyers in one of the many legal writing courses available, costing them thousands of dollars in fees and otherwise billable time.

And yet nearly every young lawyer has a story to tell of how their letter of advice or draft agreement was transformed by their supervisor from sparklingly plain language to complex and archaic legalese. One articled clerk I know whispers of their principal banning the word "fax" from all legal communications. Another one fears to start even the shortest covering letter or email with "Here is..." And still others cringe at the prospect of subjecting their crystal-clear pleadings to their partner's critical red pen (which seems to emit traditional legal terms almost of its own accord).

So if firms are generally in favour of plain language, and clients increasingly expect it, why do some senior lawyers treat their juniors' plainly-drafted work as heresy?

There are many reasons: some professional, some personal. The professional objections to plain language have now largely been discredited – some eminent authorities have clearly demonstrated that traditional legal language and the "magic words" it clings to can be positively dangerous to a client's interests.[1] Most plain language training programs spend a substantial amount of time addressing fears of sacrificing legal accuracy for clarity, so young lawyers are generally well prepared to rebut challenges to plain language on professional or legal grounds.

Instead, it's the personal distaste some seniors show for plain language that their juniors find the hardest nut to crack. Articled clerks encouraged to embrace plain language can become the targets of their supervisors' personal crusade against clarity, which can dramatically inhibit young lawyers developing their own drafting style.

Sadly, resolving this problem will take more than a quick-fix – the legal profession's notoriety for legalese is both well-deserved and deeply entrenched. However, client demands mean that change is inevitable, and young lawyers who recognise this are stifled by their partners but should at least understand the nature of the beast they face. To help those discouraged or disillusioned by their supervisors' perversity, this article sets out three of the major personal objections to plain language and shows how hollow they turn out to be.

The plain-speaking barbarians at the gate

Let's start with the most simple problem: the fear that plain language is an impolite medium. Being polite is a worthy goal for any lawyer – many see respect for others as a key difference between "common industry" and the professions.

Yet some have seen the advance of plain language as another nail in the coffin of cordial relations between lawyers and their clients and between members of the profession. To keep their communications as polite as possible, they eschew many of the tools of clarity – for example, by preferring the distant passive voice to the more direct active voice, or couching requests (sometimes even demands) in the most round-about and formal manner to avoid "harsh" or "inflammatory" statements.

However, using legalese to express politeness is clearly counterproductive. To confuse formality with politeness is nonsense: the two are hardly synonymous. It's perfectly possible (and generally much easier) to be polite in a plainly-written document; a wordy one runs a far greater risk of sounding patronising, which is the last thing young lawyers should want to appear to the clients with whom they are nurturing a relationship. Indeed, formality and politeness can be widely divergent: a colleague once told me how he fears that plain language will ultimately end the litigator's art of sending snooty letters to opposing counsel that convey mortal insults beneath a veil of formal language.

Senior lawyers who rail against plain language for its perceived rudeness must be handled with care, but their fears can be allayed. Ironically, a great deal of unnecessary language used to avoid direct statements (like "It would be greatly appreciated if at your earliest convenience...") makes it even harder to fit in one small word that best conveys a polite tone: please. It would take an overly-sensitive reader to find insult in a simple "Could you please send us the documents as soon as possible?" An ample scattering of pleases (and thank-yous) in a plainly-written document can help to avert a partner's red pen being used on the false premise that plain language and politeness are mutually exclusive.

From the greenest articled clerk to the most grey-haired partner

Insecurity is a more difficult issue to address. A nervous colleague called me not long ago to ask for advice about drafting a settlement clause. He felt that it encapsulated every issue that the clause should address, but he still felt uncomfortable: he wanted it to "sound more legal".

Lawyers have been drafting needlessly lengthy and formal documents since the days when they were paid by the word. One problem with this (apart from the shameless fraud on the client) is that many people (particularly law students, who have – sometimes – spent

hours poring over old judgments at university in an effort to translate them) now believe that this is the way lawyers should write, simply because it is the way they seem to have always written. Perhaps by necessity, law schools exacerbate this unhappy tradition: one of a student's aims in written assessment must always be to sound clever and knowledgeable about their topic.

With graduate positions hard to secure and firms occasionally letting some articled clerks go, a certain element of insecurity amongst the juniors is understandable; it takes a bold graduate to innovate. Considering both the current environment and their recent academic training, young lawyers can perhaps be forgiven for retreating from the vanguard of those leading change by espousing plain language.

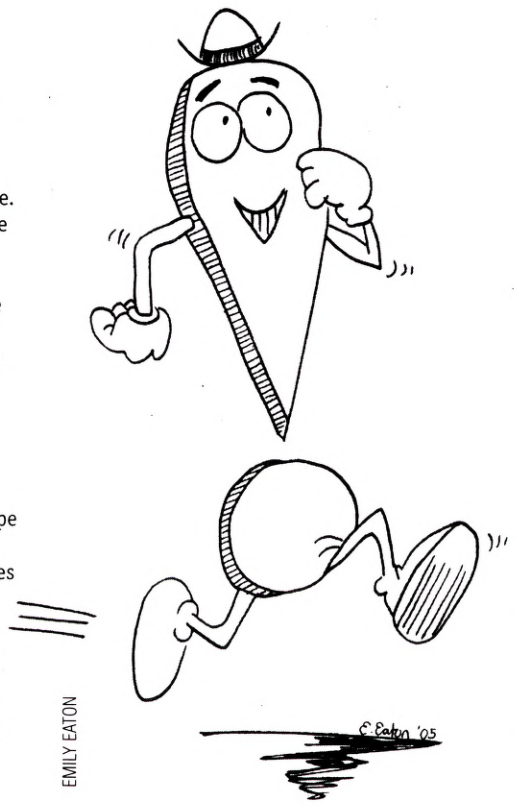
Sadly, however, young lawyers don't have a monopoly on insecurity in the law. Even established lawyers often feel the need to "sound more legal", particularly if they are in line for elevation to partnership or silk. By limiting themselves to using traditional legal language, these lawyers betray a fear that plainly-written documents will sound simplistic to the partners or peers who determine their career paths.

It's hardly surprising that lawyers are tempted to avoid plain language in the hope that the obscurity of traditional legal drafting will mask any perceived weaknesses in their legal knowledge. The legal profession is remarkably intolerant of ignorance: phrases like "I don't know" and "I don't understand" from those paid for their analytical skills are frowned upon by clients and colleagues alike. The result can be a game of foolish brinkmanship: documents become drafted in increasingly complex and obscure language that no-one is willing to confess they don't fully grasp. For example, in *Houlahan v Australian and New Zealand Banking Group Limited*, it took a direct question from the judge for the plaintiff's barrister to admit that he did not understand the particular clause in the guarantee that his client was seeking to enforce.[2]

There is no easy solution for insecurity, but measures can be taken to address it. Young lawyers at firms that actively promote plain language can take heart from their employers' commitment – firm policies about drafting may not hold much weight with senior partners, but they can be used to defend a junior's clear writing style from nervously critical senior associates and younger partners. It may also help young lawyers to realise that their senior colleagues must develop the courage to grasp that documents drafted in plain language are not simplistic; instead, they demonstrate the drafter's skill in encapsulating complex issues in a way that others can actually comprehend.

When young radicals become old conservatives

The third reason why some lawyers personally prefer traditional legal language is almost trite: lawyers are famously hesitant to embrace change. Ask any non-lawyer to describe traditional legal language and they will conjure up an image of words as old and dusty as a judge's wig: hereby, severally, aforementioned and others. The prevailing attitude that these words are commonplace in the law is reflected as much in the dense and impenetrable format of legal documents as it is in the words themselves.



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Legislative drafters are well ahead of private practitioners in recognising that using a helpful and logical structure is one of the easiest ways to make a document clearer. Employing a leading plain language expert to help achieve their goals, the task force implementing the Federal Government's Corporations Law Simplification Program introduced tables and diagrams to some of the Corporations Law's most complex provisions.[3] By comparison, too many private practitioners insist on beginning every letter or advice with "I refer" rather than with the important information the document is trying to information the document is trying to import. Others churn out contracts that include visual deterrents like the slabs of justified text so beloved of our American cousins (divided only by the occasional PROVIDED THAT).

There is no easy answer to conservatism – indeed, the law's reverence of precedent encourages practitioners to look backwards rather than forwards. However, lawyers must realise that looking to the past is not a sustainable way to develop their practice. The days when lawyers would bill a matter by weighing the file in one hand are long gone, and clients' demands for transparency in language as well as billing seem certain to condemn traditional legal language to the same fate.

Australian firms that have invested in plain language as an integral part of their practice are now reaping the rewards – for example, Mallesons Stephen Jaques recently used its plain language reputation to win work from a major Hong Kong financial institution.[4] By preparing the company's finance documents in plain language, its lawyers improved their client's attractiveness to retail investors and in doing so won their firm a foothold with a large company in a key market.

Senior lawyers often recognise where subtle traces of conservatism betray a lack of understanding in preparing legal documents. Partners are quick to criticise their juniors who put a clause in the first draft of a contract "just because it's in the precedent" rather than because it actually applies to the agreement between the parties. The same principle should apply to the unthinking use of traditional legal language. There's no real legal reason to write "in full force and effect" when "fully effective" will do the job just as well. If they discourage their junior lawyers from breaking with the traditional legal drafting style, supervisors should be gently guided towards the reasons why embracing change is desirable. Lawyers who adopt their clients' preferred drafting style quicker than their competitors are bound to position their practices more effectively in the ever-tightening market for legal work.

A final reason conservatives give for rejecting plain language is that they believe it corrupts the English language.[5] However, this argument ignores three important premises. Firstly, the English language is always changing, and to an extent plain language simply reflects those changes (dropping unnecessary capitals, for example, which simply continues a steady trend of "decapitalising" words that invariably started with a capital letter centuries ago. Secondly, there is a clear distinction between professional writing and literature: nobody is arguing that Dickens, Camus or Dostoevsky should have written plainly, but their beautiful use of their respective languages belongs in books to be read for pleasure – not in legal letters or agreements where the critical element is the meaning rather than the medium. Thirdly, it is much easier to write properly and to follow basic rules of syntax and grammar when writing plainly. Most plain language adherents strongly support the English language's sensible grammar rules – Australia's leading plain language expert, Dr Robert Eagleson, is a former professor of English at the University of Sydney. All of these reasons demonstrate that a personal love of "proper" English is no good reason to reject plain language in a professional context.

So where does that leave us?

Ultimately, all lawyers must have a fairly intimate knowledge of language and many

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