

Keeping up appearances: a skills guide for the new lawyer

In the current climate of downsizing, retrenchments, competition and cost saving, we are all judged against our professional performance. Whether in court, on paper, or in conference, new column 'Keeping up appearances' will put you one step ahead in your quest for a piece of the High Court Bench.



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Writing wrongs made easy

Written language provides a framework for the transmission, recording and dissemination of the corpus of human knowledge. Its influence is far-reaching, its power almost immeasurable. “As the powerful in legend turn the . . . vanquished into stone, they turn us to stone through language”.¹

As lawyers, we must acknowledge this, as “there can be no respect for truth without respect for . . . language”.² Why then is legal writing generally inaccessible, often verbose and, at times, utterly incomprehensible?

This question is not new. Judicial condemnation of legal gobbledegook goes back more than four centuries, from the time the Lord Chancellor of England ordered the drafter of a particularly discursive document to wear it on his head as a warning.³

Rigid legal conventions and uncertainty as to how courts will interpret plain English phrases provides part of the answer.

Former Justice Kirby attributes it to lawyers being exposed to the “largest body of poorly written literature ever created by the human race” – law books.⁴

This is not a get-out-of-jail-free card for those who draft legal documents.

It seems that as lawyers, we too often neglect our audience, forgetting that writing is an exercise of imaginative empathy with the reader.

Instead of cobbling together “loose, baggy monsters” from inherited materials, lawyers should focus on communicating clearly, consistently and unambiguously.⁵

The elements that govern easily transmissible writing should apply to all writing, including legal drafting. Using plain English is central to all clear and effective communication and should be exercised in legal writing.

When writing in plain English, there are some considerations. A few words that I

recommend printing out in a large font and blu-tacking to the wall:

1. Coherence.

This is particularly important in relation to legal writing, as the English legal language is subject to such intense scrutiny.

2. Comprehensive.

Care must be taken that plain English writing is as comprehensive in its scope as traditional legal discourse. It should address everything covered by the equivalent legalese, but cut through the muck.

3. Consistency.

Plain English is certainly better than the hackneyed jargon served up by the legalese of old with its insistence on “covering-the-field”, but due care should be exercised when discussing legislative adjustment. Uncertainty can arise if words are changed.



4. Clarity.

True to its name, readers must be able to understand what is being communicated in plain English writing. While understanding may be dependent on the reader's grasp of the legal concept, plain English must be accessible.

5. Care.

Plain English writing is not an excuse for laziness. Avoiding the love-of-double-negatives-cover-all-bases power of legalese makes it easier to pick up mistakes, so more care must be taken to avoid them.

In the modern world where mistakes in writing can be readily fixed before they are printed, accuracy still eludes lawyers. Much can be done to improve this.

As stated, the English legal language is too legalistic, too old school. Tortuous prose and prolixity is a thing of the past – it's time for modernisation. But how to modernise?

To start, as lawyers we should question the suitability of words and phrases that are peculiar to legal drafting.

Redundant and confusing words should be removed or replaced and archaic language updated.

Take a word like "devise", for example. In ordinary speech to "devise" something is to work out a scheme or a plan.

Taken in its legal context, it means to give real property under the terms of a will.

There are many words that simply have no place in an updated English legal language and these should be removed. To list a few: thereinbefore; hereinafter; aforesaid; thenceforth; herewith.

The use of words like "shall"; "such"; "the same"; and "said" ought also to be reconsidered.

Tautological phrases like "true copy" and "including but not limited to" should be embraced like you might embrace a flatulent echidna on a diet of beans.

There are simple changes that can be made to the way legal writing is formatted to make it more accessible.

By choosing appropriate fonts, ensuring there is adequate line spacing, employing the active instead of the passive voice, using the present tense and using short sentences (like this one, for example), legal writing becomes markedly more approachable.

Threading these elements into your writing will ensure your message is communicated more effectively.

Every writer has a distinct style and it is important that we all understand our own, but there must be a willingness and ability to adapt. Every legal document is written for a different purpose, be it an inter-office memorandum, an advice to a client, or a contract for the sale of the barrier reef.

The reader's needs often dictate the document's form and internal structure, and the writer must remember that they are not, in fact, constructing it for their own reading pleasure, but for a specific audience.

It is here that I ask you to break off another wad of blu-tack.

Print this out in red ink: **the client prevails.**

Now cut it out and stick it to your jacket, your robe, your wig – whatever works for you.

In legal drafting, the first consideration should always be protecting the client from

15 Basic tips for improving your writing

1. Prefer the active voice to the passive
2. Avoid multiple negatives
3. Learn to detest jargon
4. Make everything you write speakable
5. Use the "deep issue" to spill the beans on the first page
6. Summarise. Don't over-particularise
7. Vary the length of your paragraphs, but generally keep them short
8. Be forthright in dealing with counterarguments
9. Edit yourself systematically
10. Remember that good writing makes the reader's job easy; bad writing makes it hard
11. Delete every *shall*
12. Replace and/or wherever it appears
13. Shun newfangled acronyms
14. Plan all three parts of your work: beginning, middle and end
15. Make time to "rest" your work. If you allow time between completing a piece of work and submitting it, you will pick up on mistakes and find things you would prefer to change

all foreseeable problems by producing an efficient and fiscally effective transaction or document.

Ultimately, it is not about stylised and attractive writing. There is no need to furnish the reader with a replacement for their copy of *Spot Goes to Town* – a logically formatted, clearly structured piece will suffice. ●

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1. D Watson, *Death Sentence: The Decay of Public Language*, 2003, Random House Australia, p5.

2. Note 1 above.

3. S Palyga, "Is plain English dangerous?", *The Law Society of South Australia Bulletin*, February 1999, p26.

4. M Kirby, "Is law poorly written?", *Law Society Journal* (1995) 56.

5. M Meehan and G Tulloch, *Grammar for Lawyers*, 2001, Butterworths, pp77-78