

Elegance and Relevance: Plain English from a Student Perspective¹

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Introduction

After six years of teaching professional communication skills to law students, I firmly believe that their ability to put Plain English to effective use depends upon two pre-requisites. Firstly, they need a comprehensive grasp of grammar. Secondly, students need to be able to source appropriate role models whose writing style they can emulate. I now find myself having to give grammar lessons to final year law students, many of whom are already working in law firms in anticipation of being admitted to practice very soon, whilst at the same time listening to their concerns about resistance to Plain English by members of the legal profession as well as clients. This paper explores my experience of how law students engage with the concept of Plain English, and what it means to them in the context of their vocational training².

Background

The benefits of the use of Plain English as an important tool in legal and business communications are well researched and documented. Government departments in many English speaking countries devote vast resources to ensuring that modern documents are written in a way that ensures their comprehension. Large corporations pay consultants huge sums of money to re-write agreements and

¹ This paper is based on a paper of the same title which I presented at the Clarity Conference entitled *Clarity and Obscurity in Legal Language* held at Boulogne sur Mer, France, in July 2005.

² The whole notion of whether or not completing a law degree is in fact vocational training is a moot point which I will not explore in this paper, except to say that I believe vocational training is a large part of a law degree, although not the sole focus.

policies in Plain English. The use of Plain English is an accepted component of client-centred legal practice.

I teach professional legal skills (including drafting, interviewing, negotiation, mediation, research and problem solving) at Flinders University in South Australia where we have run a Professional Legal Training (PLT) program since 1999. The PLT program is integrated within the undergraduate degree. Our students graduate with a Bachelor of Laws and Legal Practice, at which point they are fully qualified to be admitted to practice as a barrister and a solicitor of the Supreme Court of South Australia, and if they choose, to be admitted in any other state of Australia as well.

Over the years that I have taught Plain English drafting techniques, students have repeatedly expressed concern that writing in Plain English means a “dumbing down” of the English language. At the same time, I have also been struck by two further issues:

- 1) The average law student’s spelling and grasp of English grammar is poor;
- 2) The ability of most students to express themselves or to provide written advice to a client is weak.

I was inspired to write this paper when, during a class discussion, a number of my students expressed the view that clients expect lawyers to communicate in a certain “legal” way, because “that is what clients are paying for.” A catalyst for exploration sprang from this twofold assumption expressed by my students:

1. “Clients expect lawyers to communicate in a certain way”
2. Complicated documents = value for money

This classroom discussion prompted me to investigate the matter further, which I did by asking all students enrolled in the topic to complete a questionnaire about what students were really experiencing in the context of plain language, and what they thought about it. I asked them³ to complete a short survey about their perceptions of Plain English drafting. I told them I wanted them to be completely candid. I was particularly looking for answers from students who were already employed or had done some work experience in legal offices⁴.

³ 119 students in total

⁴ Part of our LLB/LP program involves a six week work experience Placement in a legal office which may be in a private firm, a community legal centre or a government legal office such as the Office of the Director of Public Prosecutions.

The Survey

The first three questions in the survey required the students to describe their own level of confidence in performing certain drafting tasks:

1. Do you feel confident writing legal letters?
2. Do you feel confident drafting simple pleadings?
3. Do you feel confident drafting simple commercial documents?

If they answered “slightly unconfident” or “not confident at all” to the first three questions, they were then invited to explain why.

The next seven questions asked students to relate their perceptions and experiences:

5. What does "Plain English" mean to you?
6. Have you tried to implement Plain English drafting techniques in your work or Placement and encountered resistance, either from clients or colleagues / supervisors?
7. Some lawyers perceive that clients actually think they are getting value for money when they receive documents written in legalese? What do you think about this?
8. Do you feel that there are some drafting skills that you lack or need help with? Explain.
9. Do you think a grasp of basic English grammar is necessary for a lawyer? Why or why not?
10. Any other comments about legal drafting?

Twenty students provided responses. The results of the responses to questions 1, 2 and 3 are summarized in Table 1. Out of the 20 students who responded, 84% said they were confident writing legal letters but would like someone to check their work, 55% said they were confident but would like someone to check their work when drafting simple pleadings and 50% felt confident but would like someone to check their work when drafting simple commercial documents.

The responses from students to the survey indicated that they were most confident when drafting letters. The next level of confidence was in drafting simple pleadings and the lowest level of confidence was expressed in drafting simple commercial documents.

The responses to the other questions are reproduced and analysed later in this paper.

TABLE 1

| Question 1: Do you feel confident writing legal letters? | | |
|--|-------------|-------|
| Out of 20 replies | | |
| 1 – very confident | 2 students | 10% |
| 2 – confident but would like someone to check my work | 17 students | 84% |
| 3 – unsure | 1 student | 0.05% |
| 4 – slightly unconfident | none | 0.0% |
| 5 – not confident at all | none | 0.0% |
| Question 2: Do you feel confident drafting simple pleadings? | | |
| Out of 20 replies | | |
| 1 – very confident | 1 student | 5.0% |
| 2 – confident but would like someone to check my work | 11 students | 55% |
| 3 – unsure | 2 students | 10% |
| 4 – slightly unconfident | 6 students | 30% |
| 5 – not confident at all | none | 0.0% |
| Question 3: Do you feel confident drafting simple commercial documents? | | |
| Out of 20 replies | | |
| 1 – very confident | 1 student | 5.0% |
| 2 – confident but would like someone to check my work | 10 students | 50% |
| 2-3 – between confident and unsure | 1 student | 5.0% |
| 3 – unsure | 2 students | 10% |
| 4 – slightly unconfident | 6 students | 30% |
| 5 – not confident at all | none | 0.0% |

Language Skills in Secondary Education

Often, the way to truly discover one’s own language is to learn another language. However, learning a second language is not compulsory in Australian schools. Interestingly, I have found⁵ that students for whom English is not their first language generally have better English grammar skills than students for whom English is their first (and usually only) language. I am convinced that this is because students who have learned English as a second (or third etc) language have had to actually learn the rules of English grammar. One student commented in a survey response:

So many students I studied with in Legal Practice topics had a below average to average understanding of sentence structure – including myself. This is an issue that I will have to battle with...In fact the most advanced student I have worked with commented that the only reason she had sound knowledge of

⁵ This hypothesis is based on my informal observations.

English grammar was because she was studying another language. This knowledge did not come from her studies at law school.

Another student said:

... I feel that I am at an advantage for having undertaken a Major in English in my Arts degree, as well as professional English in Law. It makes it easier to understand judgments in a case, and interpret them. It also makes it easier to make the transition from uni to firm life, as I have been undertaking a great deal of letters to clients, memos to supervisors and drafting of documents.

The requirements for secondary school students to study English vary around Australia. In South Australia, there are various English topics which secondary school students may study (such as English as a Second Language, English Communications, English Studies), but the study of English is compulsory only until year 11 in South Australian schools. It is not compulsory to study any form of English in the final year (year 12) prior to going to university. In other parts of Australia, English is compulsory in the final year. English is an essential pre-requisite for entry into some law schools. It is not a pre-requisite for entry into Flinders Law School where I teach, so we have students who may not have studied English in their final year at school.

Upon arrival at Law School, these students are faced with long slabs of text contained in judgments, academic articles and text books which they have to read in order to pass the course. They become familiar with convoluted language. They are in fact immersed in convoluted legal jargon for four or five years. When they attempt to write letters to clients, some find it very difficult. For many law students, the transition from writing academic essays to letters and documents which a lay client can understand is a difficult one. Many students have acknowledged this. For example:

I would like to have had more experience with drafting. I have no problems writing an essay as I have done so many of these; it would be helpful if more assignments were focused on what we will be doing in the workforce rather than writing essays.

Written English in the LLB/LP

Law students at Flinders University encounter principles of Plain English drafting in various guises throughout their degree. As English is not a pre-requisite to being accepted into the Law School, the standard of English expression covers a wide spectrum – from poor to highly articulate. I am sure that this is typical of any Law School. It is true that obtaining a place in a School of Law requires high academic achievement, which is often paired with a good grasp of the English language, but this is not always the case. The student body may include those who do not know how to use apostrophes, have a poor understanding of sentence construction and

make far too many spelling mistakes (my current source of annoyance is “tenant”). At the other end of the scale, we have students who have an outstanding command of the language and write extremely well. Students’ understanding and usage of appropriate grammar ranges from poor to excellent.

Students are required to complete a number of drafting tasks in the first year of their Law degree, by way of introduction, and then they are specifically taught Plain English concepts in the second year topic, *Professional English in Law*. In that topic, they cover basic English grammar and how to write in English in a professional context⁶.

Flinders continues the Plain English education within the third year topic *Corporate Law [Drafting]*. In that topic, students are required to produce a competent letter of advice to a client about a commercial matter. They learn about tone, formality, structure, avoidance of legal jargon and gender neutral language, and revise certain aspects of grammar such as the benefits of using the active rather than the passive voice.

Many students express the view that grammar should be taught in the first year of a law degree. A common student observation is that by the time students do *Professional English in Law* in second year, they have already been inculcated in “legalese” and find it hard to go “back” to Plain English. One student, in response to the survey question “**Do you think a grasp of basic English grammar is necessary for a lawyer?**” said:

Yes, but [i]t should be studied in first year before we’re too set in the ‘legal frame of mind.’

The recognition of the importance of grammar varies amongst students. One student, in response to the survey question above, expressed it thus:

Obviously need to be able to structure some basic sentences but I think that it is overrated! I don’t think most people care if you split the definitive (sic) or whatever. Obviously need to be careful that a grammatical error does not change the meaning of what you write, and in that way it is important.

On the other hand, the overwhelming majority of students who responded to the survey said that they thought grammar was important. A cynic might argue that only those who agree with the notion of Plain English and grammatically correct English as a cornerstone of legal professional practice would have responded to the survey. Those students who disagreed with the concept of Plain English might have chosen not to respond at all. However, the responses to the question “**Do you think a grasp of basic English grammar is necessary for a lawyer?**” are nevertheless

⁶ My ultimate goal is to expose students to Plain English right from the start of their legal education.

very interesting. The majority of students who answered the survey indicated a significant acceptance that correct use of grammar is important in legal communications.

Absolutely, Professional English should remain a compulsory subject.

Definitely, a lack of grammar in a written letter to a client or another party would not give an ideal impression. It is important to speak and write eloquently.

Yes, completely, if only for the fact that you will be picked up on it – and a split infinitive (or any grammar mistake) is never taken as a marker of intelligence, or of being careful and detailed.

Yes because it helps them to communicate more effectively and also gives a more professional impression.

Absolutely. Some lawyers have completely lost sight of writing and speaking as “normal” people, which I think alienates the community.

Yes it is necessary. I think it is unprofessional not to have basic understanding of English grammar as a lawyer. Clients expect lawyers to have a basic understanding of English grammar and there is nothing unacceptable about this expectation.

Of course it is important, this is a profession entrenched in the use of the English language. I’m beginning to believe that all we do is sit at a computer and draft letters and documents. That said, my grammatical skills are appalling so if passing the bar relied on a grammar test, I would have to wait tables for the rest of my life.

Yes, better English will allow for better communication between solicitor and client.

Absolutely. One cannot write cohesively, smoothly and fulfil all their obligations as a lawyer if they do not have a sound grammatical basis from which to work upon, as the English language is the pillar upon which all lawyer's (sic) work stems.

Yes. The law is confusing enough as it is, and in order to explain issues to clients (which is mostly done via letters) lawyers need to be able to write in a concise and clear manner. Waffling just confuses clients, and it is quite a skill to get straight to the point.

Yes, definitely. Because clients and lawyers from other firms that you are writing to must be able to understand what you are writing, and it must always look professional.

Obviously. I have always considered myself to be reasonably (oops passive)⁷ good at plain written English. However, given the difficulty I had with your English grammar exercises that were disguised as short drafting exercises, I am concerned about the extent of your definition of 'basic' English Grammar. Does this mean I can never be a lawyer?

Yes – people expect lawyers to have a strong grasp on grammar and good word use skills as a result of their education.

Yes, I think as lawyers we use language as a professional tool, we use both written and oral means of communication and it is essential that we use this to our advantage. Law suits can arise from ambiguity and it is essential that we know how to spot the ambiguous phrases and try to eliminate them from our own documents.

One student compared language to music:

Yes, I think if a lawyer is going to strive for a clearer and more precise use of the language s/he must know about the elements and rules that comprise the language. I could hardly hope to play music without knowing the names of the notes, the rules of rhythm or the structures which allow different instruments to play together in order to make up music. If nothing else, I think it would make teaching English a lot easier and more meaningful.

This comparison with music is an excellent analogy. I have also used a sporting analogy with students in the past. I have suggested to them that if they want to play football, they could get out there on the field without knowing the rules of the game, and have a great time kicking the ball in any direction and disregarding what the other players are doing and what the rules dictate. In doing so they may, over time, play a passable game and will probably have some fun. But to reach their best potential, and play football as well as they possibly can, it is critical that they know the rules of the game. So it is with writing. To be a really great writer and communicator, it is critical to know the rules. Only from that starting point can excellence be produced.

⁷ This is an interesting reference back to my lectures and assignments on using the active voice rather than the passive voice. This student had not grasped the concept of the use of the passive voice as opposed to *being* passive.

In this regard, I stress that just as in football, the aim is to kick goals, the aim in writing well is to communicate. Sometimes lawyers lose track of the aim of their writing.

Several students expressed the importance of grammar to clear communication:

Yes because it helps them to communicate more effectively and also gives a more professional impression.

Absolutely. Some lawyers have completely lost sight of writing and speaking as “normal” people, which I think alienates the community.

Interestingly, today’s students are well used to using inclusive, non-sexist language and use it with ease. In fact, a new rule seems to have developed. It is common practice to express every pronoun as plural and to avoid using gender specific pronouns. Plural pronouns are used with singular verb conjugations, as in:

A lawyer needs to tell their client that ...

A lawyer should always empathise with their client.

What I do find interesting is the use of this “New Grammar” even when the subject under discussion is known to be either male or female. For example, in a simulated interview environment where the “client” is expressed to be female, the students often use “them” or “they” rather than “she” or “her”. For example, in a letter to a client about a particular (female) witness, a student wrote:

I spoke to the witness. The witness said that they were unable to attend court on 12 June.

This “New Grammar” is becoming commonly accepted although there is debate amongst my law school colleagues as to whether it is simply a product of the evolution of language or laziness on the part of students who don’t bother to find another way of expressing what they wish to say. Some colleagues would find this perfectly acceptable:

A lawyer needs to tell their client that...

Others argue that it would be far more elegant, and grammatically correct to say:

Lawyers need to tell their clients that...

Certainly students are well aware of the need to write in gender-neutral terms, and in fact do it quite naturally, to the extent that occasionally, when a visiting lecturer

uses gender-specific pronouns (usually “he”), it is glaringly obvious and the cause of comment.

Whilst gender-neutrality seems to have become an accepted fixture, the use of Plain English rather than legalese is not as readily sold to all students. In their survey answers, many students indicated a belief that lawyers have to provide “value for money” by producing letters of advice and documents that are complicated and hard to understand because that is the proof that that they have been created by a wise lawyer who holds the key to legal understanding. Some students have said to me that if a document looks too simple, the client will think they have wasted their money by paying a lawyer to draft it. One student said in a survey response:

I think that the use of legalese helps the lawyers ensure that the mystic (sic) that surrounds the profession is not eroded by allowing the average ‘punter’ the opportunity to actually understand what the lawyer has drafted. Secondly the use of legalese is occurring because of the need to ensure that some documents are ‘water tight’ with regard to what is trying to be conveyed.

Conflicting Messages

These observations create an interesting backdrop against which law is taught at law school. Law teachers are faced with a dichotomy. We teach students to write Plain English, and suggest Plain English guidelines in relation to how to draft documents, what a comprehensible pleading looks like, how to create contracts which are reader-friendly, and how to write letters to clients so that they understand the advice we give. For example, a basic rule of Plain English is to include white space on the page. It is fairly well accepted nowadays that a page covered in long sentences within long paragraphs is uninviting to a reader, whereas the same information conveyed in a series of paragraphs with headings and dot points or numbered lists is much clearer. This is nothing new. Yet students are obliged to read judgments and academic texts which contain paragraphs which extend for pages, sentences which cover entire paragraphs with no headings, and nothing to make them reader-friendly at all.

If we are holding out our judges and textbook authors as the paradigm of legal intellectual excellence, then of course our future legal leaders will seek to emulate their writing style. Unfortunately, in many instances, this is not a style which showcases Plain English at all. Students are also required to read and write long academic essays which have a particular character, tone and style. Law students spend at least four years perfecting that scholarly style. When they try to write a letter of advice to a client, it is no wonder that they feel enormously frustrated when they are told to write that advice in Plain English because it seems at odds with the other writing they produce in essays and research papers.

The Plain English dilemma faced by students is twofold. Firstly, they seek to emulate the convoluted style of judges and academics but appear not to have the linguistic skills to do so. Secondly, they confuse formal language with convoluted language, or what is commonly termed “legalese”, the language unique to one profession. The coining of the term “legalese” suggests in itself that this is a language spoken and understood only by lawyers, only taught in Law Schools, and inaccessible to all others.

One of the major problems in relation to both sides of this dilemma is that many law students are unfamiliar with basic grammar. I am sure that this is not confined to law students, but is widespread across other disciplines. However, it is a serious issue for students who are preparing to enter a profession where they are required to be wordsmiths. For example, Plain English stalwarts advocate the composition of documents in the active voice rather than the passive voice. Many students do not know what this means. In relation to an exercise involving changing sentences from the passive to the active voice, one of my students wrote, “If I say this, it will be more active”. This student clearly did not understand the concept of active and passive voice. So before we can teach them the merits of using the active voice, we have to teach them first of all what it is.

A knowledge of sentence construction is critical to drafting logical documents. Students who lack the ability to form proper sentences have difficulties with drafting agreements and pleadings, not least because they have no idea where to put sub-paragraphs and where to split sentences into a), b), c) etc. In turn, this leads to great difficulties with correct numbering of paragraphs in documents and pleadings. They find it difficult to put agreements into numbered paragraphs and sub-paragraphs which flow properly as grammatically correct sentences.

1. *If the author of the document does not*
 - a) *Know where to break the sentence into dot points or where to start*
 - b) *a new paragraph or sub-paragraph or where, to punctuate, the sentence*
 - c) *the revised attempt at “Plain English” will be*
 - d) *A disaster. (Like this example)*

It was clear from the students’ survey responses that they are aware that client-centred legal practice involves empathy, communication, and trust and that the exercise of client-centred practice is also sound risk management. I was interested to find out if students consider the use of Plain English as a necessary component of client-centred practice.

First of all, I wanted to know what students understood by the expression “Plain English”. I asked them, “**What does “Plain English” mean to you?**”

The answers I received revealed an overwhelming acceptance that clarity is necessary in order to communicate advice to a client. Students were very clear on the meaning of “Plain English” and its purpose:

Drafting documents in words that any person of average intelligence without any knowledge of the law would be able to understand. Not using legalese or unnecessary long words and sentences. Stating how it is – no fluff.

Clear language, without overly technical words, legalese etc

The average person in the street should be able to read and understand the underlying message of any legal document, otherwise what is the point?

Being able to convey a clear message without relying on obscure or specialised terminology that would most probably confuse or alienate the layperson.

Easy to understand, absence of legal terms however when legal terms used they should be explained. Not colloquial language but straightforward and easy to read once without having to stop and think after each line.

Plain English means using language that the reader can understand. It means using simple language or explaining words that don't have an everyday meaning.

Plain English to me means that the words written do not contain any legalese, and that any layman from any profession can understand comprehensively what is written.

It means not using legal jargon, instead using normal everyday language

Simple short sentences devoid of jargon. Easy to read, but more importantly, easy to understand.

Plain English means not writing in “legalese”. It means being to the point.

Something the ‘lay’ person can read and not have to employ a lawyer to de-crypt it.

It means leaving out legal jargon so that what you are writing can be understood by clients who have no legal training.

Plain English is unambiguous, yet concise, written as if directed at a lay-person and uses the least amount of legal jargon practical.

English written in a format that allows the average person on the 'Bondi tram'⁸ to be able to read and understand what is intended to be conveyed. The use of jargon and Latin words is absent (sic).

Plain English means conveying a legal message in simple, straight forward terms. It means writing something that your client can understand without needing you as their lawyer to explain it to them. It is an effective means of communication.

Writing something that the client can easily understand without too much use of legal jargon or excessive wordiness.

Everyday language that the lay person understands – not legalese.

Writing in a way that any normal person without special experience will understand what is being said.

Clear precise non-technical language. No legal terms which are not readily understood by lay people.

Using language that is easy for people to understand. Avoiding "legalese" or unnecessary complicated words when a simple word will suffice.

The students have emphasised that the function of Plain English is to enable the non-lawyer (especially a client) to understand. These answers indicate that students do in fact want their clients to understand their advice. There is an apparent acceptance of legal advice being provided as a service, which is indicative of client-centred practice rather than a paternalistic model.⁹

However, one student knew exactly what "Plain English" means and agreed with its use, but expressed doubt about its use in future practice:

[Plain English is a] format that is intended to revolutionise legal drafting including but not limited to matters such as letters – legislation etc. It is a great idea and format. However I doubt I

⁸ This is the Australian version of the famous "man on the Clapham Omnibus".

⁹ See Binder & Price, *Client Centred Counselling*, West Group 1989 and Dinerstein, 32 Arizona Law review, 1990.

will use it after uni because law firms/practitioners will teach us to write how they do – majority of students will be sucked into a style that is not consistent with plain English.

This doubt about how the practising profession views Plain English usage undermines much of the teaching of plain language principles in law schools and practical legal training programs. Teaching law students how to write letters of advice and documents which are clear and unambiguous involves breaking through many pre-conceived ideas about how lawyers represent themselves in written form. For many students, convoluted language matches the pin-striped suit which they can't wait to wear. There is a notion that Plain English is alright if your client is downtrodden, destitute or inarticulate, but the corporate high flying lawyer wants to work for corporate high-flying clients, and presumes that those clients want value for money in the form of fancy words and fine print that needs further explaining. One student said:

I think it's an easy trap to fall into. Not even necessarily in using legalese but excess verbosity or complex vocab as is seems smarter. If something is too clear and simple you wonder why you paid \$300 an hour for it.

Another response was:

Depends on the area of law. In corporate or commercial [the belief that complicated documents represents value for money]... may be the case. In Family or Criminal Law I believe clients prefer simple English that they can properly understand.

In response to these pre-suppositions I always advise students of statistics which indicate that a very low level of literacy is prevalent in society. Statistics are readily available in relation to literacy levels. For example:

44% of 15–64 year olds in 1996 were recorded as having poor or very poor prose literacy skills (in English) and could be expected to experience some or considerable difficulties in using many of the printed materials encountered in daily life.

Only 37% of people have skills that would enable them to cope with many printed materials found in everyday life.

Only 19% of the population have good or very good prose skills and would be capable of managing all the literacy demands of everyday life.

The average reading age in the UK is equivalent to an educated nine-year-old.¹⁰

¹⁰ 1996 statistics - Dr Maged Boulos from Bath University – in the context of internet health sites and how hard they are to understand (10 September 2004), <http://news.bbc.co.uk/2/hi/health/3641634.stm>

An Australian study, “where respondents were asked to rate their reading, writing and basic mathematical skills for the needs of daily life and for the needs of their main job, revealed that of people who did not speak English as their first language, between 43% (on the quantitative scale) and 48% (on the prose scale) were at Level 1 (very poor literacy skills), representing approximately one million people. Of people whose first language was English, 14% (on each scale) were at Level 1, about 1.5 million people. Some 18% to 20% of those whose first language was English were at Level 4/5 (good to very good literacy skills), compared with 7% to 8% for those whose first language was not English.”¹¹

Language as Image

The way we write is a reflection of ourselves. Writing tends to evoke strong emotions, even in a commercial or professional context. What is created under our names is representative of us and no-one likes to be misrepresented. Whilst I teach the importance of conveying an appropriate professional image through all forms of written communication, I am aware that many law students take great pride in their writing, and are highly offended if it is criticised. Most lawyers and law students consider themselves to be good writers. To be told that one’s writing is less than perfect can be a crushing blow. To have one’s draft document corrected and altered is often seen as very belittling and embarrassing and can be damaging in terms of self-esteem and confidence.

One student expressed this feeling:

Sometimes I feel that to sound intelligent and to know what I am talking about...I should be using legal jargon

Many students also see the use of language to portray a certain professional image as important. For example, one student said of the correct use of grammar:

Essential. ... Grammer (sic) is completely necessary for clear communication. An incorrect apostrophe, comma etc can completely change the meaning of a document and it makes you look incredibly stupid too.

In order to obtain entry into Law School, students must demonstrate that they have a high level of intelligence and an aptitude for academic rigour. After three or four years of passing law exams and writing extensive research essays, it is understandable that students often regard the manipulation of their written work as offensive. After all, it is confronting for someone else to presume to be able to re-

¹¹ Australian Bureau of Statistics, Aspects of Literacy, Assessed Literacy Skills 08/09/1997
<http://www.abs.gov.au/ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/887ae32d628dc922ca2568a900139365!OpenDocument>

write your creation, especially if you really believe that you do have literary talent. It is sometimes said that many lawyers are frustrated actors, and that the drama of the court room is the antidote for the thespian lawyer who longs to be quoting Shakespeare and Moliere instead of citing statutes and arguing about costs. Many lawyers and law students have an interest in language and literature and consider themselves to be better than average writers.

One student expressed:

... a wish that we could have more poetic freedom to express legal concepts and procedures which could 'warm up' the use of language in law. I think there must be a lot of top barristers, lawyers and judges that would write poetry or literature, it is evident from the eloquence in their legal writings, but somehow law remains a cold and 'harsh' vehicle for the development and enjoyment of the language.

Also of significance is the fact that not all new lawyers are young lawyers. Many law students today are of a mature age and have been in the workforce for several years and have career and life experiences which cause them to resist change to their writing style. However, even professional writers know that editing is the key to great writing, and so I encourage Plain English as an editing process as well as a drafting one.

Some students have expressed the view that Plain English is a “dumbing down” of the English language. I have had students say to me that they have “dumbed down” their letter of advice “for the purpose of the exercise” (which was to write a letter to a client). The desire for linguistic elegance amongst law students is strong, although many students do not see that their convoluted language and poorly constructed sentences are far from elegant. In discussing the use of Plain English, students have said to me, “I don’t want to sound simple.” So even though they are aware of the need for clients to understand, there is a deep-seated need for recognition of their own worth which they want to demonstrate in their writing. One student argued:

Some clients may think that a complicated letter means that the lawyer knows what they are talking about and that it's all very complicated, but I don't think that makes up for the client not understanding a letter as they will be less likely to know what is going on and may not assist their solicitor with info because they don't know what is needed.

Students are acutely conscious that language can be used to mislead¹² and that sometimes, the rights of parties may be intentionally “hidden” in documents. The

¹² See Dale Barleben, *The Plain English Movement and Present-day English Registers*, 2003
<http://www.chass.utoronto.ca/~cpercy/courses/6362/2/Plain.htm>

popular caricature of the lawyer using “fine print” and “legal loopholes” feeds upon the clichés adopted in popular culture which depicts lawyers as shady characters with unethical business practices. The number of “lawyer jokes” websites which can be found on the Internet is indicative of the poor standing of lawyers in the community. However, those students who see themselves as smart, strategic commercial movers and shakers might not like to discard the image of the sharp practice, and may actually aspire to moving in fast and cut-throat business circles. They see themselves as strategists and are not interested in client centred lawyering to unsophisticated clients. So the use of “dumbed down” English has no appeal.

For these students, the sales pitch for the concept of Plain English can take a slightly different tack. In recounting the virtues of clear language, I explain to students that client-centred communication is important whoever your client is (especially if you want to keep them as a client) and that in a global economy, where transnational and multinational transactions involve complex legal documents, the need for clarity in those documents is paramount, not just so that all parties are sure of their rights and obligations, but also because many documents these days must be translated into different languages. Precision in the originating document is critical if the document is to undergo the process of translation into another language, sometimes more than once. Furthermore, it is also very important to use clear English for clients whose first language is not English. Clients in this category might range from a refugee, to a small business owner, or a client seeking custody of a child, or the owner of a multi-billion dollar enterprise.

For legal educators, to embark upon teaching students how to write is challenging and the reaction can be hostile. To be accepted into Law School is a high achievement. Law students, upon arrival, are already glowing with the success of having got into Law School, before they have even read a case. Many of them consider that their language skills are acceptable when they are clearly not; others reject suggestions that their expression could be improved. Yet, in my experience, students at all levels find putting even the simplest advice into a letter very difficult. They tend to write long convoluted sentences. They use complex vocabulary which is often incorrect or inappropriate. A recent howler I read in an essay was “the stigmata of being accused of a crime”.

I have seen too many poorly constructed sentences and badly drafted letters to accept that Law School guarantees the likelihood of a law student being able to write coherent English. Somehow, a lot of these students have by-passed learning about sentence construction. In popular usage at the moment is ‘whereas’ at the beginning of a sentence, although it leads to something which is not a sentence at all, as in:

Whereas the other driver was not at fault.

Incorrect use of punctuation, or complete lack of it, is also an impediment to learning how to construct an agreement or a pleading. “Translating” a document

into Plain English means eliminating unnecessary verbiage and making the document reader-friendly and clear. Clarity is paramount, but it is very difficult to teach Plain English when the starting point is a grammatical quagmire.

However, I do not believe that a lack of grammar skills is a new phenomenon. It is likely to have always been there. The difference now is that we are teaching lawyers to write so that everyone can understand them, and they are no longer able to hide their defects in long sentences and page covering paragraphs.

Client-Centred Legal Practice.

There is a tendency today to talk about “client-centred lawyering”. As an aside, I actually dislike the word “lawyering” and never use it. If Plain English for some people means the end of linguistic elegance, then that word “lawyering” is a prime example. Plain English need not be inelegant, but it is true that it is inextricably linked to a client-centred approach. We teach students to focus on their clients, to empathise. This they readily accept and do well.

Empathy is reflected in the way lawyers communicate with their clients. I hold firmly to the belief that if we teach law students to establish a relationship of trust with their clients, then communication is the key to developing such a relationship. Further, language is the key to communication. If we use language that our clients understand, they are more likely to understand our advice, which means that our service is appreciated. The strategists amongst us will identify that as a good risk management strategy.

The new lawyer may be very keen to share with a client the benefit of knowledge, gleaned over years of hardship and sacrifice whilst plodding through a law degree. However, Lewis and Kyrou’s advice is sound: “Your client is not interested in the intricacies of the cases and statutes that you spent years mastering. Your client wants you to solve his or her problem quickly and with a minimum of fuss.”¹³ It is the lack of fuss that is a key component of Plain English writing. Many times I have had students and junior lawyers say to me that they are having trouble putting their advice into words. They know what steps they have to take, and what the client has to do, but they just don’t know how to say it. I say to them, “Don’t try and write it, just tell me in your own words what your advice is.” Usually, the student/lawyer is then able to elegantly and easily say to me in a few sentences what they have been trying to write for hours. “Oh, well, what I’m trying to say is that they have to do this and then do that and then we’ll need to speak to Mr X. And so on.” And then I tell them, “That’s what you have to put in the letter.” When students approach their writing from this perspective, they find it much easier and end up with a clear, concise, elegant result which conveys advice in a way that the client can understand but is not in “baby talk” or “dumbed down” language.

¹³ Lewis & Kyrou, *Handy Hints on Legal Practice*, Second Edition, The Law Book Company Limited, 1993, p3.

It is often not until students come into contact with real clients and the need to convey information that the penny finally drops in the context of using Plain English. In addition to my work with Practical Legal Training, I am involved in running a Clinical Legal Education program. We operate a legal advice service for unrepresented litigants in the Minor Civil Claims division of the Adelaide Magistrates Court. This jurisdiction covers civil claims of up to \$6,000 (approximately €3850). Students deal with real clients with real legal problems and the concept of using Plain English to provide an effective client service becomes very real. Many students have commented to me that being able to work in this way is the most effective method of learning the importance of Plain English drafting techniques.

Precedents

Another area fraught with difficulty is the use of precedents, especially for junior lawyers. Teachers of Plain Language drafting need to first of all acknowledge that all lawyers rely on precedent documents. Law teachers must teach our emerging lawyers how to interpret precedent documents, and then how to recognize if they need amendment. The final step is to teach lawyers and law students how to amend them as necessary.

Over-reliance on precedents can be a problem. Many law students who already work in law firms as clerks tell me that when they need to draft something they just use one of the hundreds of precedents already available in the firm precedent bank. Using precedents in itself can be sound business practice. Why spend hours creating a new document when a perfect precedent exists? The problem lies in detecting whether or not a particular precedent is satisfactory for the proposed purpose. If not tailored to meet the exact measurements of the client, using a precedent may not do the perfect job, and may even be detrimental to the client's case. An experienced lawyer knows how to use a precedent effectively, but this is a skill which develops with experience. Many new lawyers are lulled into a false sense of security by relying on precedents which have been used before in similar situations. Our law students need to learn how to understand and use precedents effectively. Students answering the survey recognized this:

I think the most difficult time to avoid legalese is with court documents. They are often precedents, or there are certain phrases you have to use, that always contain legalese. It is difficult to avoid in these situations.

I think where precedents are used it is harder to draft using plain English because it saves time to use the precedents and unless there's a conscious effort from above to revise precedents it makes it hard to break from the norm.

The Impact of Technology

We are also now dealing with a generation of students who have lived with email since they started writing. This is a generation who have rarely, if ever, written letters, they nearly all own and use mobile telephones, and they use email and text messaging as their regular form of written communication. They never knew life before stereo radio and most have grown up in a house with more than one television. They expect instant answers to their questions because their world has always involved information at the push of a button on a keyboard. Most importantly, they are used to instant communication. They have all grown up with computers and have done their homework on computers. They don't write a lot of letters! They don't know about tone or appropriate vocabulary so they write text messages and emails with smiley faces at the end so as to ensure that their addressee knows that this is a happy letter. They send emails without correcting mistakes and with no need to format, and they expect an instant reply. They don't even need to remember to put the date because it is all there for them, pre-packaged and formulaic. Composing a formal professional document is challenging in every respect, not just in relation to its technical competency or the soundness of the advice it contains.

So in order to engage students who are skeptical about Plain English, it is important to explain that a key aspect of it is professional detachment, and learning to write in an appropriate tone, using appropriate vocabulary. An experienced lawyer can spot at a glance a letter which has been written by another lawyer who has become emotionally involved with their case. The tone is anxious or angry. Affidavits seethe with resentment or long-held animosity, revealing sensitive hidden nerves. I teach students that it is the hidden nerve which must remain concealed, because its exposure can reveal a cracking of the professional mask.

I also teach law students that professional legal writing is entrenched in a historical mire. Lawyers have traditionally written lawyers because they were once paid by the word (and not for punctuation, hence the lack of it in many old legal documents). Lawyers often write letters when they should be just picking up the telephone and having a conversation about the matter which needs to be discussed. Letters are often a way of actually avoiding direct contact with the client. So one of the first questions a lawyer should ask when commencing the letter is, "Why am I writing this? Why is it necessary?"

Lewis and Kyrou¹⁴ say that one of things new lawyers get wrong is the belief that partners don't make mistakes. Just as this is true, so is the fact that partners might not draft documents in the best possible way either. This creates a dilemma for new lawyers who have learnt the concepts of Plain English drafting, and valiantly try to put these ideas into practice, only to have their work crossed out and told "we do it this way here." Do they stick to their Plain English principles or do they cling to

¹⁴ Gordon D. Lewis & Emilius J. Kyrou & Albert M. Dinelli, *Lewis & Kyrou's Handy Hints On Legal Practice*, Sydney, Law Book Co, 2004.

their tightly won job? The answer is not difficult to determine. Just as many senior practitioners initially resisted the intrusion of new technologies into their practices (and some still do), so too do some resist Plain English and continue to pepper their letters “of the 17th inst” with “heretofore” and “aforesaid” and sprinkle liberal quantities of “hereunder” and “whereas” as if living out a Dickens novel.

Most modern Australian law firms and government sponsored agencies use and produce documents in accordance with “Plain English” policies. However, there is an undercurrent of doubt about this amongst students. I have been concerned for some time about resistance to Plain English by the profession. I asked my focus group of students if, in the event that they had worked in a legal office or completed a Practicum placement¹⁵, if they had attempted to use Plain English. I also asked them, if they had ever encountered resistance, either from clients, colleagues or supervisors when trying to implement Plain English drafting techniques at work or on Placement. The responses were varied, but overall, the impression is that the profession has embraced Plain English:

I think because I am still new in the legal profession my use of English has not yet been overridden by legalese or rhetoric, therefore I tend to use plain, but formal English whenever drafting documents. Nevertheless, my lack of experience means that some times more precise wording is needed to convey the same message that I had constructed in a simpler form. I imagine sometimes it becomes a difficult balance to strike, between simple clear language and the need for unambiguous and precise documents.

... there appears to be a general attitude of resistance to such use by older more conservative established members of the profession.

Yes, however, these are mostly for valid reasons, e.g. a certain phrase is used because it has been tested by courts and so we can be sure ‘that it works’. Certain clients also want documents which are ‘legal’ in the sense that they seem official (this is particularly so for some commercial contracts). Also sometimes being precise is easiest done by using a legal term, the term brings with it meaning from many cases etc, to explain it using ‘non legal language’ can be lengthy and difficult.

Yes, and there is a handbook that says we have to use Plain English, also a continuing education course within the firm that teaches it.

¹⁵ As part of their Practical Legal Training, all law students at Flinders University must undertake a six week Placement in a legal office.

Yes – especially in draft letters of advice - I try to make advice as simple and straightforward as possible whilst still including all the important information.

I always try and implement Plain English in my drafting techniques at a legal service I work at. I have not encountered resistance from colleagues or supervisors.

The firm I have been working at has a plain English style in their letters already.

Working in an accounting firm, I have had a couple of letters changed in ways that I think deviated them from plain English but didn't actually change the subject matter.

I have not started my Placement yet. From legal firm: didn't get to do much legal work, but one file gave me the opportunity to draft a letter/claim in plain English.

Have tried to write letters to clients that explains (sic) the situation without using typical legal language. My firm likes to keep letters to clients simple and understandable, so no, I haven't encountered resistance

No, the issue hasn't come up at work yet.

Haven't done my placement yet – but would want to try and use plain English whenever possible because I find it makes my life easier as well.

I find that sometimes I don't use plain enough language and that my supervisor encourages me to be less formal in my letter writing than I am.

In placement at [Community Legal Centre] I have assisted in drafting/editing information brochures so that people with little understanding of legal terminology can understand the issues. The use of plain English has been encouraged. I know from experience as a legal secretary in criminal law firms, that practitioners often prefer convoluted language and can be quite pompous even in the way they speak. For instance, I told a young lawyer about a year ago that the location of his lunch meeting had changed. Rather than simply say “thank you” or “okay” his response was, “Right, I'll take that on board.” Silly.

One student already speaks legalese and does not seem to realize it:

As per yet, I have not commenced my Placement, however I do not foresee it to be a problem. In fact, my belief is that they would be in favour of it.

Value for money?

In the survey, having asked for comments about Plain English and what they thought of its use in practice, I then asked the major question which had led me to conduct the survey in the first place: **Some lawyers perceive that clients actually think they are getting value for money when they receive documents written in legalese? What do you think about this?**

Although some students were familiar with this assumption, they did not all necessarily agree with it. The majority of the answers I received argued in the same vein as this response:

Clients need to fully understand the advice given (whether written or verbal) in relation to their instructions. Otherwise they may feel removed from the process, powerless and be more willing to complain about any outcomes.

I don't see how this could be the case. If the work is done properly and thoroughly then the client will know they are getting value for money anyway. Particularly when the work is easy to understand down the track if/when a problem arises.

I do not believe this is the case. I believe that a client would see a letter that contains valuable and easily understood information more valuable than having to call the lawyer to find out what they have just been told.

If a client can't understand the document then they are not going to think that they are getting value for money.

This is definitely not true. What happens is that if you write a letter in legalese, it actually ends up costing the client more money, as they then have to call you up and ask you to explain what you wrote in the letter!

However, the very existence of the notion of clients expecting legalese is concerning. Several students acknowledged that some clients might feel this way:

I would tend to agree, but I still think that that is not necessarily a good thing. I think people that (sic) expect legalese have come to expect that precisely because of the alienating nature of legal

work (more so in the past). In other words since legal documents have always had this mystic aura about them which makes them difficult to understand...anything that is not like that must not be as good as or as 'professional'. Having said that, I don't see anything wrong with 'dressing up' a document a little with language to give it an air of formality which would befit the document, e.g. a will. Again, I think a balance is required in order to convey a clear message but still be able to distinguish it from everyday mundane language use. I believe that language is a versatile and powerful tool which more than allows for this balance to be achieved.

This is a common perception. I do not think it benefits the client because it is not value for money if they cannot understand what is going on in their case.

I think that is definitely still the way some lawyers think and maybe it is true to an extent. If clients received a drafted document that seems really simple because it is in plain English they may not think they've got their money's worth. On the other hand, if they can understand what is going on they are probably also more likely to feel satisfied with the work the lawyer has done.

I think this could definitely be true, it does make them sound more professional, however the client is probably fooling themselves if they can't actually understand what is being said!

One student spoke about the expectations of clients in relation to the tone of a lawyer's letter. Clearly, appropriate tone is a critical component of a professional document, but a formal tone does not need to be in legalese. This is where the confusion lies. One student said:

I think some clients do want documents written in a formal legal tone. However, the default position should be to assume that clients actually want the most 'workable' document.

This next response was very candid:

A lawyer once said to me that he wakes up in cold sweats of guilt for the amount he charges clients for basically telling them common sense. But that the reality is unless you wear a suit, charge a fortune and make it sound technical – people don't listen to common sense. I think a client wants to understand what is happening to them but they don't want to be given something that they could have just done themselves. I think

plain English is important because it helps the client understand the law. However I think it is important to keep a degree of formality. I don't think a very casual approach is appropriate either.

There is an indication here that there is confusion between formal English and informal (or casual) language – and that plain English is necessarily informal. I don't think this is so, and I teach students that it is necessary to be use plain but formal English.

Some students did agree that there is an extant perception that legalese represents value for money, or proof of a lawyer's skill:

This is because the more complex it looks, it reflects more upon the nature of work of a lawyer, and the client believes they have a very good lawyer, as they themselves cannot understand the text. These lawyers who actually believe that clients think like that however are unfortunately misguided in my opinion, as a client would always want to understand what is going on, and so therefore when they do not understand any text, they will feel as if they are NOT getting value for money.

I agree that some clients do think this. Client's (sic) go to lawyers as they don't understand the legal system and associated legal jargon. Sometimes client's (sic) may feel that they are paying lawyers lots of money just to write something they could have written themselves – so I can understand that some lawyers write in legalese to make their client's (sic) feel as though they are getting their money's worth. This can be counter-balanced by the ones who complain about having to go to a lawyer to interpret a simple two page letter that really could have been summed up in a couple of paragraphs.

I had a client asking for a "legal" type letter using legal words to assist her with her submission that she was taking to the Social Security Appeals Tribunal.

When it comes to billing the client, (and I know from the experience of a close relative) clients want all the legalese they can get in their matter but none in their account. It causes problems between the lawyer and client when all matters pertaining to the bill and charging are not clearly spelt out for the client. I think some lawyers adhere to the notion of providing as little clear information as possible.

I think this perception is linked to the elitism of lawyers and thinking it's the only way to do things. I think it is a misconception. If clients had a legalistic document and a plain English document in front of them, and you explained that they meant the same thing, they would choose the plain English version. Simple and clear language should prevent future disputes based on confusion of what the terms meant. Clients will also save money if they don't have to book an extra appointment or make an extra phone call to get their lawyer to translate what they have written

One interesting comment suggested that lawyers do not need to be concerned with their written communication skills:

Let the secretary make the grammatical corrections.

Apart from the obvious questions raised by this (e.g. would the secretary have the linguistic skills to do this, would junior lawyers even have their own secretaries, would the secretary have time to do tasks such as editing grammar mistakes, will the secretary proof-read everything produced by the lawyer, etc), a more fundamental issue is raised by this suggestion. Grammar is an integral part of sentence structure. Without a concept of how to draft a sentence, a lawyer cannot draft a letter, a pleading or any kind of agreement. This underestimation of the importance and magnitude of the role which grammar plays in written communication underlines my thesis here: if you haven't grasped the building blocks of writing, you'll never be a great writer. It then becomes a question of whether our students wish to strive for excellence, or whether 'near enough' will do.

Conclusion

Those in the legal profession who are dedicated to excellent client service and access to justice for everybody have seen the connection between these concepts and the use of plain language. It is true that the use of legalese has been diluted substantially over the last ten to fifteen years, and that the legal profession has embraced the notion of clear communication with clients, if only for risk management purposes if nothing else. After all, a client who understands advice and knows what is happening is less likely to complain.

Law students are generally keen to embrace use of language that their clients will understand, and with a little grammar tuition to assist the process, the next generation of lawyers will be in an excellent position to provide that service. As in all areas of learning, students need encouragement in their endeavours to use Plain English and need to find that encouragement in their leaders, mentors and teachers.

Law schools and legal educators must start the process of teaching Plain English drafting early in the degree. Legal academics must start using Plain English

principles themselves and publish articles which are easier to read. Those who draft legislation and have embraced Plain English principles must continue to strive for excellence in that endeavour. The judiciary must also come to grips with this concept. Judges must write judgments which are clear, comprehensible and reader-friendly. Then we will be able to teach law students to not just “do as we say” but to “do as we do”.
