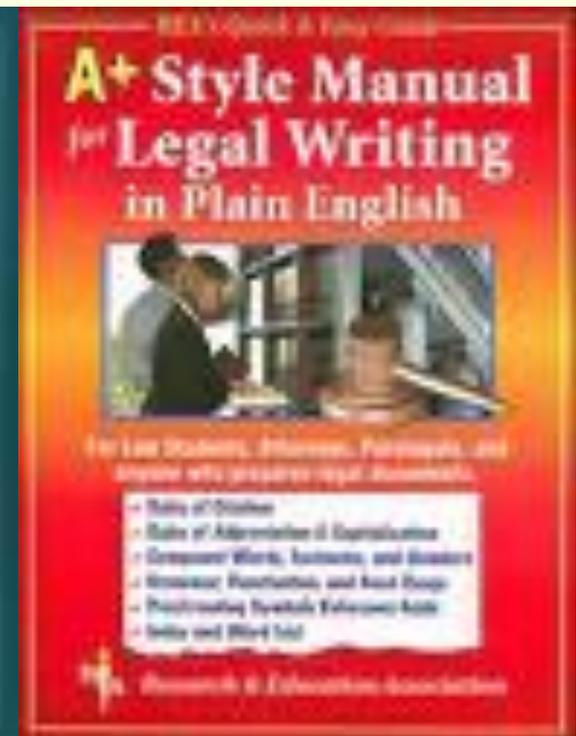


Legal English and the Plain Language movement



What is legal English?

- Descriptive vs. prescriptive. Also 'hybrid' forms of legal language
- Communication between lawyer and client, or between two lawyers
- The language used in the courtroom (interrogation of witnesses, summing up by judges etc.)
- Law reports in newspapers, academic textbooks on legal matters
- Language of legal documents – extremely formal, difficult for the non-expert to read.

The Norman invasion (1066)

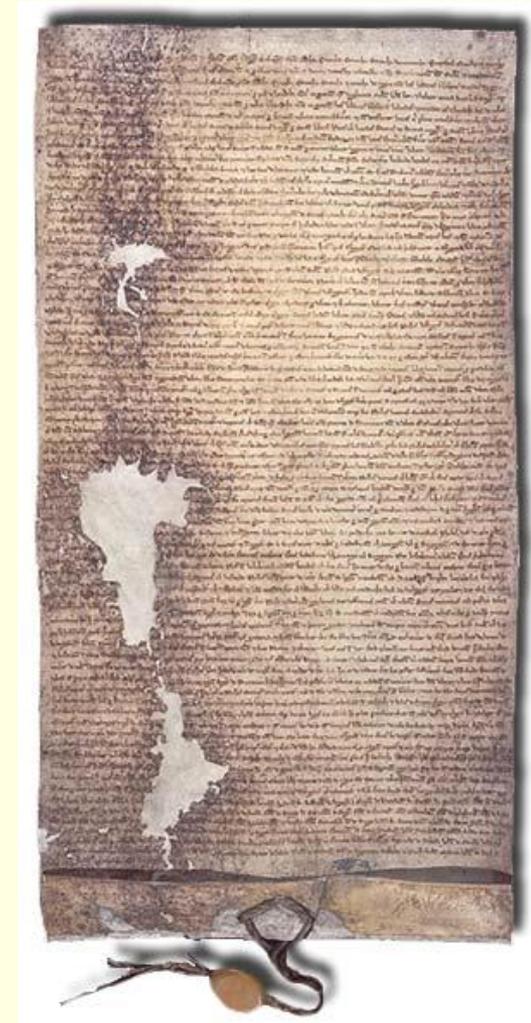


The legacy of French and Latin

- Commonly used Latin expressions
 - ratio decidendi
 - Habeas corpus
 - caveat
 - bona fide
 - mens rea
- Cases where the adjective comes after the noun (influence of Norman French)
 - notary public
 - heir apparent
 - advocate general
 - secretary general
- Many of the most commonly used nouns in legal English come from the French
 - judge
 - court
 - appeal
 - magistrate
 - tribunal
 - sentence
 - verdict
 - jury
 - justice
 - prison

Magna Carta of 1215

- A central precept of *Magna Carta*: “no freeman shall be taken or imprisoned or dispossessed unless by the lawful judgment of his peers (equals) or by the law of the land.”
- (This is the English translation: *Magna Carta* was written in Latin)



'The bad old days'

- The plea to use plain language in legal English isn't new:
- King Edward VI (1550): 'I would wish that the superfluous and tedious statutes were brought into one sum together, and made *more plain and short*, to the intent that men might better understand them'



'Conspiracy theory'

- Jonathan Swift on lawyers (*Gulliver's Travels*): 'This society hath a particular cant and jargon of their own, that *no other mortal can understand*, and wherein all their laws are written, which they take special care to multiply'
- Jeremy Bentham (1748-1832): 'The power of the lawyer is in the *uncertainty of the law*'.

The two sides of the coin

- On the one hand legal language can be difficult to understand and it therefore distances and disadvantages ordinary citizens who are non-experts
- But an alternative perspective is that the formulaic formality of such language may help participants to understand that they are entering a world which must be taken very seriously

Fog: metaphor of the English legal system

- Charles Dickens (*Bleak House*):
'Fog everywhere. Fog up the river ... fog down the river ... Fog on the Essex marshes, fog on the Kentish heights ...
- ... members of the High Court of Chancery mistily engaged in one of the ten thousand stages of an endless cause ... with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, *mountains of costly nonsense*, piled before them'



Old-style legal English

- Long, complex sentences
 - Excessively 'wordy' and pompous
 - Antiquated and repetitive
- “SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:
 - SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1995, and shall be applicable to all taxable years beginning after December 31, 1994 but before January 1, [2006] 2009; provided, however, that the tax credit under Article 88A, § 54 of the Code, as enacted under Section 1 of this Act, shall be allowed only for employees hired on or after June 1, 1995 but before July 1, [2003] 2006 ... etc. etc.

Queen Elizabeth I or II?

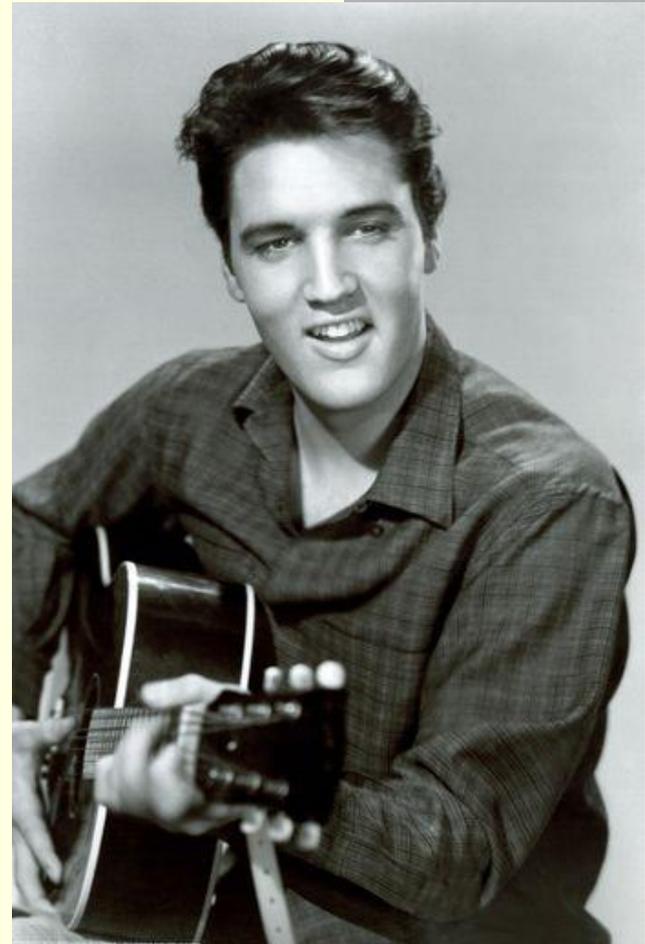
- *The following is the enactment clause still used today in Westminster for financial bills:*
- *Most Gracious Sovereign, WE, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this Session of Parliament, have resolved to grant unto Your Majesty the sums hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the Queen's most Excellent Majesty ... etc. etc. etc.*

Cut, cut, cut!!

- *Redundancy and repetition: largely the result of the 'all-inclusive' logic of the Common Law system with its narrow interpretation of the law.*
- *US National Park Service rule § 5010: A person may not prune, cut, carry away, pull up, dig, fell, bore, chop, saw, pick, move, sever, climb, molest, take, break, deface, destroy, set fire to, burn, scorch, carve, paint, mark, or in any manner interfere with, tamper, mutilate, misuse, disturb, or damage any tree, shrub, plant, grass, flower, or part thereof ... etc. etc. etc.*

Last Will and Testament of Elvis A. Presley (filed 22 August 1977)

- I, Elvis A. Presley, a resident and citizen of Shelby County, Tennessee, being of sound mind and disposing memory, *do hereby make, publish and declare* this instrument to be *my last will and testament, hereby revoking any and all wills and codicils* by me at any time *heretofore* made. (...)



Elvis (continued)

- *In the event that all of my descendants should be deceased at any time prior to the time for the termination of the trusts provided for herein, then in such event all of my estate and all the assets of every trust to be created hereunder (as the case may be) shall then be distributed outright in equal shares to my heirs at law per stirpes.*
- *The first 19 words of the clause above could be said in 6 words: “If all my descendants die before ...”*

Beginnings of the Plain Language movement

- Consumer movements of the 1960s: the protection of consumers' rights
- US Citibank promissory note of 1973: the first attempt to use Plain Language
- The initiative was successful and so it was extended to insurance and other spheres in the US
- UK. The first Plain Language organization was set up in 1979, the Plain English Campaign

Plain Language and legal English

- David Mellinkoff 1963. *The Language of the Law*. His book was a critique of legal language in the US.
- Joseph Kimble has long been a vociferous campaigner of Plain Language. At the Thomas Cooley Law School in Michigan he organized legal writing courses and was editor of *Scribes Journal of Legal Writing* outlining the principles of Plain Language
- A well-known association is *Clarity: An international association promoting plain language* (<http://www.clarity-international.net/>)

Plain Language goes worldwide

- Australia. The Australian Office of Parliamentary Counsel was the first to introduce Plain Language principles into legislative drafting, in the late 1980s.
- New Zealand. NZ Parliamentary Counsel Office
- Canada. PLAIN (Plain Language Association International)
- South Africa. 1997 Constitution
- EU. 'Fight the Fog' campaign
- Plain Swedish Group (Klarspråksgruppen), still active
- Progetto *Chiaro!* once active, now dead!
(<http://www.funzionepubblica.it/chiaro/>)

Proposals for reforming legal texts

- eliminate archaic and Latin expressions
- reduce sentence length
- include a 'purposive' clause at the start of the text
- remove all unnecessary words
- ensure the text can be understood by someone 'of average intelligence'
- reduce the use of passive forms
- reduce nominalization
- replace *shall* with *must* or the present simple
- ensure the text is gender-neutral

'Conservative' north v. innovative south

- Innovators: Australia and New Zealand, and to a lesser extent South Africa and Canada
- 'Conservatives': the US, the UK, and the major international organizations (United Nations, European Union, International Labour Organization)
- But in recent years the north/south gap has narrowed

The UN: rewriting legislative texts for didactic purposes

- *Universal Declaration of Human Rights of 1948*
- Article 1 (original version). **All human beings** are born free and **equal in dignity and rights**. **They are endowed with** reason and conscience and should act towards one another **in a spirit of brotherhood**.
- 1. When **children** are born, they are free and **each should be treated in the same way**. **They have** reason and conscience and should act towards one another **in a friendly manner**.

-
- Article 3 (original version). **Everyone has the right to life, liberty and security of person.**
 - 3. **You have the right to live, and to live in freedom and safety.**
 - Article 4 (original version). **No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.**
 - 4. **Nobody has the right to treat you as his or her slave and you should not make anyone your slave.**

South Africa Constitution: removing *shall*

The South Africa Constitution of 1997 is widely considered to be the high point of the Plain Language movement's efforts to date to modernize legal English.

- Interim 1994: The Republic of South Africa *shall be* one, sovereign state
- The national flag of the Republic *shall be* the flag the design of which *shall be* determined by the President by proclamation in the Gazette.
- Final version 1997: The Republic of South Africa *is* one sovereign democratic state ...
- The national flag of the Republic *is* black, gold, green, white, red and blue, as described and sketched in Schedule 1.

Avoiding *shall*, syntactic discontinuities, passives, and unnecessary words

- Interim 1994: The detention of a detainee *shall, as soon as it is reasonably possible* but not later than 10 days after his or her detention, *be reviewed* by a court of law, and the court *shall order the release of the detainee if it is satisfied that the detention is no longer necessary* to restore peace or order
- Final version 1997: A court *must review* the detention *as soon as reasonably possible*, but no later than 10 days after the date the person was detained, and the court *must release* the detainee *unless it is necessary to continue the detention* to restore peace and order.

The 'Good law' initiative in the UK

- <https://www.gov.uk/good-law>
- “The good law initiative is an appeal to everyone interested in the making and publishing of law to come together with a shared objective of making legislation work well for the users of today and tomorrow.”

Good law: the vision

- The Office of the Parliamentary Counsel (OPC) would like the user to experience good law - law that is:
- necessary
- clear
- coherent
- effective
- accessible
- We are asking a range of partners – in government, in Parliament and beyond – to help us get there. For some this may mean challenging their current approach to preparing, making, scrutinising, or publishing legislation. It may mean working more closely together with partners, or knowing better how the user finds legislation, or what they do with it. We want to build a shared accountability for (and pride in) the quality of our law, and to create confidence among users that legislation is for them.

Gender-neutral texts

- *Jack Straw, leader of the House of Commons in Westminster, said on 8 March 2007: “Male pronouns are used on their own in contexts where a reference to women and men is intended, and ... words such as 'chairman' are used for offices capable of being held by either gender. Many believe that this practice tends to reinforce historic gender stereotypes, and presents an obstacle to clearer understanding for those unfamiliar with the convention.”*

Gender-neutral texts

- *Meg Munn, Minister for Women and Equality in March 2007, said: "It may seem a small thing in one sense, but language is important. We have a society in which we believe men and women are equal, so why shouldn't the law refer to us equally? Many other English-speaking countries do so already. It really is outdated to have language which refers to 'he' when it means women as well. Most people would see this as a normal, sensible way forward."*

An example of gender-neutral drafting

The Review of Children's Cases (Wales) Regulations 2007:

- *SCHEDULE 1 Elements to be included in review (...)*
- *5. Explaining to the child any steps which he or she may take under the Act including, where appropriate—*
- *(a) his or her right to apply, with leave, for a section 8 order (residence, contact and other orders with respect to children),*
- *(b) where he or she is in care, his or her right to apply for the discharge of the care order*

House of Lords debate on gender neutrality on 12 December 2013

- <http://www.theyworkforyou.com/lords/?id=2013-12-12a.1004.0>
- <http://www.bbc.co.uk/democracylive/house-of-lords-25351370>
- <http://www.halsburyslawexchange.co.uk/interpreting-legal-language-can-he-truly-be-gender-neutral/>
- <http://feministphilosophers.wordpress.com/2014/01/15/gender-neutral-language-debated-in-the-house-of-lords/>
- <http://chronicle.com/blogs/linguafranca/2013/12/19/lord-quirk-drops-the-ball/>

Plain Language Rewrite of US Federal Civil Court Rules

- This was the product of an intensive four-year effort by federal judges, practising lawyers, law professors, and a drafting consultant, Joseph Kimble.
- The rules, which were approved by the Supreme Court of the United States, took effect on 1 December 2007.
- The civil rules, originally written in 1937, govern the procedure in all federal trial courts (US District Courts), are relied on daily by countless judges and lawyers. They also serve as models for state courts.

Before and after

- Old: **The practice as herein prescribed** governs in [sic] actions **involving the exercise of the power of eminent domain** under the law of a state, **provided that** if the state law **makes provision for trial of** any issue by jury, or for trial of the issue of compensation by jury or commission or both, **that provision shall be followed.** (57 words)
- New: **This rule** governs an action **involving eminent domain** under the State law. **But** if State law **provides for trying** an issue by jury, or for trying the issue of compensation by jury (or both), **that law governs.** (37 words)

US Plain Writing Act of 2010

- President Obama signed the Plain Writing Act of 2010 on October 13, 2010. The law requires that federal agencies use "clear Government communication that the public can understand and use." On January 18, 2011, he issued a new Executive Order, "E.O. 13563 -Improving Regulation and Regulatory Review. It states that the US regulatory system "must ensure that regulations are accessible, consistent, written in plain language, and easy to understand."

Conclusion

- Plain Language drafting has been applied to legislative texts in Australia and New Zealand for over 20 years. Since 2010 this is also true for the UK.
- It is also prevalent in South Africa and Canada.
- Despite resistance, in the US changes are being introduced, e.g. the US Plain Writing Act of 2010 and the Plain Language Rewrite of the US Federal Civil Court Rules.
- In international bodies such as the EU or the UN there has been relatively little change in drafting style.