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Plain English Campaign

DRAFTING IN PLAIN ENGLISH

What is plain English?

Plain English is presenting information so that in a single reading, the intended audience can read, understand and act upon it. Plain English means writing with the audience in mind and presenting information clearly and accurately.

How do courts interpret laws?

Courts originally used a literal approach, meaning that the words in a law were interpreted exactly as they appeared, however ridiculous the effect. The legal system now more commonly uses a purposive approach, meaning the intended purpose of the law is taken into account. The legal rule 'noscitur a sociis' (literally, a thing is known by its associates) means that laws should be interpreted in their intended context.

What does this mean for drafting in plain English?

The experience of courts shows that attempts to make Acts of Parliament totally comprehensive with no room for different interpretations have failed. Trying to cover every eventuality does not work, and is not necessary when courts use their discretion. The argument that clarity should be sacrificed for a document to be comprehensive does not stand up.

Why are laws written in legalese?

- Laws were originally written in Latin or French, and many of the common terms are still being used.
- Drafters were once paid by the word, rather than by the job.

- Drafters prefer to use tried and tested clauses rather than risk using alternative language.
 - Many laws were originally written by humble court clerks rather than skilled lawyers.
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What are the main features of legalese and why do they cause problems?

- Long sentences, often trying to cover several points

This may be because of a tradition of making each part of a bill or legal document only one sentence long. Experience shows that shorter sentences, each dealing with only one main point, are more effective. This does not have to mean using an over-simplified writing style, rather making a conscious effort to make each sentence serve one precise purpose.

- Verbiage (using more words than are necessary)

As well as obscuring the message, this can be risky. Courts will usually assume that every word in an act is there for a reason, and unnecessary words may be interpreted in a way that the writer had not intended.

- Too many double negatives

If double negatives are used, the reader has to perform mental gymnastics to understand the meaning of a sentence.

- Being overly formal

This often includes using unfamiliar words where common ones would do just as well, although there is a minority of legal expressions, called 'terms of art', that have a precise meaning which cannot be achieved in plain English. A reader confronted with an overly formal, unfamiliar term will usually try to work out the difference between that term and the everyday alternative. When there is no difference, the reader will be on a fruitless task, which will harm their understanding of the text. If you have to use such expressions, it is best to provide the reader with a glossary explaining these terms at the beginning of the document.

What do other countries say?

- United States

The National Conference of Commissioners on Uniform State Laws says: 'The essentials of good bill drafting are accuracy, brevity, clarity and simplicity. Choose words that are plain and commonly

understood. Use language that conveys the intended meaning to every reader. Omit unnecessary words.'

- Canada

The Uniform Law Conference's drafting conventions say: 'An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language'.

- European Union

EU guidelines say that 'the wording of (an) Act should be clear, simple, concise and unambiguous; unnecessary abbreviations, "community jargon" and excessively long sentences should be avoided'.

What are the arguments against plain English drafting, and are they valid?

- **'Plain English is simple, restrictive language, and takes away the skills of the drafter.'**

Drafting a document in plain English takes a lot of skill. Communicating your points clearly so that the reader can accurately interpret your meaning is the most important task in writing. The draftsman's job is to communicate precise ideas, not produce a work of literature.

- **'There is no need to make legislation easy to read. It's not meant to be the same as a newspaper. People who want to read laws should educate themselves.'**

Using plain English does not mean writing everything in the style of a tabloid newspaper. It means writing documents in a way that is appropriate for the audience. If a law affects people (for example, an employment law affecting small business), those people should have a fighting chance of understanding it. The language used in a law should depend on who the law affects, taking account of how familiar they are with the subject. Saying it is impossible to produce laws that everybody understands is no reason not to make it understandable to as many people as possible. Plain English is not dumbing down.

- **'Plain English is not legally accurate or precise.'**

This myth has been steadily and repeatedly shattered. In the United States, 44 of the 50 states have some form of requirement for insurance contracts to be written in plain English. Contrary to lawyers' expectations, there has never been a case where a contract has been declared less legally valid though being written in plain English.

Attempts to make text legally accurate through excessive (and impenetrable) detail are often flawed. For example, trying to define an organisation's powers through a comprehensive list will

inevitably lead to problems. Eventually a situation that the drafter had not foreseen will arise. A perfect example is when new technology arises, such as when courts have to decide if a law applying to a posted letter also applies to an e-mail. Courts can use their discretion to settle such disputes, taking account of the law's intended purpose as well as its exact content.

In any case, this argument is based on the idea that existing legalese is perfectly accurate. If this were true, there would be far less need for lawyers to debate conflicting interpretations of a law or document. Drafters should aim for clarity and precision rather than choosing between the two.

- **'Plain-English drafting is too expensive and time-consuming.'**

Our experience shows that rewriting legalese into plain English can take time, but this can be avoided by using clearer drafting in the first place. Even if the drafting takes longer, the new law or document will take less time to understand, and there will be less need for its meaning to be debated and explained. Studies in the Australian state of Victoria, which uses plain-English drafting, show that lawyers can understand and use a plain-English version of an act in between a half and a third of the time it takes with the traditional version.

What use would a purpose clause serve?

Given that English courts take into account the intention behind an Act, the purpose clause would be an extremely useful way for the drafter to give guidance for future disputes. The purpose clause would give a clear explanation of what a law should achieve, overriding any interpretation of its contents that appeared to contradict this aim. The purpose clause would also help the drafter, as a writer who starts with a clear outline of his message is far more likely to write that message clearly.

Is plain English drafting really possible?

Realistically, the idea of producing legal documents that everyone can understand on a single reading is unlikely, but not impossible. The law is the most important example of how words affect people's lives. If we cannot understand our rights, we have no rights.

Government

As a campaign, one of our first targets was the British government. The proposals and decisions politicians make affect all of us, all the time. Yet many of us feel increasingly alienated from political matters. Like many industries, there is a huge amount of 'insider speak' and jargon. This is fine

between like-minded people, but many people do not understand these terms when used in information for the public.

We try to convince politicians that difficult matters can be explained clearly. The only way to get people interested in political matters is to make them easy to understand. With polling booths half-empty, it seems that politicians need to look at how they communicate.

Everybody has a right to understand the issues that concern them, however complicated they may be. Recently, a Parliamentary bill (the Coroner's Draft Reform Bill) was issued to the House of Commons. It was the first ever bill to contain a plain English translation alongside each clause in the bill. Although improvements could still be made to the translation, it was a mark of progress. We hope that in the future, all documents of its kind will be produced in this way.

Although great improvements have been made, there is still a long way to go. We will never take our eyes off the gobbledygook monster.

Unfair terms in consumer contracts

In Britain, the Unfair Terms in Consumer Contracts Regulations 1994 say that terms in consumer contracts must be in 'plain and intelligible language'. The regulations also say these terms must be accessible, which means they must use clear design and typography. Consumer contracts are those between a member of the public (a consumer) and a firm that is selling or supplying a product or service to them. If a consumer challenges a term, and it is found to be unclear or ambiguous, the court must interpret it in the way that best favours the consumer. The Office of Fair Trading regularly warns firms to change such terms before they are challenged in court.

Similar regulations apply to all countries in the European Union.

The Office of Fair Trading has very kindly allowed us to reprint some of the terms they have ordered firms to rewrite to meet the rules on clarity.

The firms concerned are now using revised terms. These changes help shatter the myth that replacing legal jargon with plain English sacrifices the legal meaning.

Here are some examples of 'before and after' clauses in consumer contracts.

Original term

'This Agreement and the benefits and advantages herein contained are personal to the Member and shall not be sold, assigned or transferred by the Member.'

New term

'Membership is not transferable.'

Original term

'Lessor shall not be liable for loss of or damage to any property left, stored or transported by Hirer or any other person in or upon Vehicle either before or after the return thereof to Lessor. Hirer hereby agrees to hold Lessor harmless from, and indemnify Lessor against all claims based on or arising out of such loss or damage unless caused by the negligence of Lessor.'

New term

'We are only responsible for loss or damage to property left in the vehicle if the loss or damage results from our negligence.'