PAPER

Plain Concord

Clarity's Ten Commandments

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PLAIN LANGUAGE CONFERENCE SYDNEY
17 October 2009

OPENING LAWYERS' MINDS TO PLAIN

It is not always easy for lawyers to write and speak plain language. For many of us, we need to be rescued from our "heretofores", "whereas" and "party of the first part". Desirably, the process has to start early in our lives. We have to learn in our childhood the beauty and elegance of simple expression. By the time we get to law school (and certainly when we ascend to a judicial bench or the professorial seat) it may be too late.

In my upbringing, I was fortunate in the choice of my parents. Both of them had great comprehension and verbal skills which they deployed and communicated to their children. My father was, and is, a fine storyteller. From him, I learned the importance of clear speaking. And from my mother, clear writing. And it was copperplate in those days.

Learning how to tell a story is quite important for communication in life. For a life in the law, it is essential. Every case that comes before a court is a story of sorts. Our bookshelves are full of the human tales of greed, lust, envy, cruelty and love. The greatest of judges have a gift in telling the law's stories in a brilliant way. Lord Denning was probably the greatest legal story teller in my lifetime. Who else would start a judicial opinion with the immortal words: "It was bluebell time in Kent"?

Learning the great classics of the English language is also important for plain expression. In my day, people like me learned from the *King James Bible* and *The Book of Common Prayer*. The beauty of Thomas Cranmer's language in the latter has always stayed with me. My partner tells me that he is fed up with hearing me declaim its words in the bathroom.

I grew up in Concord, then a western suburb of Sydney. Now, it is fashionably "inner west". As an infant, I attended St. Andrew's Anglican Church just across Parramatta Road in Strathfield. Actually, I would often pretend that I lived in 'Strathfield', because it was a far more fashionable suburb than Concord. However, every Sunday, I would learn from the second Collect, for Peace that Concord had a special place in God's love[1]:

"Oh God, who art the author of peace and lover of concord. Whose service is perfect freedom. Defend us … in the same through thy mighty power. That we, surely trusting in thy defence, may not fear the power of any adversary. Through the might of Jesus Christ Our Lord. Amen."

The beauty and simplicity of this language burst into my brain like rays of sunlight. It is still there. Sixty years later, I still search for this capacity of plain speaking. And it was always comforting to know that the Almighty is paying particular attention to us who came from Concord.

My training in the law was fairly orthodox, except for the instruction I received in jurisprudence and in international law from Professor Julius Stone. It was he who taught the law students at the University of Sydney Law School in the 1950s, about the judicial choices that exist; about the considerations of principle and policy that influence their outcomes; and about the duty of judges and other lawyers to be transparent about such considerations. And to explain them simply so that all citizens would understand[2].

My most specific instruction in plain language, however, came after university. It was as well that it did. For in those days, even more than today, there was little or no instruction at university in plain speaking, drafting and writing. Nevertheless, it was a fine university scholar, who gave me the instruction.

I refer to Professor David St. L. Kelly. He was the first full-time Commissioner of the Australian Law Reform Commission. In 1975 I had taken up appointment at the inaugural Chairman of that Commission (as the office was then called). David Kelly was the first full-time Commissioner, apart from myself. He came to us from Adelaide. Like an Old Testament prophet, he was constantly full of fire and brimstone.

David Kelly taught me two very important lessons that have stuck with me throughout my career as an appellate judge. The first was the importance of conceptual thinking. The defect of the common law is that it tends to stumble from case to case. It is a highly pragmatic system. But it often lacks concepts and readily discernible principles. David Kelly taught me, in law reform, to search for those principles. That search continued throughout my judicial life.

His second lesson was about the importance of plain language. I do not know whether he had a deep knowledge of that subject before he came to the Law Reform Commission. However, he was soon put in charge of two projects, each of which attracted his interest to plain language. The first was a project on debt recovery[3]. Because we were dealing with often disadvantaged people, complex forms and contracts were commonly a source of legal and other problems for

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[1] The Book of Common Prayer, Eyre and Spottiswoode, London, 1558, (1951), Service of Morning Prayer, 54.

[2] J. Stone, Social Dimensions of Law and Justice, Maitland, Sydney, 1966, 649.

them. The need for clear expression in legal documents was specially apparent.

It became more so in the project to reform the law of insurance contracts. The report on that subject analysed hundreds of such contracts. It concluded that there was a need for clearer expression, for standard plain language contracts, and for fairer principles of law[4].

In the course of undertaking these projects, David Kelly made contact with a legal scholar in the United States, Professor Vernon Countryman. He was an early expert in the "plain English" movement, as it was then described. I remember a lengthy telephone consultation with him, in the United States, when Professor Countryman elaborated the fairly simple rules that could be followed in expressing legal concepts and documents in clearer language. By the time my service in the Law Reform Commission concluded in 1984, I was a convert.

It was at about this time that two great Australian scholars entered the field of plain expression. I refer to Professor Robert Eagleson and Professor Peter Butt. The former was not a lawyer at all, being an expert in linguistics. The latter was one of the finest lawyers in the land. His chosen area of discipline has been land law. This is not a topic for the faint-hearted. He threw himself into dialogue with Robert Eagleson. Between them, they initiated the plain movement in Australia. They link us to the world Clarity movement. They are doyens of plain language in this country. Rightly, they are honoured for their outstanding contributions, devotion and persistence.

I am here to honour such brilliant Australian scholars. But also the scholars from other lands who are joined in this common enterprise.

There are, of course, limits on the extent to which we should change too quickly established ways of doing things, and saying things in the law. Some legal expressions in the Latin language, for example, are still commonly used. Yet, because very few students, and thus lawyers, now study Latin at school, a switch to English language equivalents is essential. My one-man campaign during my service on the High Court, to get my colleagues to drop "*lex loci delicti*" failed[5]. However, the time will come when even Australian judges will substitute the simple English words: "the law of the place of the wrong". What is so hard about that? Perhaps the answer is that those who conceive of themselves as members of an expert priestly caste, prefer a dead language because it conveys the mystery of technicality. English, after all, is a very mixed up tongue. And clients may be more willing to pay more for Latin.

Complex ideas are sometimes inescapable in law. Taxation legislation and statutes of limitations are prime examples of complexity. Yet simpler expressions can often be secured by analysing more closely the concepts that are at stake. It was not a coincidence that David Kelly's legal obsessions were conceptualisation and plain expression. The two are intimately connected.

PLAIN STORIES FROM MY PAST

The earliest contribution of mine to this subject dates from March 1982, when I was under the spell of David Kelly. In an address to a luncheon of the Constitutional Association of Australia, I described "the monumental task of simplifying the law"[6]. The reference was to the statutory obligation of the Australian Law Reform Commission to "reform, modernise and simplify" federal laws. Not long after, in another speech to the Australia Britain Society at the Plain English-speaking Awards at the Sydney Opera House in August 1993, I gave an aria on "Plain English and the Power of a Wink and a Sniff"[7] . The reference in the title was to the capacity to communicate in many ways, including by body movements and facial expressions[8]. Yet most legal communication is made in words and hence the attention paid to them.

Rummaging through speeches I have given over the past thirty years, I found a number on plain writing of the law. The earliest was on "Plain Legal Language", attributing wisdom to Professor John Lindsey, another American expert on the topic. This was given in 1990[9].

In July 1998, I gave a talk, later published, on "Speaking to the Modern Jury – New Challenges for Judges and Advocates"[10]. I explained that the jury of the 1990s was more than likely made up with a sprinkling of jurors from Generation X. Now, jurors from Generation Y and later generations have joined their ranks. The different capacities and inclinations of those raised on electronic communications, to listen to a talking head for hours, obviously affects the way in which judges and advocates must today speak to such a group of individuals.

In 2006, I undertook an interview by Kathryn O'Brien on judicial attitudes to plain language and the law[11]. I had to confess to her the element of resistance to plain language in judicial ranks. Not to put too fine a point on it, some judges are positively hostile to the endeavours of the plain language movement to support clearer statutory expression and simpler judicial communication. My interrogation followed the publication in 2006 of my very favourable review of the excellent book by Professor Joe Kimble, *Lifting the Fog of Legalese*[12].

These and other efforts on my part show, at the very least, a longstanding commitment to the plain movement. For this, I have been rewarded with

[3] Australian Law Reform Commission, *Insolvency: The Regular Payment of Debts*, AGPS, Canberra, ALRC 6, 1977, 52-3 [118].

[4] Australian Law Reform Commission, *Insurance Contracts*, AGPS, Canberra, ALRC 20, 36 [58].

[5] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 563 [157]; cf at 539 [84]; 544 [103].

[6] M.D. Kirby, "The Monumental Task of Simplifying the Law", unpublished, Constitutional Association of Australia, 15 March 1982 (Kirby Speeches 314).

[7] M.D. Kirby, "Plain English and the Power of a Wink and a Sniff", unpublished, Australia-Britain Society, 19 August 1983 (Kirby Speeches 450).

[8] Cf. Levy v. Victoria (1997) 189 CLR 579 at 637-638.

[9] M.D. Kirby, "Is Law Properly Written? Plain Legal Language", ALJ 1990 (Kirby Speeches 1091)

[10] M.D. Kirby, "Delivering Justice in a Democracy. The Jury of the Future", (1998) 17 Australian Bar Review 113.

[11] M.D. Kirby, "Judicial Attitudes to Plain Language and the Law" – Interview 1 November 2006 (Kirby Speeches 2143).

[12] M.D. Kirby, Review of J. Kimble *Lifting the Fog on Legalese: Essays on Plain Language*, Carolina Ac. Press, NC, 2006 published in (2006) 80 *Australian Law Journal* 623.

appointment as a patron of Clarity, the global body committed to simpler and clearer expression in legal language.

It is not all that difficult to improve the simplicity of legal expression. Long ago, Professor Kimble gave a number of very simple rules that all of us can follow. During my judicial years, I certainly tried:

- Complex statements of facts and law should begin with a summary to let the reader know where he or she will be travelling;
- Short sentences and shorter words should replace long;
- The passive voice should generally be banished and replaced with active voice. This assumes that lawyers of today have learned what „active" and „passive" voice means. But it can be explained.
- Words of connection should be at the beginning of sentences. Words of emphasis should generally be at the end.
- Where there is a choice, the shorter word (ordinarily from a Germanic root) should be preferred to the longer word (ordinarily from the French language of the Norman Conqueror);
- Sexist and obviously ambiguous language should be removed;
- Vagueness is sometimes necessary in legal drafting. However, ambiguity should generally be tackled head on;
- Those old potboilers "whereas", "hereinunder", "cognisant", "requisite" should be deleted;
- Lay out is a technique of communication that matters. It can assist human understanding. As can headings and sub-headings; and
- In legal texts that will cross borders, it will generally be necessary to be especially careful in the use of words. Mr. Keating found this when he used the word "recalcitrant" in describing the attitudes of the then Prime Minister of Malaysia. Seemingly, the word had a more pejorative meaning in Malay than in the English language.

If we all observed these simple rules in our legal communications, how much clearer would our voices be. One of the reasons why students feel attracted to my reasons in the High Court of Australia, they tell me, is that I followed the Kimble commandments. I also used layout and white space to take the eye through the reasons. Even so great a judge as Sir Owen Dixon sometimes wrote in uninterrupted prose. Just take a look at the reasons published in the *Communist Party case*[13]. Great prose. But frequently obscure and hard to keep in one's mind. Likewise, the use of graphs and tables and other means of communication, photographs, charts and maps can often improve the clarity of judicial, statutory and other expressions[14].

These are not hard rules to follow. They should be taught to every law student. But are they taught? The answer is a resounding no. Are they embraced by the judiciary of this country? The answer is, not wholly. I find it significant that no judge in the entire hierarchy of the judicature of Australia has attended this conference. But I am here. And will continue to support the endeavours of David Kelly, Robert Eagleson, Peter Butt, David Sless and all of you present. Clarity International could strike a blow for plain expression by propounding the foregoing Ten Clarity Commandments. If they alone were observed by increasing numbers of lawyers worldwide, the result would be a marked improvement in written and oral legal expression.

NEW CHALLENGES AND A NOBLE CAUSE

I conclude with words of thanks and praise for those who participate in the plain language movement. Do not be discouraged. The movement continues to gather force. We must press on with the effort to include in every law course and every legal practice course education in clear expression. It is not very hard; but it needs instruction. Above all, it needs examples and good illustrations. All of us must contribute to this endeavour.

With each new generation of lawyers, there are fresh challenges to plain language. Because the English language changes over time, according to usage (and no learned committee of experts dictates the permissible course that it will be allowed to take), a never-ending stream of new words and expressions enters the language. Some of these present new challenges to the aims of plain language, including in legal expressions. Take, for example, the rapid introduction of computer language with its words ("website", "webmaster", "download", "upload", "hard copy", "tweet" etc) adapted from earlier generic words. Take also the abbreviated spelling of words in new text, designed for use in "texting" as in the social networks such as *Twitter*). Examples include the use of "b4" for "before" and "cu" for "see you". Will these changes become standard and accepted in legal language? Stranger things have happened. Only time and the market place of mass practice will answer this question.

Some contemporary use of language agitates writers who pride themselves on clear and elegant prose. Books are now being written aimed at stopping this development in its tracks. Attempts to debase the English language with a new generation of clichés and politically correct expressions. Don Watson, at Australia master of clear and powerful political speech, has written a new text targeted at his special hates in this respect, (such as "homeland security", "mission statement", "factual matrix", "medical termination", "a range of foci")[15]. Just when the proponents of plain language thought they had the objects of their reforming zeal in sight, fresh challenges have presented for the attention of the next generation of disciples.

At stake in the plain movement is not just the theoretical objective of improving the understanding of the law by lawyers. It is the noble objective of making the law speak with a clearer voice to the people who are bound by the law. This is an idea central to the notion of democratic governance. It is a concept that gives a moral dimension to the plain language movement and to the worldwide mission of Clarity International.

Acknowledgement

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This paper was first presented at the Plain Language conference Sydney 17 October 2009.

[13] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

[14] See e.g. the use of tables and graphs in Forge v Australian Securities and Investment Commission (2006) 228 CLR 45 at 97-109 [135]-[154].

[15] Don Watson, *Bendable Learnings. The Wisdom of Modern Management*, Knopf, Sydney, 2009.