

## Trends and innovations in the market for legal services

# ‘Harry Potter language?’ The Plain Language Movement and the case against abandoning ‘legalese’

MICHAEL STEPHENSON

*Barrister at Law*

There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.<sup>1</sup>

The recently published report by the Law Commission<sup>2</sup> recommending the replacement of the Offences Against the Person Act 1861 (OAPA) with modern legislation (a modified version of the Home Office’s 1998 Draft Bill), which would involve abolishing the offences of ‘grievous’ and ‘actual bodily harm’ and replacing them with supposedly simpler language, raises again the age-old issue of the perceived complexity of traditional legal language and its place in the modern world. While the reforms instigated by Lord Woolf in the 1990s led the way towards a more streamlined legal process in general, it is still normal practice among many lawyers and drafters of legislation to employ the norms of earlier centuries when writing. The Plain Language Movement nevertheless continues to attract supporters, led by groups such as Clarity (which has members in more than 30 countries),<sup>3</sup> and on the surface the benefits of its mission appear undeniable – the elucidation of convoluted ‘legalese’ and the increased accessibility this would bring about. This paper will argue that the issue is not so clear-cut and that legal language is complex for historical but still very valid reasons and should not be tampered with lightly.

Many of the criticisms of the OAPA highlighted by the Law Commission are the same as those levelled at legal language in general by those who wish to see it reduced to its simplest form; that it is outdated, obscure, archaic in both style and vocabulary, and is ultimately confusing and illogical. It is conceded that there is surely no reasonable objection to tidying up the statute by removing offences which are essentially meaningless in the twenty-first century (the Act is 156 years old after all), such as assaulting a magistrate in the exercise of their duty preserving a wreck, or not providing servants or apprentices with food. Similarly, it is desirable that amendments be made in order to capture offences which were not legislated for under the original Act. This is clearly important since as Scully notes, ‘at present, there is a very large gap between the least serious offence against the person, common assault, and the next most serious, assault occasioning actual bodily harm’,<sup>4</sup> thus necessitating, perhaps, a new summary offence of

---

1 Fred Rodell, ‘Goodbye to Law Reviews’ (1936) 23 Virginia Law Review 38.

2 Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015).

3 Daphne Perry, ‘Comment: Talking our Language’ (2014) 111(7) Law Society Gazette 10, 10.

4 Vincent Scully, ‘Reforming Offences Against the Person – Seventh Time Lucky?’ (2015) 10 Archbold Review 4, 5.

'aggravated assault'. But while the virtues of streamlining the law and making it more fit for purpose are obvious, the author would argue that the same cannot be said of what would essentially amount to translating the OAPA into modern language and relegating more of our mother tongue's more evocative words to a footnote in history.

For example, the recommended replacement for 'grievous bodily harm' is 'intentionally causing severe injury', while 'assault occasioning actual bodily harm' would become 'intentionally or recklessly causing injury (whether or not by assault)',<sup>5</sup> which already sounds more inelegant and unwieldy than the original! The reason given by the Law Commission in its Consultation Paper is that 'grievous' is 'not a word in frequent use in modern English, except in deliberately high-flown and rhetorical contexts'.<sup>6</sup> This may be so, but it is difficult to believe that anyone who has ever watched a crime drama does not have a good idea of what the phrase refers to. The term has been defined by the courts over the years to mean 'really serious bodily or psychiatric harm'<sup>7</sup> and, as the Consultation Paper itself acknowledges, 'it could be argued that the word "grievous" is more precise than "serious", which is capable of a wide range of meanings [such as] "substantial"'.<sup>8</sup> Other words the Law Commission takes issue with include 'bodily'<sup>9</sup> and 'maliciously'.<sup>10</sup>

Of course, old-fashioned words represent just the tip of the legalese iceberg which plain language proponents wish to thaw. As O'Brian defines it, legalese is:

. . . the collective creation of centuries of legal speech, embodying evolving practices, traditions and precedents. Some of the key characteristics of legalese include the use of arcane Old and Middle English words, Law French and Latin phrases, 'terms of art' encapsulating legal concepts, formulaic phrases, word doublets and triplets . . . long and complex sentences with multiple clauses, word strings or lists, excessive use of the passive voice and double negatives.<sup>11</sup>

Some or all of these characteristics (a 'verbal blitzkrieg')<sup>12</sup> are still found in most areas of legal writing, and in the legal systems of nearly all Commonwealth countries and other heirs to the common law tradition of English law, be it pleadings, contracts, deeds or legislation, and there are many among the legal profession itself and the judiciary who increasingly condemn them. Harman LJ, in delivering judgment, famously voiced his exasperation with interpreting particularly impenetrable legislation thus:

. . . to reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhalant from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side.<sup>13</sup>

5 Law Commission (n 2) 'Table of Existing and New Offences'.

6 Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Law Com No 217, 2014), para 3.72.

7 *DPP v Smith* [1961] AC 290, HL; *R v Cunningham* [1982] AC 566, HL.

8 Law Commission (n 6) para 3.73.

9 *Ibid* para 3.70.

10 *Ibid* para 3.81.

11 Fern O'Brian, 'The Common Bond of the Anglo-American Legal Tradition' (2001/02) 14 *European Lawyer* 63.

12 Peter Butt, 'Plain Language and Conveyancing' (1993) (Jul/Aug) *Conveyancer and Property Lawyer* 256.

13 *Dary v Leeds Corporation* [1964] 3 All ER 390, 394.

Legal writing is seen as verbose, abstruse, self-important and tedious, ‘one of those rare creatures, like the rat and the cockroach, that would attract little sympathy even as an endangered species’.<sup>14</sup>

The movement for simpler legal writing is far from a modern crusade, however. Bentham regularly railed against the legal profession, declaring legal writing to be ‘wrought up to the highest possible pitch of voluminousness, indistinctness, and unintelligibility’.<sup>15</sup> Even earlier, in the sixteenth century case of *Mylward v Weldon*,<sup>16</sup> the son of a litigant (possibly a barrister) submitted pleadings running to 120 sheets. The judge believed that 16 would have been sufficient and so sent the pleader to prison, fined him £10, ordered that a hole be cut in the voluminous papers, the pleader’s head be put through it and had him marched through the Westminster courts.

Plain English campaigners argue that their purpose is to make legal documents and statutes easily understandable by non-lawyers, and without risk of ambiguity. This would be achieved by using:

... simple language, shorter sentences, shorter words, the avoidance of double negatives, the avoidance of words with similar meanings such as ‘give, and bequeath’ and ‘null and void’, the use of the positive rather than the negative, the use of the active rather than the passive voice, the non-use of provisos, the non-use of words like ‘shall’, ‘notwithstanding’, ‘heretofore’ and the avoidance of Latin terminology.<sup>17</sup>

The most commonly espoused rationale for this departure is that laws ‘affect the rights of citizens and ultimately justice reinforces the need for a drafter to try as much as possible to produce legislative proposals that are clear, simple and precise for the reader and those who are expected to abide by the law’.<sup>18</sup> Thus plain language is *necessary* in order to make the law more accessible to the public and to uphold the rule of law. In order to live under and follow the law, citizens must be able to understand it. After all, *ignorantia juris non excusat*.<sup>19</sup> Laws are, at the most basic level, a means of communicating, and to be effective they must be easily understood by everyone. As stated by Hashim, ‘legislative drafting is not a work of literature. Legislation is drafted to achieve a specific goal.’<sup>20</sup> Similarly, the drafting by lawyers of legal documents has the specific goal of conveying a client’s instructions and meaning.

Critics and cynics contend that the function of ‘legalese’ is not to communicate, but instead acts as a smokescreen; a way of preserving the mystery of the profession in order to justify high fees – ‘that through obfuscation and jargon lawyers delude the public into believing that lawyers are wise, and therefore valuable economically’.<sup>21</sup> Again, this unflattering perception of the profession is far from new. In the sixteenth century, the population of Thomas More’s *Utopia* had ‘no lawyers among them, for they consider

14 Richard Hyland, ‘A Defence of Legal Writing’ (1986) 134 *University of Pennsylvania Law Review* 599, 600.

15 Jeremy Bentham, *The Works of Jeremy Bentham, Now First Collected: Under the Superintendence of his Executor, John Bowring* (W Tait 1839) 332.

16 (1596) Tothill 102, 21 ER 136; [1595] EWHC Ch 1.

17 Brian Hunt, ‘Plain Language in Legislative Drafting: Is It Really the Answer?’ (2002) 23(1) *Statute Law Review* 24, 24–5.

18 Alain Songa Gashabizi, ‘In Pursuit of Clarity: How Far Should the Drafter Go?’ (2013) 39(3) *Commonwealth Law Bulletin* 415, 415.

19 Ignorance of the law excuses not.

20 Noor Azlina Hashim, ‘Plain Language: Give It a Try!’ (2013) 39(3) *Commonwealth Law Bulletin* 423, 430.

21 Butt (n 12) 258.

them a sort of people whose profession it is to disguise matters',<sup>22</sup> while 200 years later saw Jonathan Swift describe lawyers in *Gulliver's Travels* as 'a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and that black is white, according as they are paid'.<sup>23</sup> The language of the law was thus designed to set lawyers apart from society, manufacturing an atmosphere of reverence around them and creating the idea that the law was not for mere mortals to comprehend. On this reading, the Plain Language Movement is evidence, perhaps, of a lingering suspicion that obfuscation is still the lawyerly *modus operandi*, with Phelps suggesting that lawyers 'write, too often, as if they existed alone in the world and ignore those with whom they converse'.<sup>24</sup>

In this view, the legal profession seems to take on the role of a clandestine mystical society, with legalese as the arcane method of communication amongst its privileged members, and this image is only heightened by the use of black robes and wigs. Ching reinforces this elevated, rather sinister impression of lawyers, claiming that, 'the general public thinks lawyers have an occult power over language',<sup>25</sup> while in 2014, Moray Council in Scotland asked its inhouse lawyers to stop using 'Harry Potter language' after the Latin Scots law term '*avizandum*' was used in a questionnaire distributed to residents.<sup>26</sup> Plain language is consequently regarded as a means of bringing the legal profession down to earth and of making the law more transparent for ordinary citizens.

However, before 'legalese' is hastily brushed aside in favour of a new paradigm of legal writing, we must first understand the evolution of legal language; how and why it came to be. The development of legal language reflects the history of England – of successive invasions and of assimilation. As Danet notes, '[e]ven before the birth of Christ, the Celts already had a group of identifiable lawyers who perpetuated customary law in a "learnedly archaic language", departures from whose formulas were considered a violation of tribal taboo'.<sup>27</sup> The subsequent conquests by the Romans, Angles and Saxons and, finally, the Normans in 1066 led to the legal language of today which, despite evolving over the centuries, remains a blend of Latin, Old English and Norman French.

This is the reason, for example, for the frequent use of doublets and triplets in legal writing. These offered alternative languages so as to avoid any ambiguity in legal documents, in the hope that everyone could understand it regardless of which language they spoke. Thus we have phrases such as 'breaking and entering' (English/French), 'will and testament' (English/Latin) and 'give, devise, bequeath' (English/French/Latin).

Accordingly, legal language can appear ornate because much of its original meaning has been lost to us. However, it has persisted because long after England ceased to be a multilingual society, these peculiarities of legal writing were recognised as providing greater emphasis and meaning and so were retained and perpetuated as a stylistic convention. It is easy therefore to see why lawyers and drafters write in the way that they do – because this is the way that lawyers and drafters have always written. As Macleod puts it, legal language is affected by history in two ways. First, since the common law legal system is based on precedent, 'a discussion of past events or concepts is central' and, second, the language is affected by 'how members of the profession see themselves as

22 Thomas More, *Utopia* (Bibiolis 2010) 97.

23 Jonathan Swift, *Gulliver's Travels* (Simon & Schuster 2005) 283.

24 Teresa Godwin Phelps, 'The New Legal Rhetoric' (1986) 40 Southwestern Law Journal 1089, 1090.

25 Jane Ching, 'Speak up: Profession Education and Training' (2013) 163(7582) New Law Journal 19, 19.

26 <[www.scotsman.com/news/odd/moray-council-told-to-ditch-harry-potter-language-1-3536935](http://www.scotsman.com/news/odd/moray-council-told-to-ditch-harry-potter-language-1-3536935)>

27 Brenda Danet, 'Language and the Legal Process' (1980) 14(3) Law and Society Review 445, 464.

part of a tradition, as something that one generation hands down to the next'.<sup>28</sup> In echoes of the Celtic legal tradition mentioned above, Phelps suggests we have come full circle, with law students acquiring 'their new "tribal speech" by imitating the style of the appellate opinions they read, by quoting judges' words at length . . .'.<sup>29</sup>

Of course, if the only argument for retaining long-established legal language was out of maintaining tradition, it wouldn't resist modernisation very long. The fact remains that, despite the desire to open it up to the general public, the law is a complicated entity which cannot be reduced to a more basic form without repercussions. Detail and complexity are required in order to give the law precision and avoid unpredictability. Law is an expertise, which, as Bennion (a draftsman of state constitutions) writes, 'is why we have a legal profession . . . Most law texts are designed to be read exclusively by legal experts'.<sup>30</sup> Lawyers are there to interpret the law for their clients, and so 'legalese' works as a shorthand and common language between members of the profession to allow them to communicate legal arguments effectively with a minimum of explanation which, in the modern era of global business, is a huge asset.

As O'Brian states, traditional legal language, however flawed, has played an important role in 'binding lawyers from disparate cultures together, as it clearly has done with British and American lawyers . . . it provides a common ground on which we can stand as members of the worldwide legal profession'.<sup>31</sup> The profession is far from alone in having its own shorthand terminology, with scientists, doctors, accountants, stockbrokers and many other occupational groups possessing their own vernacular. This is, as Danet notes, a consequence of 'the complex division of labour in modern societies' with 'the tendency for occupational specialties to develop their own communicative codes . . . Occupational jargons are functional insofar as they facilitate communication about difficult technical barriers between members of the group and outsiders'.<sup>32</sup>

Since legal texts have expanded to their current labyrinthine form in order to reflect the inherent and ever-increasing complexity of our society – and the law which governs it – without risk of ambiguity, any attempts to simplify matters must be taken with extreme caution. Legal documents, because of the important requirements placed upon them, do not easily lend themselves to straightforwardness. Many time-honoured, if archaic, words and phrases have legally nuanced and settled meanings which have been defined and refined by the courts over many years and so cannot simply be substituted for more up-to-date versions. Ironically, abandoning 'legalese' in favour of modern parlance may result in more legal wrangling, as we attempt to settle on new definitions and nuances, not less.

Legal language has developed as an attempt to cover all possible contingencies and try as far as possible to be watertight; to eliminate imprecision, loopholes or misinterpretation. Sometimes vague words (such as 'maliciously' which has so irked the Law Commission in its OAPA report) are required in order to allow space for the lawyers and judiciary to fill in the gaps and define the specifics. As Ching asserts, 'there is a need to be precise in a very particular way, which is sometimes, in fact, being vague in a very

---

28 Peter R Macleod, 'Latin in Legal Writing: An Inquiry into the Use of Latin in the Modern Legal World' (1998) 39 Boston College Law Review 235, 241.

29 Phelps (n 24) 1102.

30 Francis Bennion, 'Confusion over Plain Language Law' (2007) Commonwealth Lawyer's Association 63, 64.

31 O'Brian (n 11).

32 Danet (n 27).

particular way'.<sup>33</sup> Introducing variations of well-established words in legal documents and statutes (unless the intention is to specifically change the meaning) is, as Bennion argues, dangerous and inevitably leads to ambiguity or uncertainty.<sup>34</sup> These words and phrases serve an important legal function and cannot be swapped easily, since, as Hunt expresses it, 'the English in general usage today does not lend itself to the high level of accuracy and precision which legislative drafting demands'.<sup>35</sup> Thus the main aim of the Plain Language Movement is frankly not always achievable. As Hyland affirms, 'despite the critics' fervent wish and the idea's utopian appeal, legal concepts cannot be translated into Plain English by looking in a thesaurus'.<sup>36</sup>

Besides the content and technicalities of legal writing, the style also has an important part to play, even if only for symbolic purposes. While arguments that the move towards plain language is just 'dumbing down' do not necessarily hold water, it is hard to deny the innate power of many of the stylistic traits of traditional legal language and the way in which the archaic words (such as 'grievous') and Latin phrases evoke the dignity and gravity of the law in a deeper fashion than any modern equivalents could. Words are the tools of our lawyerly trade and rooting them out of our statutes and documents undoubtedly removes some of the poetry, drama and magic from the profession.

Law is a solemn and complex business and needs to be so. Legal language helps convey this and ensures that it is taken seriously, in the same way that court procedure and dress do. Latin maxims, for example, have perceived ancient and therefore enduring characteristics, expressing wisdom across the centuries. As Macleod states: 'Latin is a symbol of the age of legal structure, a reminder that what we do now is essentially what people did for many years before us . . . it makes the language of the law richer, more flexible.'<sup>37</sup>

## Conclusion

Space precludes a thorough examination of the role traditional legal language has to play in our society. Instead, this introductory paper argues that the retention or eradication of 'legalese' is not an open-and-shut case; that replacing our legislation and drafting styles with up-to-date versions poses many potential dangers and could cause more problems than it solves. Plain language is not the panacea for every perceived ill of legal language. Established legal terms, though antiquated, have a precise meaning defined through years of judicial interpretation, whereas plain language, the great unknown, leaves the law open to uncertainty, with Hunt opining that the 'language of our legislation cannot be reduced to baby talk for consumption by the masses'.<sup>38</sup> *Res ipsa loquitur*.

---

<sup>33</sup> Ching (n 25) 20.

<sup>34</sup> Bennion (n 30) 66.

<sup>35</sup> Hunt (n 17) 26.

<sup>36</sup> Hyland (n 14) 618.

<sup>37</sup> Macleod (n 28) 250–1.

<sup>38</sup> Hunt (n 17) 44.