

AUSTRALIAN LAW JOURNAL
BOOK REVIEWS

LIFTING THE FOG OF LEGALESE

Essays on Plain Language

AUTHOR: Joseph Kimble
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This is a book review in "plain language" about a new text addressed to simplifying legal writing. The review will tell you something about the author; the contents of his book; and its main suggestions. It will finish with an evaluation of the book's utility for Australian lawyers and offer a few words of criticism: applying the author's high standards to himself.

In that introduction you have "plain language", as Professor Kimble would have us write it. There is an opening summary to identify the subjects that follow. This contains a brief indication of the ensuing structure. The use of more informal language (including, in some circumstances, the pronoun "you") aims to make the writing approachable to the ordinary reader. Short sentences. The avoidance of jargon.

Professor Kimble teaches law in the United States. He is a leading proponent of "plain language". In fact he is the current President of Clarity, an international organisation devoted to improving legal writing. A past-president is Professor Peter Butt who regularly contributes the "Conveyancing and Property" section to this Journal. This reviewer is a patron of that organisation. So he approaches Kimble's themes with sympathy. In recent times, Professor Kimble has led the work of redrafting the *Federal Rules of Civil Procedure* in the United States. He tries to practise what he preaches. For more than fifteen years he has been castigating legalese. In this book, he draws together his main themes.

The central thesis of the book is that, by and large, lawyers write poorly but, with a little instruction and by observing a few simple rules, they could achieve great improvements. The first part of the book outlines the author's arguments for change and the evidence he assembles for the need to do so. It gives examples of howlers in statutory language, legal forms, judicial reasons and typical attorney correspondence. Professor Kimble laments the resistance to better writing, the persistence of verbose and overloaded language and the failure of the "plain language" movement to have much impact on legal writers. He puts the slow progress down to lack of training in clear expression at law schools, professional adherence to settled habits of speech and expression; and the persistence of antagonistic myths.

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Amongst the myths that Professor Kimble sets out to expose are the following:

- That plain language reduces legal writing to the lowest common denominator;
- That it deprives legal texts of the literary effects, elegance and symbolic values present in the law;
- That it overlooks many legal terms of art (such as "hearsay" and "res judicata") which exist with settled meanings, well known to lawyers and efficient to use in practice; and
- That it fails to appreciate that law is inescapably concerned with complex issues which do not always lend themselves to "baby talk".

To counter these "myths", Professor Kimble circulated to American lawyers and judges contrasting versions of legal forms, statutes and judicial reasons. Overwhelmingly, the recipients preferred the plain language revisions. So, he asks, how can we get lawyers to write in that way, naturally, without needing translators and constant redrafts?

According to Professor Kimble there are some simple rules we can follow. These include:

- Provisions of summaries at the beginning of documents;

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- Better layout and design of our writing, using headings, italics and bullet points;
- Improved organisation of the text, with shorter sentences and minimal repetitions and cross-references;
- Avoidance of the passive voice and use of active verbs;
- Abandonment of long-winded legalese. He singles out words like "cognizant", "requisite" and "utilise" as the type that lawyers, and just about no one else, use but could do without. He accepts the need to stick with some expressions that have a settled legal meaning ("beyond reasonable doubt"). But he shows, with telling examples, that restructuring and abbreviating legal writing can add greatly to its intelligibility.

Professor Kimble praises work done in Australia, mainly in the 1980s, to promote plain language. He mentions law schools and statutory drafting in this country. He gives special praise to the project of the Victorian Law Reform Commission on *Plain English and the Law*. He suggests that it has had an effect in Australia on the clearer statements of statutory purposes and on the layout of judicial reasons - especially the introduction of headings. However, his book is extremely critical of the enduring culture of resistance in the law and the failure of most law schools (despite demonstration of the need) to introduce courses on better legal writing.

This book is specially useful for the list of simple rules that can make a big difference to legal writing. In effect, Professor Kimble's rules

are (as he acknowledges) simply an elaboration of what H W Fowler wrote in *The King's English* a hundred years ago:

"Prefer the familiar word to the far-fetched.
Prefer the concrete word to the abstraction.
Prefer the single word to the circumlocution.
Prefer the short word to the long.
Prefer the Saxon word to the Romance".

I accept most of what Professor Kimble has written. Yet explaining judicial reasons sometimes needs to go into more detail than he likes, if only to respond to submissions and to deal with citations placed before the judge during argument. Moreover, reasoning to conclusions in finely balanced cases is a complex process in which the decision-maker's mind plays on the detail of the facts and the applicable rules of law. Sometimes there is something in the complex facts that tips the mind in favour of one side rather than the other. If this is so, a true statement of reasons may need more detail than Professor Kimble's blue pencil likes to acknowledge.

The book is the product of essays written over the past decade. The result is that there is some repetition, a tendency for which Professor Kimble rightly castigates his fellow lawyers. For example, there is repeated mention of the need for law school courses on legal writing. The main rules of clear writing pop up in several chapters. He deals with the differential use of words (such as "shall" and "must") in three places (pp 42, 72, 159-160). But for all this, the book is timely and important. It is written by a scholar and practitioner, angry at the

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"glacial" pace of progress, who sees the importance of clear and succinct writing in legal English yet the persistence of the opposite in much of what lawyers worldwide write.

Word processors now risk embalming current errors for regurgitation by future generations, even future centuries. Before it is too late, it would be good if Joe Kimble's text could land on the tables of Australia's law deans, court librarians and parliamentary counsel's chambers. Improving legal writing in Australia will take time and effort. Following Kimble's chief rules is not difficult. Doing so would make a noticeable difference. Lawyers are often quite good in oral communication. What we need is to get them to *write* in the simple way in which the best of them *speak*.

Michael Kirby

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