Living in the Past

The Critics of Plain Language*

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Abstract

This article addresses three core complaints that are frequently levelled by critics of plain legal language: (1) It will reduce reliance on lawyers; (2) It is uncertain and will lead to greater litigation; and (3) Legal writing is, and should only be, for a legally trained audience. The article develops a definition of plain language that reflects a more contemporary understanding. It demonstrates that the three core criticisms misrepresent this understanding and are unsustainable with regard to lawyers' duty to clients, the role of legislation as public documents, and modern commercial realities.

Keywords: plain language, legal drafting, legislation, professional responsibility, legalese.

A. Introduction

There is an open question about what lawyers do. It concerns their audience. Is it the client (or layperson), or is it other lawyers? Are lawyers mediators of the law, and if so, how should the mediation take place? After all, lawyers have a duty to communicate the law to their clients. Yet they also require a precision in language to protect their client's rights – a precision which is not present in ordinary discourse. These questions have caused a significant division within the legal profession, with a dividing line between plain language advocates and their critics. Some critics assert that lawyers are the gatekeepers to understanding the law; they claim that the law is too complex to be properly comprehensible by those without legal training. Other critics argue that plain language lacks judicial scrutiny – it is not safe – and opens the way to a flood of litigation to test meaning. Despite a growing body of evidence to the contrary, these criticisms continue to hold sway even today, when plain language finds increasing acceptance amongst law firms and the judiciary.

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This article will examine these criticisms. It will address the three complaints that form the core of warnings against plain language:

1 Plain language will reduce peoples' reliance on lawyers;
2 Plain language is not sufficiently certain and will lead to litigation; and
3 Legal documents (statutes and private documents) are not written to communicate with laypeople, but rather to other lawyers.

I will argue that understanding what is written is but a portion of the law that impacts on a document's interpretation. Whole areas of law are found in judgements and across legislation, and represent knowledge which is only collected in the lawyer's mind for ready access. I will also show that plain language can reduce the need for litigation. Its clarity makes documents easier to comprehend and apply to the facts. Finally, if legal documents can be made clear and certain, then there is every reason why they should communicate with laypersons. This is especially true for public documents, such as legislation. Clarity in writing is in keeping with lawyers' responsibilities to their clients. Quite contrary to diminishing the legal profession, plain language can only enhance its standing.

B. Housekeeping: The Meaning of 'Plain Language' and 'Legalese'

Before tackling the substance of this paper, it is important to establish the meaning of 'plain language' and 'legalese' so as to proceed from common ground. 'Legalese', or legal English, is the unnecessarily complex expression of ideas and the use of jargon. It uses Latin terms where English will do: *sub suo periculo* instead of 'at his own risk'.[1] It uses word-pairings of English, Latin, or French terms where one English word will do.[2] For example, 'use and enjoyment' where 'enjoyment' alone will suffice, because 'enjoyment', in the legal context, usually connotes the 'use' of something.[3] It also employs overly long sentences, with the most egregious examples running to hundreds of words. For example, the *Conveyancing Act* 1919 (NSW), Pt 4 Sch 4A has a form of 'Easement to Drain Sewage' which runs to 258 words. Related to this is the complex expression of ideas via embedded information. In very long sentences, key parts can be separated by long tracts of information unrelated to the main idea being expressed.[4] Embedded clauses can therefore force readers to retain multiple concepts in their mind while still processing others.

Writing in legalese is vastly different from writing in everyday language. Indeed, Kerridge, Lowe, and Stewart have the following advice for health professionals reading the law:

1 Centre for Plain Legal Language, 'Versus Latinum', *New South Wales Law Society Journal*, Vol. 32, April 1994, p. 22.
2 P. Butt, *Modern Legal Drafting: A Guide to Using Clearer Language*, 3rd edn., New York, Cambridge University Press 2013, pp. 26-31 [2.42]-[2.53].
3 *Ibid*., pp. 29-30 [2.48].
4 *Ibid*., pp. 185-187 [6.15]-[6.18]; Australian Government Office of Parliamentary Counsel, *Plain English Manual*, at [7], available at: <www.opc.gov.au/about/docs/pem.rtf>.

> A sometimes confusing feature of the law is that lawyers use language in different ways than common usage. … The best approach to studying law is to treat it like the study of a foreign language that is similar to, but not the same as, English.[5]

The inherent problem in this statement is that, since the mid 1300s in England, at least, it was decided the law should not be expressed in a foreign language.[6] For example, the *Pleading in English Act* 1362 (36 Ed III c 15) required that legal proceedings in England were no longer to be conducted in French, but English. The rationale underlying the statute was straightforward; most of the country's people did not speak French. The simple and still relevant idea was that a person should be able to understand what is being spoken of in their name, and against it.

Plain language is the opposite of legalese. It is communication in an idiomatic style – words and expressions that are natural to a native speaker. It avoids jargon and long sentences. It expresses ideas on its own; it does not embed one idea in another. I do not suggest that all legal documents, no matter how complex, can be perfectly certain and understandable by non-lawyers. This is the view of some authors who would critique the plain-language movement's goals.[7] Plain language will not remove all legal ambiguities. But it can avoid unnecessary ambiguity that leads even experienced judges and counsel to have no idea what they are reading. In other words, as much as possible, plain language restricts doubt to the state of the law itself, not to how it is expressed.

C. Plain Language Will Reduce Reliance on Lawyers

If the law is expressed clearly, it will be easy to understand; if it is easy to understand, lawyers will no longer be needed; therefore, to protect their profession, lawyers must make the law difficult to understand for laypersons. This is how the argument runs. Admittedly, it is an outmoded complaint and is rarely stated openly nowadays. It is more the product of various influences on legal drafters. One influence is client pressure to include particular clauses in a contract, even though legally speaking other clauses already do the job.[8] Another influence is the payment model still prevalent in the legal profession of billing by time. Unfortunately, lawyers (especially junior practitioners in large firms) are still rewarded on the basis of how long a task takes.[9] Both of these pressures (client-pressure and

5 I. Kerridge, M. Lowe & C. Stewart, *Ethics and Law for the Health Professions*, 4th edn., Leichhardt, The Federation Press 2013, p. 61.

6 Victorian Law Reform Commission, *Plain English and the Law*, Report No. 9, 1987, pp. 13-15; A.C. Baugh & T. Cable, *A History of the English Language*, 5th edn., London, Routledge 2002, p. 149; *Pleading in English Act* 1362 (36 Ed III c 15).

7 J. Barnes, 'When "Plain Language" Legislation Is Ambiguous – Sources of Doubt and Lessons for the Plain Language Movement', *Melbourne University Law Review*, Vol. 34, No. 1, 2010, p. 677.

8 N. Lear, *Law Society's Gazette*, No. 84, 1987, p. 1630, cited in Butt 2013, pp. 21-22 [2.32].

9 Butt 2013, pp. 38-39; L. Aitken, '"Another Matisse": Adam Smith, Lawyers' Remuneration and the "Billable Hour"', *Australian Bar Review*, Vol. 29, No. 2, 2007, p. 210.

time-billing) are related. As Peter Butt writes, 'To write succinctly takes time.'[10] Yet it is superficially easier to sell to clients a large billable block of time when it is accompanied by an equally long, complex document. This is ironic to say the least, and as shown below, is a practice steadily falling out of favour.

However, despite its decline, the core of the argument – it is merely legal language that makes the law difficult to understand – is often one attributed to plain language advocates by critics.[11] But it is a straw man, built on tacit presumptions that do not stand up to scrutiny:

– The only thing making law difficult to understand is the way it is expressed; and
– The content of the law applying to a document can be expressed entirely within it.

Two important aspects of legal drafting illustrate why these presumptions are false. The first is the use of terms of art, and the second is the role of case law.

I. Terms of Art

A term of art is an expression that has a particular meaning, which is unaltered by its use in a particular context. These meanings have been settled by decades, if not centuries of judicial consideration. Terms of art have what a legal drafter may prize most: a degree of certainty. Terms of art also serve as a form of shorthand for those familiar with them. To explain their meaning could take many sentences, and even then without fully conveying an understanding of the term.[12] It is this facet (the volume of meaning contained in terms of art) that argues against the tacit presumptions. The correct use of terms of art represents a grasp of legal principles that a layperson does not have. Further, these principles can never be fully conveyed in the document itself.[13] Even a glossary or an explanation may only give a sense of them.[14] Lawyers have gone through years of education and experience to understand how and where terms of art should be used. A well-drafted plain language document, though, may reveal that there are in fact very few true terms of art.[15] For example, Barr and colleagues cite a research project by the Wayne State Law School.[16] In the project, a typical real estate document was searched for words and phrases that also occurred in case law.[17] Of 1,820 words contained in the agreement, only the meaning of 15 words could be regarded as

10 Butt 2013, p. 21.
11 Barnes 2010, p. 706.
12 Butt 2013, p. 257 [7.36].
13 I.M.L. Turnbull, 'Clear Legislative Drafting: New Approaches in Australia', *Statute Law Review*, Vol. 11, No. 3, 1990, p. 164, cited in Barnes 2010, p. 705.
14 Butt 2013, p. 259 [7.42].
15 *Ibid*., p. 257 [7.38]; B. Barr, G. Hathaway & N. Omichinski, 'Legalese and the Myth of Case Precedent', *Michigan Bar Journal*, Vol. 64, 1985, p. 1136; J. Kimble, 'Plain English: A Charter for Clear Writing', *Thomas M Cooley Law Review*, Vol. 9, No. 1, 1992, pp. 20-21, cited in J. Barnes, 'The Continuing Debate about "Plain Language" Legislation: A Law Reform Conundrum', *Statute Law Review*, Vol. 27, No. 2, 2006, p. 104.
16 Barr *et al*., 1985, p. 1136.
17 *Ibid*., 1985, pp. 1136-1137.

forming an important issue in the judgments.[18] A further 24 words could possibly have been precedential, but were doubtful.[19] The final result was that only about 3% of the words in the real estate document had a possibility of forming case precedent.[20] But those few can be vitally important for the parties to a transaction. Any misuse of these terms by a person unfamiliar with them, or who thinks a simpler word will always suffice, only illustrates why a lawyer's learning is still necessary.[21] A case in point is that of *City Inn (Jersey) Ltd v. Ten Trinity Square Ltd*[22] in which a covenant prohibited building on land without the consent of the 'transferor'. As Peter Butt notes, this was in distinction to the usual wording of "the transferor and successors in title".[23] The result was that the covenant was not binding once the transferor sold the benefited land. In other words, for legal effect to be given to a desired intention, a drafter must understand the law they are seeking to invoke. This leads to the next reason why plain language will not put lawyers out of business: where this learning comes from.

II. Case Law

The law is contained in cases. Judicial decisions going back hundreds of years are cited today as reasons why a court should follow a particular course. Even newly enacted legislation is subject to principles of statutory interpretation laid down in past case law.[24] But judicial decisions (judgments) are often heavy (and heady) pieces of text, not least because they frequently violate many of the guidelines of writing in plain language. Yet lawyers must wrestle with these beasts if they are to have any hope of understanding the law. Indeed, if one were to ask, 'What do you do at law school?' my answer would be, 'Read cases'. That answer would not be imprecise. When lawyers draft a contract, an advice, or even a statutory provision, they are informed by case law. Indeed, to draft in plain language itself requires a significant amount of knowledge of the law the drafter is seeking to invoke.[25] This important fact refutes the presumption that the complexity of the law is merely due to its expression. Drafting in plain language is a skill. It is a skill that goes hand-in-hand with legal knowledge and is an empty skill without it. How can someone draft a document setting out a person's legal rights and obligations, without knowing what those rights and duties can be?

18 *Ibid*., 1985, p. 1137.
19 *Ibid*., 1985, pp. 1137-1138.
20 *Ibid*., 1985, p. 1137.
21 Butt, 2013, pp. 260-262 [7.44]-[7.48]
22 [2008] EWCA Civ 156.
23 Butt 2013, p. 262 [7.48].
24 D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 7th edn., Chatswood, LexisNexis Butterworths, 2011, p. 4 [1.3]; J.J. Spigelman, 'The Principle of Legality and the Clear Statement Principle', *Australian Law Journal*, Vol. 79, 2005, p. 775.
25 Butt 2013, p. 7 [2.5].

To illustrate, consider the drafting of an express trust. Much of trust law is default law: law that exists unless excluded by the trust deed's terms.[26] But there is also mandatory law: law that cannot be excluded at all.[27] Trust law is contained in many different sources, including judgments (for an Australian lawyer, both Australian and English) and in various statutes.[28] This law may be unknown to laypersons, yet it governs the very nature of the legal entity they want to establish. It falls to the lawyer to collect this knowledge and explain it to their client. It is the lawyer's task to ascertain their client's wishes and give the wishes legal effect in a trust deed.[29] The only effect of plain language here may be that the client, and third parties, actually understand the trust deed. But does this mean they will understand all the law that governs the trust, including the trustee's rights and liabilities? Of course not.

In light of this, drafting in plain language may reduce peoples' reliance on lawyers. People may understand their rights more clearly than if the trust deed were drafted in legalese. But will it do lawyers out of a job? No, and in just the same way as no longer being paid by the length of documents did.[30] To use a metaphor, it is like arguing that if science were expressed as plainly as possible, we would no longer need scientists. Lawyers have technical skills and knowledge acquired over years of learning. The law is not easy to understand, no matter how clearly it is stated.[31] It often appears to be contradictory, and in many areas there is significant judicial and academic debate over it.[32] To express it plainly requires knowledge and understanding of the law. Drafting in plain language will not do lawyers out of a job. What it asks of them is that they know the law as well as they can, so as to communicate it as plainly as possible.

D. Plain Language Will Lead to Litigation

The second critique is that plain language is not safe – that it lacks the certainty of meaning settled by judicial scrutiny.[33] The evidence against this criticism is substantive, and it comes from the experiences of law firms and judges.

26 M. Scott McDonald, 'What Contribution Does Trust Law Make to the Regulatory Scheme Shaping Superannuation in Australia?', p. 9, available at: <www. apra. gov. au/ AboutAPRA/ WorkingAtAPRA/ Documents/ Scott -Donald_ What -contribution -does -trust -law -make -to -the -regulatory-scheme-shaping-superannuation-in-Australia.pdf>; J.H. Langbein, 'The Contractarian Basis of the Law of Trusts', *The Yale Law Journal*, Vol. 105, No. 3, 1995, pp. 650-651.

27 *Ibid*; J.H. Langbein, 'Mandatory Rules in the Law of Trusts', *Northwest University Law Review*, Vol. 98, No. 3, 2004, p. 1105.

28 *Trustee Act* 1925 (NSW); *Trustee Act* 1925 (ACT); *Trustee Act* 1958 (Vic); *Trustee Act* 1936 (SA); *Trustee Act* 1898 (Tas); *Trustee Act* 1962 (WA); *Trustee Act* 1980 (NT); *Trusts Act* 1973 (Qld).

29 G.E. Dal Pont, *Lawyers' Professional Responsibility*, 4th edn., Pyrmont, Thomson Reuters 2010, pp. 74-75 [4.20].

30 Butt 2013, pp. 32-33 [2.55].

31 K. Pistor & C. Xu, 'Incomplete of Law', *New York University Journal of International Law and Politics*, Vol. 35, No. 4, 2003, p. 933.

32 J. Glover, 'External Liabilities of Trustees', *in* H.A.J. Ford & W.A. Lee, *Principles of the Law of Trusts*, Update 82, 3rd edn., Pyrmont, Thomson Reuters 2010, at [14.3930].

33 Butt 2013, pp. 39-40 [2.65]-[2.66].

Over the past three decades, there has been a body of research conducted on the attitudes of practising lawyers and judges to plain language. The overwhelming response has been favourable.[34] The reasons why are twofold. One is that it is now 'commercially essential' for lawyers to communicate with their clients in understandable language.[35] John Mann, a partner at law firm Middletons, has said,

> Plain English has become an essential plank of legal practice and I think it comes down to the fact that clients, non lawyers – and possibly some lawyers – don't understand advice and documents that are full of legalese and legal terms. And, ultimately, if they don't understand it, they're not able to effectively use it – so it's a competitive advantage if you can give advice that your client easily and quickly understands.[36]

Tacit in Mann's statement is the view that legalese is not as legally effective as plain language. Particularly in transactional documents, a lawyer may be reluctant to sacrifice legal certainty for the sake of their client being better able to understand them. The key, though, is that by adopting plain-language techniques, law firms have endorsed the argument that plain language does equal certainty. This is the second reason why plain language has gained support: it is legally more effective than legalese drafting. Steve Palyga cites several English and Australian decisions supporting this view.[37] For example, in the case of *Goldbrough v. Ford Credit*[38] Young J considered a "lease transaction that was written in such legalese that not even the New South Wales office manager of the defendant knew what it meant". A similar view emerged from Higgins J in *Houlahan v. ANZ Banking*[39] in reference to a bank guarantee. There his Honour stated it was "impossible for counsel appearing in the case to construe even the first clause [of the guarantee] when asked". Such opinions are also held amongst other senior members of the Australian judiciary.[40] In their assessment, the top Australian barristers tend to put their submissions in a clear and economical style.[41] Lesser barristers, or bar-

34 S. Harrington & J. Kimble, 'Survey: Plain English Wins Every Which Way', *Michigan Bar Journal*, 1987, p. 1024; J. Kimble & J.A. Prokop, 'Strike Three for Legalese', *Michigan Bar Journal*, 1990, p. 418; M.M. Asprey, 'Lawyers Prefer Plain Language, Survey Finds', *Law Society Journal*, November 1994, p. 76; K. O'Brien, 'Judicial Attitudes to Plain Language and the Law', *Australian Bar Review*, Vol. 32, No. 2, 2009, p. 204.

35 L. Harris, 'What Does Plain English Have to Offer Lawyers?', *Write: Information with Clarity*, Vol. 8, November 2013, available at: <www.write.co.nz/Resources/Plain+English+articles/What+does+plain+English+have+to+offer+lawyers.html>; Z. Lyon, 'Plain Sailing: Lawyers Prefer Keeping It Simple over Legalese and Latin', *Lawyers Weekly*, 10 November 2009, available at: <www.lawyersweekly.com.au/news/plain-sailing-lawyers-favour-keeping-it-simple-ove>.

36 Lyon 2009.

37 S. Palyga, 'Is It Safer to Use Legalese or Plain English? What the Judges Say', *Clarity*, No. 43, May 1999, p. 46.

38 Unreported, NSW Supreme Court, 10 November 1989, cited in Palyga, 1999, p. 48.

39 Unreported, ACT Supreme Court, 16 October 1992, cited in Palyga, 1999, p. 48.

40 O'Brien 2009, p. 204.

41 *Ibid*., p. 214.

risters with a poor argument to make, tend to avoid clear language as a means of concealing a poor legal argument.[42]

Implicit in the views of the law firms and judges cited above is that plain language leads to less litigation. This is because litigation is usually borne out of uncertainty. There can be many different types of uncertainty. One was addressed earlier: uncertainty of the law. But when a document is drafted in legalese, its meaning can be uncertain because the parties, and possibly their lawyers, are not sure what its words mean. If people are not sure of the meaning of a clause in a contract, then they are more likely to see it as open to argument. As to the assertion that plain language lacks the certainty of case law, studies show very few legal phrases have received judicial consideration.[43] Indeed, apart from terms of art, those phrases that have been considered come out looking rather poorer for it. Peter Butt cites several examples, one of which is 'best endeavours'.[44] Goff J in *Bower v. Bantam Investments Ltd*[45] said that phrase was completely uncertain, as there was no yardstick against which to measure it. Mason J (as he then was) in *Transfield Pty Ltd v. Arlo International Ltd*[46] gave a working definition, but that was likewise qualified by:

- Reasonableness in the circumstances;
- The nature, capacity, qualifications, and responsibilities of a person; and
- How both are viewed in the context of the contract.

In light of this, it is difficult to argue that the term 'best endeavours' would be clearer than drafting the parties' actual obligations in plain language.

What we are left with is the assessment that legalese is used to obfuscate weak argument. Its use can leave lawyers and judges uncertain about what a document means. In reality, centuries of litigation have had little impact on certainty. Indeed, NRMA Insurance noted that after redrafting their policy in plain language, litigation was actually reduced.[47] Many legal practitioners have echoed this sentiment.[48] However, there is one final argument against plain language to be addressed: legal documents are written to communicate only with other lawyers. This argument is important, because it goes to the heart of to whom the law is addressed, and to whom lawyers owe their duties. It also matters because the counterargument expresses why communicating the law as clearly as possible should be the goal of any legal writer.

E. Legal Documents Are Written to Communicate Only with Other Lawyers

If the law can be expressed clearly, and still be sufficiently certain, there is no reason why it should not communicate with laypersons. Apart from this, though,

42 *Ibid*.
43 Barr *et al*., p. 1137.
44 Butt 2013, pp. 244-245 [7.11]-[7.13].
45 [1972] 3 All ER 349 p. 355.
46 (1980) 144 CLR 83 p. 101.
47 Butt 2013, p. 111 [4.22].
48 Harris 2013; Lyon 2009.

there are at least two reasons why the law should communicate with those outside the legal profession. The first concerns legislation and its role as a public legal document. The second regards lawyers' responsibilities in advising their clients.

I. Legislation

Suzanne Corcoran writes, "Statutes now dominate the practice of law. They touch the lives of all Australians."[49] This echoes the statement of the Law Reform Commission of Victoria which said, "Once a Bill has been passed, the primary audience is the group of people who are affected by it and the officials who must administer it."[50] However, not all agree that legislation should communicate to laypersons. These arguments stem from a view that posits plain language as seeking to remove all ambiguity from the law as written.[51] If knowledge and understanding of the law is required to completely understand a statute, then drafting in plain language is unnecessary.[52] The lay reader will never understand the law.[53] If this is the case, then legislation should only be drafted for a limited audience of trained lawyers. Therefore, the language employed should be such as to assist them to perform their task in advising clients.[54] If we accept this, the solution to the problem of understanding the law lies in explanatory materials.[55]

A further claim is that legalese is no longer prevalent in modern drafting practice. For example, the Western Australian Parliamentary Counsel's Office states that its style of drafting is not plain language, but rather 'straightforward – no frills'.[56] Indeed, an advocate of plain language drafting, Ian Turnbull, writes, "the legal effect of the traditional style, even its bad forms, is usually very precise", in that it "gives exact effect to the wishes of the policy makers".[57] Should this serve to dismiss plain language in legislation as a goal? Whether legislation should communicate directly with the public, or be mediated by lawyers, is ultimately a policy question, and in that case there is no objective yes or no answer. As noted above, though, the problem with legalese is that it, in extreme forms at least, confuses even the most learned judges. Furthermore, most of the judiciary

49 S. Corcoran, 'Introduction', *in* S. Corcoran & S. Bottomley (Eds.), *Interpreting Statutes*, Leichhardt, The Federation Press 2005, p. 1.

50 Law Reform Commission of Victoria, 1987, p. 44 [69].

51 Barnes 2006, p. 103.

52 Barnes 2010, p. 704.

53 F. Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford, Oxford University Press 2009, p. 9; F. Bennion, *Bennion on Statutory Interpretation: A Code*, 5th edn., London, LexisNexis UK 2008, p. 593, cited in Barnes 2010, p. 672.

54 F. Bennion, 'Don't Put the Law into Public Hands', *The Times*, 24 January 1995.

55 B. Hunt, 'Plain Language in Legislative Drafting: Is It Really the Answer?', *Statute Law Review*, Vol. 23, No. 1, 2002, p. 45; M. Kelly, 'The Drafter and the Critics', *Law Institute Journal*, Vol. 62, 1988, p. 964, cited in Barnes 2010, p. 706.

56 N. Horn, 'Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Informal Survey', *The Loophole*, No. 55, March 2005, p. 86.

57 I.M.L. Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle', *Statute Law Review*, Vol. 18, No. 1, 1997, p. 22.

support plain language in legislative drafting.[58] For example, former Chief Justice Gleeson of the Australian High Court said that while he could cite individual examples of "over-simplification, you could produce dozens of examples of over-complification".[59] Former Justice Austin of the NSW Supreme Court argued that a benefit of plain language was that it forced drafters "to rationally and logically order and present the concepts and precepts".[60] If legislation should be presented in plain language for the benefit of the legal profession, then this must also be of benefit to the general public. Will it make legislation instantly understandable to them? No. The text *Statutory Interpretation in Australia*[61] is 398 pages long. It does not take much to realise that a statute alone may never give the reader all they need to understand it.[62] Yet if it is drafted in a clear, idiomatic style, a lay reader may find a quick answer to a simple problem that clearly falls within a statutory provision.[63] This will not rid us of those cases at the margins of a statute's text that require judicial consideration.[64] However, regardless of whether legislation should be addressed only to the legal profession, plain language does make statutes more accessible to the public. To argue that statutes should not be accessible to the public is also to argue that they should be less accessible to the legal profession. This would be a patently ridiculous proposition.

II. Lawyer's Professional Responsibility – Private Documents

Issues surrounding legalese and private documents such as contracts were discussed above. This section concerns something far more personal to clients – their interaction with their lawyer.

Lawyers owe duties to their clients. Amongst these is the duty to promote quality and client care.[65] A central part of this duty is to communicate with the client. Yet Bruce MacDermott notes that for the 17 years leading up to 2004, 80% of LawCover claims arose from just two causes.[66] One was to avoid oversights, such as a limitation periods being missed. The other was "a lack of common understanding between solicitor and client (where, for example, the solicitor does not appreciate the expectations of the client, or the client does not listen to or comprehend the solicitor's advice)".[67] An example is the recent English case of

58 O'Brien 2009, p. 244.
59 *Ibid*.
60 *Ibid*.
61 Pearce and Geddes 2011.
62 F. Bennion, 'The Readership of Legal Texts', *Clarity*, No. 27, 1993, p. 18; J.M.H. McHugh, 'The Growth of Legislation and Litigation', *Australian Law Journal*, Vol. 69, 1995, p. 47; J. Burrows, 'Plain English and New Zealand Statutes', *Clarity*, No. 52, 2004, pp. 5-6; M.M. Asprey, *Plain Language for Lawyers*, 3rd edn., Leichhardt, The Federation Press 2003, p. 80.
63 Barnes 2006, p. 94; W. Twining & D. Miers, *How to Do Things with Rules*, 4th edn., Cambridge, Cambridge University Press 1999, p. 207, cited in Barnes 2006, p. 120.
64 Barnes 2010, p. 676.
65 Dal Pont 2009, p. 80 [4.80].
66 B. MacDermott, 'Law 9000 Provides Primary Risk Management Tools', *Law Society Journal*, Vol. 42, July 2004, p. 50.
67 *Ibid*.

Levicom International Holdings BV v. Linklaters (A Firm).[68] The case concerned a telecommunications company, Levicom, being advised by Linklaters, a law firm, on a contract dispute with two Swedish telecommunication companies. The issue was that Levicom had proceeded to an expensive arbitration proceeding against the Swedish companies on the advice of Linklaters and subsequently settled on unsatisfactory terms. Levicom then brought an action against Linklaters claiming the advice was negligent. Smith J held that the advice was negligent, but not because Linklaters "failed to exercise proper skill, care and competence" in reaching their opinions.[69] Rather, it was because they "did not properly convey their advice" to Levicom.[70] His Honour stated, "In order to discharge his duties, a solicitor ... must exercise proper skill and care to ensure that his advice is sufficiently clear".[71] A key distinction was drawn between the interpretation of a contract or statute (which has been discussed above) and a letter of advice. In communications between solicitor and client, the lawyer 'should have anticipated' whether the client would understand them.[72] The case was subject to an appeal, but Smith J's relevant findings for this discussion were not disturbed.[73]

At first blush, *Levicom v. Linklaters* may support the view that it is a lawyer's role to explain the law clearly to the client.[74] However, lawyers do not always treat advices as communications to clients. They treat them as legal documents subject to review by a court in case of a negligence claim. *Levicom v. Linklaters* reinforces this view. But as communications to a client, they must be put in a form the client understands – that is the lawyer's job. Indeed, while people can always go to their lawyer for a further explanation, these advices are subject to the court's review if the client alleges they were not properly advised by their lawyer. The inescapable conclusion is that advices must be drafted in plain language. And they must be understandable to a client, as the figures from LawCover demonstrate. Therefore the duty to communicate is just that, a duty. Lawyers who draft letters to clients that the clients cannot understand have breached their duty. In other words, plain, clear language is part of the lawyer's responsibility to the client. Legalese is not.

F. Conclusion

In this paper, I have addressed three concerns about plain language:

1 Plain language will reduce peoples' reliance on lawyers;
2 Plain language is not sufficiently certain and will lead to litigation; and

68 [2009] EWHC 812 at [279].
69 *Ibid*., at [299].
70 *Ibid*.
71 *Ibid*., at [279].
72 *Ibid*.
73 *Levicom International Holdings BV v. Linklaters (a firm)* [2010] EWCA Civ 494 at [253].
74 R. Sullivan, 'Some Implications of Plain Language Drafting', *Statute Law Review*, Vol. 22, No. 3, 2001, p. 157.

3 Legal documents (statutes and private documents) are not written to communicate with laypeople, but instead to other lawyers.

The arguments against these concerns have naturally overlapped. The law is complex and often contradictory. A lawyer's knowledge will always be necessary to successfully navigate the law in difficult cases. Convoluted language can only compound the complexity. Even judges, whose knowledge of the law is assumed to be secure, overwhelmingly prefer clear, plain language. Plain language is essential for legislation and will naturally make legislation easier for laypersons to consult. Yet it will not turn statutes into a one-stop-shop; the law is complex and requires legal knowledge and interpretation. Finally, lawyers have a responsibility to communicate the law to their clients in a clear and understandable way, else they may be liable for negligence. Surely though, the lawyer who communicates clearly to clients will get more business from them. They will hardly be done out of a job.

We see, then, that the benefits of plain language overwhelm the arguments against it. Indeed, the experience of the profession is that the tide is turning against legalese. Clients demand plain language of lawyers. So, lawyers begin to think and express themselves in plain English. These lawyers become the judges, academics, and drafters of the future, who will, in-turn, pass these norms on. In much the same way as legalese came to dominate through practice and habit, so (hopefully) will plain language. It will be driven by a recognition that language evolves and changes. There is no reason to think this is a risk to the legal profession. Indeed, believing otherwise seems to be a far greater gamble for those practitioners who cling to the legalese past, as they may be left within it.