

Book Review

Legal Usage: A Modern Style Guide

Emeritus Professor Peter Butt, published by Lexis Nexis Butterworths, Chatswood, New South Wales, Australia, 2018

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In the Preface to this book, Professor Butt states that the reason for writing it is that most lawyers lack formal training in legal usage. And this, he rightly states, is because legal educational institutions in Britain and most Commonwealth countries rarely teach legal usage in any structured way. He goes on to say that, as a result,

many law students emerge from their educational chrysalis with a style that mimics the usage of the only role models they have encountered – academics, text writers and judges – many of whom also never systematically studied the elements of good legal writing.

This, he further observes, leads many graduates with the assumption that ‘good’ legal usage is formal, academic, dense and sterile, packed with passives, word strings and redundancies.

Upon graduation, he further notes, those law graduates begin their working careers encountering new role models – peers, partners and managers. But many of these new role models went through the same educational and professional processes. In this way, he concludes, poor legal usage is perpetuated within the legal profession, despite recent efforts to improve the language and style of professional legal writing.

To address this issue, the author states that the book has two broad, linked aims. The first is to catalogue existing legal usage. It does so by topic, phrase and word. The second is to scrutinize each usage. While observing that the existence or otherwise of particular usage is a matter of fact, he also notes the obvious, that ‘good’ usage is a matter of opinion, which is partly objective. However, he posits that the opinion can be tested by two key objective criteria: (1) is the usage technically effective (does it achieve its legal purpose), and (2) is it understandable by what he calls ‘moderately motivated’ readers?

As to the approach to the entries in the guide, they are best described by a verbatim quote from the Preface. There, Professor Butt outlines them as follows:

1. *Legal concepts.* This includes aspects of usage as diverse as ambiguity, deeds, definitions, humour, metaphor, merger clauses, fuzzy law, plain language, recitals, terms of art, and key principles of interpretation.
2. *Practical usage.* Entries cover matters such as the use of abbreviations and acronyms, active and passive voice, brackets, bullet points, citation methods, cross-referencing, fonts and document design, footnotes, gender-neutral language,

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numbering systems, punctuation, the use of Latin, structures for legal advice and documents and techniques for editing and proof-reading.

3. *Words and phrases.* These entries discuss major legal terms in current use. The coverage does not purport to be exhaustive – that would take many volumes. But it is sufficiently complete to cover most words and phrases in current legal usage.

As the foundation director of the Centre for Plain Language at the University of Sydney and Past President of *Clarity*, among many accomplishments, Professor Butt is no stranger to plain language. He is also no stranger to writing legal dictionaries, having co-edited the first edition of *Butterworth's Australian Legal Dictionary*, and edited several editions of the *LexisNexis Concise Australian Dictionary*. What makes this work, in a sense, extra special is its foray into the Commonwealth field. In this regard, the entries include mostly examples of usage, drawn from judgments, text writers and legal documents in England, Scotland, Ireland, Australia, New Zealand, Singapore, Hong Kong and South Africa. Canada, a multi-jurisdictional Commonwealth country with easily accessible materials, goes conspicuously unmentioned. This omission is rendered even more noticeable considering that US legal usage is included, though this is said to be only for purposes of comparison. That caveat aside, the inclusion of examples from a wide range of jurisdictions that do not have a dictionary or legal usage work specific to that jurisdiction now have a work that, to a significant degree, fills that vacuum.

In assessing usage, Professor Butt states that where, upon applying the two objective criteria mentioned above, he considers that usage is deficient, he suggests alternatives that are aimed at capturing “legal nuance while communicating clearly”. The aim, he goes on to say, “is not to encourage uniformity of usage, devoid of individuality, but rather usage that communicates with power, precision and panache.” But in doing this he is not overly didactic. He explains that the book,

seeks to encourage legal writers to consider for themselves whether the structure, layout and language of their writing serves the interests of the readers – whether it invites readers into the text or tempts them to switch off and read no further.

The author also states that his recommendations on usage endorse ‘plain English’, which, as he says, requires, among other things, “eliminating archaisms, pruning circumlocution, and seeking to find alternatives for arcane terms of art.” He goes on to make what has become a fairly common prescription, and yet bears repeating, that Latin words or phrases must not be used unless they have become part of standard English. This, he states, is from, “a conviction that law can be written in a language that communicates to the average modern reader, while being concise, precise, and legally accurate.”

As to the entries themselves, they are contained in 700 pages. In dealing with them, he discusses many of the issues in the context of the substantive or procedural law in which they are used. As to my task in reviewing the book, in addition to what has already been said

from a general perspective, I will comment specifically on the perennial issues relating to Latin and gender-neutrality, as well as the recommendations relating to simpler words and phrases.

Regarding Latin, Professor Butt has dealt with not just the more well-known terms among lawyers such as *volenti non fit injuria*, *res ipsa loquitur* and *novus actus interveniens* but numerous others that are in far less common use. And in 2 crisp entries, he also reminds or acquaints us with the fact that LLB and LLM mean *Legum Baccalaureus* and *Legum Magister*, respectively. There are numerous little sometime-forgotten translations such as these in addition to entries which amount to small treatises on certain words and expressions used in law.

Specifically, the entry relating to Latin and its use in legal circles covers 3 pages. In those pages, Professor Butt manages to cover a nutshell history of the language, the need for the reader to understand, precision, continued use of Latin (and cites some extreme judicial instances), the need or otherwise to italicise, as well as plurals. But the most significant part of the entry has to be his 4 guiding principles, upon which there is already agreement among many forward-looking writers. They can be reproduced in part as follows:

1. When the Latin word or phrase has become accepted as English usage, then use it.
2. When the Latin word or phrase can be translated without loss of precision, then translate it.
3. When the Latin word or phrase describes a legal concept that is difficult to translate into English without loss of legal precision or conciseness, use it – but add an appropriate translation.
4. When the Latin word or phrase contains an inherent wooliness or ambiguity, avoid it – just as you would avoid a woolly or ambiguous English word or phrase – and find a more precise English expression.

Regarding gender neutrality, many jurisdictions, at least in the legislative drafting field, have long eschewed writing legal documents in the masculine, though there have been stragglers in the broader Commonwealth. Professor Butt conveniently summarizes the usual issues in this regard with some of his own examples. He notes the divergent views of writers regarding terms that have both a gender-neutral term as well as a gender-specific term. He notes that, in such circumstances, some prefer to use the former while others prefer to use the latter. Altogether, in about 2 pages, he summarises the main issues relating to gender-neutral writing, including literary techniques for achieving this, closing, as with many words and phrases in the book, with references for further reading.

No work on legal usage or legal drafting can be complete without the author's prescriptions on plain language substitutes for words once thought to have acquired respectable antiquity in legal writing. Numerous authors including Garth Thornton, Elmer Driedger, Robert Dick,

Michelle Asprey, as well as Americans Reed Dickerson and Richard Wydick, have had a go at prescribing substitutes, not to say anything about style manuals and handbooks issued by offices of legislative counsel. These prescriptions have done a lot to modernize legal writing. Professor Butt has his own list in an entry on simpler words and phrases from page 574 to 590. It is one of the longest I have seen.

There are other works or dictionaries on legal usage. Lawyers all over the Commonwealth use these in their practice. The writer is no exception. But this is the only work of this kind that I have had the pleasure of reviewing to test its utility to the legal and legislative fraternity. Having done that, I have no hesitation in arriving at two conclusions. First, the book is an exceptional empirical and prescriptive plain language guide. Second, I have no hesitation in recommending it to all law students in the Commonwealth for use both in substantive law and legal practice courses. It will also be a brief and convenient reference in the course of legal or legislative practice.

The book is also a treasure trove of references for the student or practitioner who wishes to pursue further any issues raised in the book, both those that extoll plain language writing and the few that do not. The references cover both legal and legislative drafting. And in making these references, the author sometimes indicates not just the title of the article of course but also parenthetically whether the publication is arguing for or against a particular view. It was also a surprise and certainly not lost on this reviewer that there is a recommendation for further reading on page 178 relating to one of his articles under the title, “The placing and other handling of definitions”.²

I cannot avoid ending this review by referring to Professor Butt’s entry relating to emoticons and emoji in electronic communications. He asks the question whether there is a role for them in legal writing to express an idea or emotion, and answers it by saying “Probably not”. Having said that, he goes on to state that, “if we can take seriously the importance of communication to intended readers, perhaps in some circumstances emoticons and emoji would be effective – but only if they are sufficiently certain.”

As an illustration, he refers to a case decided by Peter Jackson J, sitting – as I found out upon further research, at the Queen Elizabeth II Court at Liverpool – in the case of *Lancashire County Council v M*.³ There, a mother left a message in a caravan saying that the family would be back on 3 August. It had an emoji beside the date. The police found the message and said that the emoji was winking, meaning, according to them, that the mother knew that they would not be coming back. His Lordship did not agree that the emoji was winking and ruled accordingly in relation to the argument at issue.

² (2006), 27 *Statute Law Review* 73.

³ [2016] EWFC 9 [13].