THE UNIVERSITY OF WOLLONGONG

WOLLONGONG, NEW SOUTH WALES

GRADUATION CEREMONY, 7 MAY 1981

ENDING LEGAL GOBBLEDYGOOK?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

May 1981

THE UNIVERSITY OF WOLLONGONG

WOLLONGONG, NEW SOUTH WALES

GRADUATION CEREMONY, 7 MAY 1981

ENDING LEGAL GOBBLEDYGOOK?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

INTRODUCTION AND CONGRATULATIONS TO GRADUATES

On an occasion such as this, a speaker in my position is obliged by tradition and common courtesy to do certain things. You will understand that, as a judge, following tradition is doing what comes naturally!

The first thing I have to do is express a proper sense of the honour which it undoubtedly it is to be invited by this University to take part in such a happy occasion. I feel a special empathy with the University of Wollongong because of my close association with its sister institution, the University of Newcastle. Each of these Universities is small in the league of Australian tertiary institutions. Each began life as a child of the University of New South Wales. Each owes à great deal to the civic spirit of two leading cities of this State, which insisted upon the creation in their midst of a 'community of scholars'. As this University's prospectus points out, the campus is small enough to allow for considerable contact between staff and students but large enough to ensure continuity of the traditions of excellence and original research which are the hallmarks of University education. Finally, each University is going through a difficult period as funding and like problems proliferate. Community disillusionment with education generally and community lack of sympathy for research which does not have a clear and immediate practical use impose upon university men and women a special responsibility to explain the importance of higher education for the welfare and safety of the nation.

The second thing to be done is to remind ourselves of the significance of an occasion such as this. The ceremony itself is at least as old as the Christian era. Its purpose is to place before the international community of tested scholars, in a solemn way, new recruits who have earned their laurels by a period of dedicated application to study. Inescapably in that study the new graduates have acquired personal discipline and a measure of wisdom. They are sent forth by this University to the community with the commendation of their degrees. The precise form of this ceremony traces its origins to the Medieval Church and the laying on of hands: by which authority was transmitted from one generation of intellectual leaders to the next. On an occasion such as this, it is fitting that we pause for a minute to reflect upon the seemless continuity of education.

Thirdly, it falls to me to congratulate the new graduates. It does not seem so very long ago that I was sitting in a similar position to them, listening to an Occasional Address and wondering what the future held in store for me. There is no escaping it. This is a watershed in the life of those who ascend the stage today. It is a time when at least one period of concentrated study is over. It is therefore an occasion when the candidates are permitted a fleeting moment of self-congratulation. -

I am not so far removed from your position to have forgotten the rigours which are imposed upon those who pursue tertiary education today, in whatever form. When nostalgia sets in, it all seems an idyllic time. But in many ways life has become more difficult today. There are rules and restrictions to be complied with. There are special burdens on those who study part time. Always, there is competition to be faced. Nowadays, at the end of the road, there is sometimes uncertainty about securing an appropriate professional appointment. Considerations such as these have doubtless taken their toll in one way or another upon the young men and women who come forward today.

In most cases the burden has not been borne singly. The family, parents, friends, husbands and wives, children and colleagues, have all played their part. They have helped to share the burdens. The reward is here today. It is an occasion for proper shared pride. That is why we involved families and friends of the graduates in this ceremony with the community of scholars. It is a recognition of the contributions they have made to the achievement which is signalled by this occasion, here today.

On behalf of the community and on my own behalf, I extend congratulations to the graduates. I also express thanks to those who helped them on the path to this culmination of their study. The formal, structured education which began at the local kindergarten ends, for most of the graduates, here. The education in the school of hard knocks lies ahead. The community is proud of these young people. It anticipates their service. It is grateful to those who supported them on their way to this occasion.

Having discharged my primary task, it is now my function to say something of general significance. The only requirement is that I must be brief in the process. For five years I sat on the platform of the Great Hall of Sydney University as a Fellow of the Senate of that University. In that time, I attended at least 30 ceremonies such as this. Thirty times an Occasional Speaker rose in his place to address the assembled throng. It is a sobering thought as I stand here before you today that I cannot call to mind a single utterence: not one item of distilled wisdom, no aphorisms, not a single jest or pearl of any of the 30 Occasional Speakers. People in my position should do well to bear in mind the transiency of Occasional Addresses.

SIMPLIFICATION OF THE LAW

As you have heard, I am the Chairman of the Australian Law Reform Commission. The functions of that Commission are to help the Federal Parliament in the reform, modernisation and simplification of Federal laws in our country. We are living through a period of rapid change: changes in the role of government, in the operations of business and in moral and social attitudes. The greatest force for change in our time and one which will profoundly affect the disciplines that are gathered here today (as well as the law) is the dynamic of science and technology. The lives of everyone in this graduating class, and indeed of every citizen, will be profoundly affected by rapid scientific change. Engineers are generally comfortable with complex science. Accountants and others in the commercial disciplines learn rapidly to absorb its lessons for their daily lives. Lawyers tend to be uncomfortable with mathematics and science. Many of the tasks assigned to the Law Reform Commission have involved us in the study of the implications for the law of such fascinating scientific developments as the computerisation of society and the manipulation of biology. Computers and bio-ethics present acute moral dilemmas. We are only now beginning to addre many of them.

If one were to ask the average engineer or even, I venture to suggest, the average accountant or leader of commerce: 'what is it that most perplexes you about the law', the likely answer would be: 'its obscurity and the unintelligibility of many of the rules which all of us are deemed to know and which bind us in relation to our everyday activities'. The law is the one discipline that affects everyone in society. Yet until recently little has been done to communicate its basic rules, the rights and duties of ordinary citizens, to the populous as a whole.

When the attempt is made to explain the law to the layman, a frequent impediment is the difficulty lawyers have in expressing themselves in simple terms. It is about this difficulty that I wish to speak to you today. The duty of the Law Reform Commission is to try to simplify the laws. But it is a duty more easily stated than achieved. There are many institutional and attitudinal impediments in the path of a simpler legal system and the use of plain English and brief, direct expression.

A Professor of Law in the University of California put the problem bluntly. His condemnation was of lawyers as a class. This may be at once too broad (for there are some lawyers who can express themselves simply) and too narrow (for I am sure that some engineers and even an occasional accountant may be guilty of the same vices). This is what Professor Davis said:

> We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is: '(1) wordy, (2) unclear, (3) pompous and (4) dull'.[1]

This criticism of lawyerly prose is not new. In 1596 the Lord Chancellor of England decided that he had had enough. He determined to make an example of a particularly prolix document which had been filed in his court by a lawyer, doubtless quite proud of his handiwork. The Lord Chancellor of the time hit upon a novel punishment. First, he ordered a hole cut through the centre of the document and through all 120 pages of it. Then he ordered the unfortunate lawyer who wrote the turgid prose to have his head stuffed through the hole, to be led around and exhibited to his colleagues attending court in Westminster Hall in London.[2] I have to report that the endeavour of this Chancellor to promote brief and simple expression in such a radical way unfortunately had no lasting effect.

When the common law of England was transplanted to America, Australia and the other colonies, the special writing style accompanied it. In 1817 Thomas Jefferson complained of the drafting of statutes in the new United States, lamenting that his fellow lawyers were:

> making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means.[3]

When the Australian Commonwealth was set up, efforts were made to get away from this old method of drafting legislation. Sir Robert Garran, first Secretary of the Attorney-General's Department, found it a 'thrilling experience' to open a new statute book with the 'freedom that comes from not being tied to the forms and idioms of a long line of predecessors'.[4]

> We set our faces against the practice of earlier draftsmen of never mentioning a 'horse' without adding 'mare, foal, colt, filly or gelding' — ransacking the dictionary for verbal equivalents till the page [of the statute book] looked like an extract from Roget's Thesaurus.[5]

Garran boasted that the first Income Tax Assessment Act passed by the Commonwealth:

> was a thing of beauty and simplicity that would not have shamed Wordsworth or T.S. Eliot.[6]

But then the problems set in. According to Garran, the simplicity of the Tax Act tempted the 'crafty taxpayer' (doubtless counselled by an even more crafty accountant) to 'all sorts of devices to reduce his assessment'. Furthermore, Garran complained that 'what seems crystal clear to the draftsman is not always clear to the High Court'.[7] The proliferation of legislation, the handiwork of lawyers and the courts, the skill of those deft in weaving a path through the simple language adopted, all led on to:

> the battle of wits between the taxpayer and the Taxation Office ... all sorts of barbed-wired entanglements to keep the wily taxpayers from slipping through, till the Act became the literary monstrosity it is today.[8]

A fortnight ago, at the New Zealand Law Conference, one of New Zealander's leading lawyers, Mr. Ian McKay, a Vice-President of the New Zealand Law Society, concluded that the problem was not confined to Acts of Parliament but extended into the documents drafted in the lawyer's office. Moreover, error was liable now to be perpetuated and repeated by word processors, regurgitating merrily the prolix obscurities of draftsmen long since gone to their reward:

> We all profess to believe in intelligible drafting. We believe, or at least hope, that we achieve it. But we rely on precedents which we do not take time to revise and we follow traditional formulae without stopping to consider whether they could be improved. We produce documents that are often obscure or ambiguous, containing unnecessary words that are unintelligible to our clients and sometimes even to ourselves.[9]

There is no doubt that this obscurity of language, which is an acute problem for lawyers, is present to some degree or other in other professions, including those that will be practised by the graduates here today. What can we do about all this? In a world which is better educated and better informed, there will be an increasing impatience with professional people who do not bother to concern themselves about the success of their communication with the consuming public.

THE SOLUTIONS?

The first step on the way to clearer expression is a recognition that a problem exists. At the heart of this problem is the fact that the English tongue, otherwise so simple and attractive in its grammar that it is well on the way to becoming the universal language, nonetheless still suffers today from the Norman Conquest. William the Conqueror married a language of the Celts and of their Anglo-Saxon conquerors with the Latin language of the Norman Courts. In doing so he brought the great variety and beauty of a powerful mixture. But he left a language in which there are generally two words for every concept, one an original Germanic word; the other the Latin alternative. Whilst this has led to nuances of language, beautiful and attractive in poetic terms, it has also led to imprecision of language which is usually sought to be overcome by the use of two words rather than one. Doubling words has become traditional in legal language. It has persisted long after any practical purpose was dead. This explains why lawyers to this day talk of the 'last will and testament' when the single word 'will' is perfectly adequate and the word is used in everyday speech. Notably 'will' is the Germanic word. 'Testament' was brought over the Channel from France.

So it is with many other expressions. 'Alter or change', 'cease and desist', 'confess and acknowledge', 'force and effect', 'give, devise and bequeath', 'good and sufficient'. If we recognise the problem, we are on our way to its solution.[10] Various rules are offered for simpler oral and written style. Verbose words can be reduced. A special enemy of mine is that awful expression 'at this point in time' which can almost always be substituted by the single word 'now'. Short sentences can help the reader through complex ideas. The full stop is the special friend of plain English.

Mr. McKay told the New Zealand lawyers that the updating of our drafting style to the 20th century before the rest of the community enters the 21st was a special challenge:

> Let us give more thought to the words we use, modernise our style and seek clarity and intelligibility without sacrificing precision'.[11]

Can anything more be done than such exhortations? In New York, a recently enacted statute requires consumer contracts to be written 'in a clear and cogent manner using words with common and everyday meanings'.[12] But whether such a pious command in a statute book — itself often a prime offender — will have any greater effect than an appeal to a Law Conference, remains to be seen.

On the threshold of the computerisation of legal information, statutes and forms it is vital that lawyers, and indeed other professional people, should become alert to the need to use simpler language:

> The need for change is magnified by innovations in the mechanics of lawyering. We now have word processing machines that can type old boiler plate at a thousand words per minute and computer research systems that can give us an instant concordance of all the outpourings of the appellate courts, legislatures and governmental agencies. Soon we may drown in our own bad prose.[13]

In Britain, a Plain English Campaign was launched in July 1979 with the public shredding of complicated government forms in Parliament Square. Plain English Training Kits have been produced by the National Consumer Council. In Australia, a committee has been established by the Attorney-General for Victoria, to sift through the old statutes of that State to remove the redundant provisions and to suggest ways of simplifying that which is obscure, repetitious or antique in expression.

The mode of drafting Acts of Parliament which we now follow in Australia cherishes the very detailed provisions that seek to cover every conceivable eventuality. In part, this is a reaction to the narrow judicial interpretation of Acts of Parliament that may have been appropriate to deal with the legislation of the Stuart Kings, but may no longer be apt for frustrating the handiwork of the elected legislature. A change in our approach to the interpetation of laws may be the price we have to pay for a simpler expression of the law. As the community becomes more aware of the law and more alert to legal rights and duties, I have no doubt that the community will insist upon simpler laws which are readily understandable by the layman.

The economist John Kenneth Galbraith addressed the points I have been making when speaking of the need for plain English in his field. He said:

> [T]here are no important propositions that cannot be stated in plain language. ... The writer who seeks to be intelligible needs to be right; he must be challenged if his argument leads to an erroneous conclusion and especially if it leads to the wrong action. But he can safely dismiss the charge that he has made the subject too easy. The truth is not difficult. Complexity and obscurity have professional value — they are the academic equivalents of apprenticeship rules in the building trades. They exclude the outsiders, keep down the competition, preserve the image of a privileged or priestly class. The man who makes things clear is a scab. He is criticised less for his clarity than for his treachery.[14]

I suspect that the verbal scab who insists on simple expression may be the one variety of scab that will be tolerated in Wollongong.

The gift of education which the new graduates have received at the hands of this University requires them to spare a thought, even on this happy occasion, for their obligations to community. These include simply and directly to tell their fellow citizens of the disciplines and skills they have acquired here.

May you all be worthy of the privilege of education which you have received. May you be conscious of the responsibility which that privilege imposes upon you, all of you, to give the lead, beyond your immediate professional pursuits, to improving our society and helping it to respond to the challenges of a time of rapid change.

FOOTNOTES

1. R.C. Wydick, 'Plain English for Lawyers', 66 California L.Rev. 727 (1978). The passage cited is from D. Mellinkoff, The Language of the Law, 24 (1963).

2. Mylward v. Welden (Chancery, 1596), reprinted in C. Monro, Acta Cancellariae, 692 (1847).

3. Letter to J.C. Cabell (9 September 1817), reprinted in 17 Writings of Thomas Jefferson, 417-8 (1907).

4. R. Garran, Prosper the Commonwealth, 1958, 145.

5. id., 146.

6. loc cit.

7. ibid.

8. ibid.

9. I.L. McKay, 'Intelligible Drafting', Paper for the New Zealand Law Society's Conference, Dunedin, April 1981, mimeo.

10. Wydick, 734.

11. McKay, 4.

12. New York, General Obligations Law, para. 5-701B, 1978.

13. Wydick, 728.

14. J.K. Galbraith, 'Writing, Typing and Economics', Atlantic, 105, March 1978.