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THE CONSTITUTIONAL ASSOCIATION OF AUSTRALIA

ADDRESS TO LUNCHEON, 15 MARCH 1982

# THE MONUMENTAL TASK OF SIMPLIFYING THE LAW

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

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SYDNEY MENZIES HOTEL

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## SIMPLIFICATION OF THE LAW

The functions of the Australian Law Reform 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 all citizens is the dynamic of science and technology. The lives of everyone in Australian society will be profoundly affected by rapid scientific change. Lawyers tend to be uncomfortable with mathematics and science. But 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 address many of them. They present many problems, the solutions of which are not likely to be simple. In life, some matters are complicated. Some are made more complicated than need be.

If one were to ask the average citizen'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 lawyer or 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]

At the New Zealand Law Conference last year, one of New Zealand'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. 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?

Understanding the Problem. 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]

Plain English Statutes. 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]

Explaining the Law. 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. Only in January of this year the Victorian Attorney-General, Mr. Storey, announced the appointment of a Public Relations Manager to head a new unit in the Law Department to help explain new laws in simple language and to stimulate more interest in law and law reform.[14] The person engaged is a former television and radio journalist. She is a law graduate. Her efforts will supplement the efforts of the schools where, in Victoria, legal studies is now one of the most popular and successful High School courses.

Drafting Acts of Parliament. 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.

Last year the Federal Parliament approved an amendment to the Acts Interpretation Act designed to encourage courts to a purposivist rather than a purely literal approach to legislative interpretation. Already the High Court of Australia has shown a sympathy for the purpose of this amendment. It should be said that the amendment was passed despite strong reservations voiced in sections of the legal porofession.[15]

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.[16]

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

## WHAT ELSE CAN BE DONE

What else can be done to promote the simplification of the law?

One step in the right direction might be greater clarity in judicial exposition of the law. The House of Lords has come in for some recent, trenchant criticism in that prestigious journal, the Modern Law Review.[17] Words such as 'superficial', 'simplistic', 'casual', 'evasive' and 'irrelevant' are used, in place of the usual respectful tone, to describe the judgments offered by the Law Lords in a 12-month period under consideration. There is no doubt that judicial decisions today, in the highest courts, tend to be longer and more complicated than they were in earlier times. In part, this arises from the modern need to analyse parliamentary legislation which is itself highly detailed and complex. In part, it arises from the felt need to distinguish, quote from, apply or otherwise refer to, decisions of earlier courts, in analogous cases. In part, it arises from the mistaken approach of legal education in Australia that the law is just a series of categories filled with cases and statutes. Such an approach to the law encourages the avoidance of principle and concept in a passionate concentration on obfiscating detail. A recent issue of the California State Bar Journal contains a note by Dr. Robert Gardner titled 'Toward Shorter Opinions'[18].

> Recently, during some reluctant research, I stumbled on one of those wonderful brief two-page opinions found only in the earlier era of our judicial culture. Two pages! It takes [the modern judge] longer than that to clear his throat. Intrigued by the brevity of older opinions, I undertook a completely unscientific study of opinion lengths. The results were informative. ... Current opinions are distressingly longer -- as any reader ... can verify. ... The average length of the first ten opinions in the first volume of the California Reports ... came to about two and a half pages per opinion. Then I selected a random volume [of the latest reports] and discovered that ... the first ten opinions had leapt to about twelve and a half pages in length. ... The general pattern is unmistakeable. In the last 100 years, opinions have become unconscionably longer. Why this galloping prolixity?[19]

In the High Court of Australia, our highest court, there is some evidence of a return to the writing of Court judgments, with value for the practitioner and the laymen of a single statement of the current state of the law. Though this will not always be possible, consistent with intellectual honesty and the obligations of the judicial oath, a return to shorter, simpler judgments from the Bench, would be perhaps the greatest contribution the judges could make to simplification of the law.

Law reform bodies can contribute to simplification of the law by proposing the consolidation of laws, inherited from ancient times, and found in many obscure sources : bringing them together in a single statute of the Australian Parliament. This is what the Australian Law Reform Commission sought to do in its report on Criminal Investigation. Senator Durack has introduced a most important Bill based on that report. It is currently before Federal Parliament. Lord Devlin once said that it was unreasonable to insist upon policemen observing the letter of the law, when it took a day's research to find out what the law was. A short, public statement of the law is itself an important contribution to its simplification. We in the Law Reform Commission take most seriously our duty to endeavour to simplify the law. But we recognise that some matters are just complicated. The best we can then do is to state the principles clearly. It is to be hoped that the Victorian lead in the teaching of basic legal studies in the schools, and in providing for communication to the public of major law changes, is a lead we will see followed elsewhere in Australia, including in the Commonwealth's sphere. It is irresponsible to pass numerous laws (more than a thousand Acts of Parliament are passed each year in our country) and to deem everyone to know the law, the full law, and yet to make little effort to convey the chief principles of our legal system to those who are governed by it.

No easy solutions offer for radical simplification of a legal system developed over 800 years. Furthermore, some legal issues are just not susceptible to simplification. Life, as well as not being easy, is sometimes far from simple. By the same token, practical steps can be taken. Legislation can encourage a simpler approach to interpretation which will itself promote a simpler and clearer style of law drafting. The judiciary can play its part, including by briefer decisions which search for principle rather than obscure case references. The lawyer in his office, especially as he moves over to the use of word processors, can be encouraged to drop the repetitious legal language of past generations. Plain English requirements can be introduced by law, starting with consumer contracts. All of us can be aware of the special tendency of the English language to use multiple expressions, tracing their origins to the different historical branches of our tongue. Law reform bodies can bring together the law from many sources and can offer more modern, simpler laws. The community can be instructed in the basic principles of the law. Though a start on this has only just begun in Australia and is fast being overtaken by the prodigious output of our busy parliaments.

Those of us who honour the Rule of Law, as a basic tenet of Australian democracy, will recognise the importance of the issues to which I have addressed myself in this talk to you.

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. Attorney-General, Victoria, News Release, 'Unit to Explain New Laws', 27 January 1982.

15. Acts Interpretation Act 1901 (Cwlth), s.15AA. See also Attorney-General's Department (Cwlth), Another Look at Statutory Interpretation, AGPS, 1982. See also the decision of the High Court of Australia in Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation (1981) 35 ALR 151.

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

17. W.T. Murphy and R.W. Rawlings, After the Encien Regime : The Writing of Judgments in the House of Lords 1979-1980, (1981) 44 Modern L.Rev. 617.

18. R. Gardner, 'Toward Shorter Opinions', Calif. State Bar J. 240 (1980).

19. ibid.