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COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

Newsletter No. 8

Newsletter No. 6 contained details of the program for the CALC sessions of the Commonwealth Law Conference to be held in Jamaica on Wednesday 10 September 1986. Your Council is anxious to make the day a success and the organisers of those sessions are therefore anxious to ascertain which members are willing to speak at either or both of the sessions. If you are able to participate by speaking at either session, will you please let me know as soon as possible. Offers to speak for 10 to 20 minutes would be greatly appreciated.

Attached is a note of some problems arising from a campaign in Australia to have the statutes drafted in what is described as "Plain English". Members may find it of some interest.

Contributions to the Newsletters are invited from any members who feel they have something interesting or informative to impart to their colleagues.

A list of members as at 3 January 1986 is attached.

DRAFTING LAWS IN PLAIN ENGLISH - A CURRENT ISSUE IN AUSTRALIA

It is reported that when Moses came down from Mount Sinai to tell the children of Israel of the commandments given by Yahveh he said that he brought both good news and bad news. The good news was that he had persuaded God to reduce the number of commandments to ten from a higher number originally specified. The bad news was that one of the remaining ten still prohibited adultery.

Doubtless Moses sought thanks or praise for his efforts and perhaps he should have received high marks for brevity. But from any point of view the commandments were very poorly drafted and ought to have received very low marks for their lack of precision. For example, the commandment against killing did not contain any exceptions or qualifications; nothing was said about accidental killing, self-defence, provocation or insanity. On the other hand, in a later commandment the lawgiver decided to elaborate on the prohibition. A simple prohibition of covetousness was considered inadequate and instead the commandment contained a list of matters not to be coveted, such as one's neighbour's wife and his ox and his ass (the commandment appears to be directed only to men). The defect was that the commandment was over-precise and many matters in pari materia with the matters included were omitted. A good drafter would have relied on a general prohibition against coveting one's neighbour's property (which in biblical times presumably included his wife).

The moral in the foregoing is that simplicity and brevity, although desirable qualities in a law, are not enough. Precision is essential and the legislative drafter is engaged in a continuous struggle to attain precision without sacrificing simplicity and brevity. Whenever the drafter fails in this sisyphean task, obloquy is heaped on the product. No marks are given for effort. In Australia, at present, the legislative counsel are beleaguered in their temples. They are under attack for lapses from the path of righteousness, namely, for drafting laws that cannot be easily understood by the general public (whatever that expression may mean). Why has this criticism arisen to such a crescendo? How can it be answered?

In October 1984 the Standing Committee on Education and the Arts of the Australian Senate published a report on a National Language Policy. One of the recommendations in the report was that "a National Task Force be established to recommend on the reform of the language of the law". The Committee noted in particular that laws had been enacted in certain States of the United States of America that require legal documents to be subject to readability and comprehensibility tests. The author of this article is not aware of the sanctions that are applicable where the statutory requirements are infringed.

Since the Committee reported, there has been considerable agitation in the Australian community in support of the view that citizens have a right to understand the laws and regulations that apply to them. One of the main critics of existing legal and official language has been an associate professor of English at the University of Sydney. At first he directed his criticism at private legal documents, such as insurance policies, and official documents, such as taxation return forms, but he has since extended his attack to the language of the statutes.

The Attorney-General of Victoria has joined this bandwagon and, after announcing his intention to reform the language of the laws in his State, he has asked the Victoria Law Reform Commission to study how more of the laws of Victoria can be written in plain English. Apparently the Commission is to inquire into practices and procedures that make it difficult for legislation, legal agreements and government forms to be written clearly.

Plain English is like motherhood; everyone is in favour of it. There is no doubt that many privately drafted legal documents and many old laws are appallingly drafted. However, so far as the laws are concerned, in recent years there has been a considerable improvement. No doubt some legislative drafters have better techniques than others so that statutes drafted by the former are on the whole better drafted than those prepared by drafters with poorer techniques. Nevertheless no sensible person could expect a statute to be as easy to read as a work of popular fiction or a tabloid newspaper. Works of popular fiction eschew unusual or long words and tabloid newspapers usually make each sentence into a separate paragraph. If such literary works or newspapers represent the level of comprehension of most of the

adult population, no amount of effort by the drafters of legislation will render the statutes comprehensible to the average adult reader. If, however, the average citizen can be regarded as having a somewhat higher level of comprehension, the drafters have a duty to facilitate the citizen's comprehension of the statutes so far as it is practicable to do so.

However, the critics of the statutes have overstated their case by claiming that any complex idea can be expressed plainly so that all readers can grasp its meaning. To the legal drafter, struggling to find words to express an abstract concept, this claim is manifestly false. Moreover, its propagation is dangerous because the superficial attractiveness of the claim misleads the public generally, and many persons in authority, into believing that it is true. The complexity of modern laws regulating business activities, whether for the purpose of economic control, for the purpose of gathering revenue or otherwise, is largely due to the complexity of modern business operations. Business is frequently conducted in such a way as to minimise taxation and considerable technical complexity in the drafting of the laws is necessary to prevent this.

Apart from cases of complex policy or poor drafting techniques, the main reason why laws are difficult to understand was lucidly explained many years ago by Sir Ernest Gowers. He pointed out that legal English differed from literary English because literary English had as its prime objective the desire to convey an idea readily to the reader and it did not matter that the idea was not conveyed precisely. On the other hand, legal English has to convey an idea precisely and unambiguously. This involves the inclusion of exceptions and qualifications, the definition of expressions used otherwise than with their ordinary meanings, and the continual repetition of the same words where the same meanings are intended. The writer of a statute should, for example, avoid elegant variation. As Gowers has stated, lack of ambiguity does not go hand in hand with intelligibility, and the closer you get to the former, the further you are likely to get from the latter. In the case of a law dealing with complex matters, there is substantial truth in the proposition enunciated by a former English Parliamentary Counsel that the intelligibility of such a law is in inverse proportion to the chance of its being right.

Nevertheless one could reasonably expect a law dealing with a simple topic to be able to be drafted so as to be capable of comprehension by the average reader. A law requiring the driver of a motor vehicle to drive as closely as practicable to a particular side of the carriageway is a good example. But not many laws are as simple as this and most have exceptions and qualifications, though in many cases these exceptions and qualifications can be set out in a way that enables them to be fairly easily understood.

The position is different in the case of a statute that deals with an abstract and complex concept. It would be very surprising if such a statute could be easily understood by the average reader. For one thing, the reader might not have the necessary background knowledge of the subject matter dealt with by the law. In addition, the concepts involved might by their very nature be incapable of being expressed in language that is appropriate to the average reader's level of comprehension. It might be necessary to use a mathematical formula. In that event, no matter how hard the drafter tries to simplify the text, the result will not be meaningful to a person who does not have an above average level of comprehension. In one case where a provision made use of multiple formulae, a member of the Australian Federal Parliament commented that it was a case of "mathematicians rampant, Parliament couchant".

In trying to make a law as readable as possible there are constraints imposed on the drafter that are not ordinarily appreciated by the drafter's critics. In preparing legislation, the drafter has to satisfy three potential and quite different audiences. These audiences are, first, the Members of Parliament who have to enact the legislation, secondly, the citizens to whom the legislation applies and thirdly the judges who have to interpret the legilation. The needs of these three groups are not always reconcilable and, in the last resort, the drafter has to ensure that the legislation is drafted so as correctly to give effect to the policy of the sponsors. This means that ultimately it is the third group, the judges, to whom the laws must be directed.

Other, more practical, problems beset the drafter. Primarily, there is the problem of getting adequate instructions. To some extent, a draft can only be as good as the ability of the

drafter's instructors to explain the policy clearly to the drafter. If the drafter and the instructors are not on the same wavelength, the drafter may be giving effect to what he wrongly believes to be the desired policy and the instructors may wrongly believe that the draft correctly gives effect to what is in fact their policy.

Another problem is the state of the existing law. A new law has to dovetail with the existing common law or statute law. This imposes restrictions that would not operate if the drafter were free to draft a statute in a legal vacuum.

Finally there are the time constraints that are almost invariably imposed on the drafter. Governments set deadlines that usually do not allow as much time for the drafting of a Bill as the drafter would like, and in some cases there is even less time than the minimum that would be required for the preparation of a Bill that is fit to be introduced. Certainly there is rarely time for revision for the purpose of improving the readability of the draft.

I conclude by saying that, in many cases, the drafter is in a catch 22 situation. If the provisions of the draft contain as much detail as is necessary to ensure that all matters are properly covered (for example laws relating to taxation), the drafter is likely to be accused of prolixity and verbosity. If the law is in general terms, it will be productive of much litigation to ascertain how it applies in particular cases (workmen's compensation legislation and the Sherman anti-trust Act are well known examples of this.) If the drafter takes shortcuts, such as drafting by reference to, or by modification of, other existing statutory provisions, he or she is accused of being cryptic or of writing gobbledegook. In short, the drafter can't win.