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Commonwealth Association of Legislative Counsel

Newsletter No. 3

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Ties and Scarves

As mentioned in Newsletter No. 2, the Council has decided, if enough members respond to this invitation, to arrange for the production of ties and scarves with a simple, uncluttered design incorporating the Association's logo.

The design will be in gold on dark blue woven polyester. The size of the scarves will be 68cm x 68cm or 27" x 27". An illustration of the design was shown in Newsletter No. 2.

In order to make it possible for the Association to order the ties and scarves, members will need to send the Secretary or the President firm orders and remittances in advance. The cost of a tie is UK.£ 5.00 and the cost of a scarf is UK.£ 6.00.

The response to date has been disappointing and those members who have not already done so are urged to place an order for ties or scarves, or both, on the order form attached to the end of this newsletter as soon as possible.

Those ordering from outside the United Kingdom should send their orders to:

The Secretary,
Commonwealth Association of Legislative Counsel,
C/- Office of Parliamentary Counsel,
Robert Garran Offices,
Kings Avenue,
Barton, A.C.T. 2600,
Australia

Those ordering from within the United Kingdom should send their orders to: -

Sir George Engle, KCB, QC,
Parliamentary Counsel Office,
36 Whitehall,
London, SW1A 2AY,
England.

Please include the additional amount necessary to cover postage by air and packing, namely -

- (a) for goods to be sent to addressees outside the United Kingdom, UK.£ 1.50 for each tie or scarf ordered.
- (b) for goods to be sent to addressees in the United Kingdom, UK.£ 0.50 (i.e. 50p.) for each tie or scarf ordered.

It would be easier if those members within a particular drafting office send one bank draft; cheque or money order covering all the orders for that office; but it is emphasised that it will still be necessary to include UK.£ 1.50, or UK.£ 0.50, as the case may be, for each article ordered.

Members in countries other than the United Kingdom ordering through the Secretary should enclose a bank draft payable to the Commonwealth Association of Legislative Counsel in pounds sterling.

Members in Australia ordering through the Secretary may enclose, if they prefer, a bank draft, cheque or money order payable to the Commonwealth Association of Legislative Counsel in Australian dollars for the equivalent of the amount payable in pounds sterling and the Secretary will then arrange for the total amount to be converted to pounds sterling.

Members in the United Kingdom ordering through Sir George Engle should enclose a bank draft, cheque or money order payable to the Commonwealth Association of Legislative Counsel in pounds sterling.

CALC will not be able to order the ties and scarves unless members respond enthusiastically to this invitation.

AVOIDANCE OF "SEXIST" LANGUAGE IN LEGISLATION

The Australian Attorney-General recently announced a decision of the Australian Government that the use of so-called "sexist" language in legislation was undesirable and that certain changes in drafting practices proposed by Parliamentary Counsel should be adopted for the purpose of eliminating language of this kind from the federal statutes. The Government had considered various options that had, at their request, been put forward by Parliamentary Counsel.

In order to understand the basis of some of these options, it is necessary to understand the reason (whether or not one finds the reason compelling) for current calls for the adoption of non-sexist language in legislation. It is not nowadays asserted that the use in legislation of masculine nouns and pronouns has the effect, or could have the effect, of depriving women of rights conferred by such legislation. Interpretation of legislation providing that words importing the masculine gender are to be taken to import the feminine gender ensures that drafting that uses nouns and pronouns of the masculine gender only will apply equally to men and women. What is suggested, however, is that the drafting of legislation in "masculine" language, which is simply one example of a much more widespread use of such language, contributes to some extent to the perpetuation of a society in which men, and perhaps more significantly, women, see women as lesser beings. The argument is that the general use of masculine nouns and pronouns "implies that personality is really a male attribute, and that women are a human sub-species". Needless to say, this argument, while strongly propounded by some feminists, is not universally accepted. However, the Australian Government were committed to the view that the use of sexist language in legislation was undesirable and therefore addressed the question of what changes should be made.

There were three matters for consideration:

- (a) the use in legislation of masculine personal pronouns;
- (b) the use in legislation of allegedly sex-specific words incorporating "man"; and
- (c) the extent of the application of any changes to be made to current drafting practice.

Masculine personal pronouns

There were two possibilities, either to endeavour to eliminate masculine personal pronouns from legislation or to retain the use of those pronouns while taking other steps to remove from legislation its alleged tendency to perpetuate sexist attitudes:

- (a) Four possible methods of eliminating masculine personal pronouns from legislation were considered:

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- (i) Draft entirely in the plural. This option was considered not to be feasible since, notwithstanding the general rule of interpretation that the singular includes the plural and vice versa, it is often necessary to draft in the singular to avoid ambiguity: e.g. "A person who has given 2 or more notices...." is unambiguous. "Persons who have given 2 or more notices..." is not.
 - (ii) Use plural personal pronouns (they, their, them, themselves) with singular nouns. This option was not acceptable because it is ungrammatical. Moreover, it has a substantial potential for creating ambiguities in legislation, particularly in provisions containing both singular and plural nouns.
 - (iii) Use the pronouns "one", "ones", "oneself". This option has been seriously put forward in some quarters but it is grammatically incorrect and unidiomatic and was regarded as absurd. For example, "Where a person has satisfied oneself that..." is simply not English.
 - (iv) Avoid the use of pronouns entirely by repeating the relevant nouns. This option was accepted although it was recognized that repetition of a noun (especially a long one) could on occasions render a provision inelegant by comparison with an equivalent provision in which pronouns are used. For example, compare the following: "A member of a Tribunal may resign his office by writing signed by him and delivered to the Minister." "A member of a Tribunal may resign from the office of member by writing signed by the member and delivered to the Minister." On the other hand, repetition of a noun instead of the use of a pronoun sometimes avoids an ambiguity in a provision where there are two or more nouns to which the pronoun could refer.

Drafting by avoiding the use of pronouns can make provisions more difficult to read but this difficulty will be lessened as the option was adopted by the Government in conjunction with option (b) (i) below. A variation on this option would have been to repeat the relevant nouns except where substantial inelegancies would result. This option would have reduced, but not eliminated entirely, the use of pronouns and for that reason was not accepted.

(v) Invent new pronouns

A Royal Commission on "Human Relationships" that reported to the Australian Government several years ago suggested "id". The word "s/h/it" has been suggested in some quarters. Some other absurd proposals that have been seriously put forward are set out in the attached table. This was not considered to be a serious option.

(b) Consideration was given to two possible methods of retaining the use of masculine personal pronouns while removing from legislation its alleged tendency to perpetuate sexist attitudes. These were as follows:

(i) Continue to use masculine personal pronouns in relation to natural persons but accompany them with feminine pronouns when they refer to both sexes ("he or she" etc.)

It was noted that this option would of necessity lengthen Australian federal legislation, although not substantially. If the approximately 50,000 occurrences of masculine pronouns in the federal Acts to the end of 1982 were amended, this would add about 150 pages to the total amount of Commonwealth legislation. It was decided that this option could usefully be adopted in conjunction with option (a)-(iv) above.

(ii) Use masculine personal pronouns in some legislation and feminine personal pronouns in other legislation

This was not regarded as a serious option.

"Masculine" nouns

Words ending in "man", such as "chairman", "serviceman", "seaman", etc., are alleged by some to be sex-specific, and properly to describe only men. It was decided to avoid such words either by using words created by replacing "man" with "person", e.g. "chairperson" (which unfortunately appears in the latest edition of the Concise Oxford Dictionary) where the word concerned was not too inelegant or plainly absurd, or preferably by finding other words that already have a recognized place in the English language, e.g.

- President)
- Commissioner)
- Administrator)
- Secretary) for Chairman
- Convenor)
- Presiding Member)
- Principal Member)
- Senior Member)

member of the Armed Forces for serviceman
mariner for seaman

At the suggestion of the New South Wales Parliamentary Counsel, Australian federal Parliamentary Counsel have adopted the expedient, whenever forced to use "chairperson", of including a provision in the law concerned stating that the chairperson may be referred to as the chairman or the chairwoman, as the case requires.

Application of new principles

The Government decided to apply the new drafting principles in all new principal legislation and in new provisions for inclusion in existing legislation. They also decided that, where existing legislation is being amended for other purposes, it should be amended to bring it into line with the new drafting principles if resources permitted.

Some Recent Proposals for a Common Gender Pronoun in English

| | Orovan (1970) | Densmore (1970) | Miller & Swift (1972) | Timm (1976) | Darnell (1976) | Mackay (1978) | Longwell (1978) |
|------------|------------------|--------------------|-----------------------------|----------------|-------------------|------------------|--------------------|
| Subjective | co | she | tey | heesh | ho | E | hesh |
| Possessive | cos | heris | ter(s) | hiser(s) | hos | Es | Hizer |
| Objective | com | herm or hirm | tem | herm | hom | E | hirm |
| Reflexive | comself | hermsself | temself | hermsself | homself | Eself | hirmsself |

Commonwealth Secretariat survey of terms and
conditions of service of legislative drafters

The attention of CALC members is drawn to an article by David Hull concerning the terms and conditions of service of legislative drafters in Commonwealth countries that was published in the Commonwealth Law Bulletin in July 1984. The article sets out the information obtained by a questionnaire seeking information on the terms and conditions of service of drafters that was sent to Commonwealth countries by the Legal Division of the Commonwealth Secretariat prior to the 1983 meeting of Commonwealth Law Ministers. With the permission of the Commonwealth Secretariat, this newsletter reproduces the main findings of the questionnaire that are set out in Hull's article. The Commonwealth Secretariat will be pleased to provide off-prints of Hull's article on request by any CALC member.

Thirty-two jurisdictions (referred to in the article as "territories") completed and returned the questionnaires. The questionnaire was designed to ascertain, in relation to each territory -

the way in which drafting services are organized and used
how drafters are trained
the status of drafters
the extent, if any, of the shortage of drafters.

The information supplied is analysed by Hull in relation to the larger and smaller territories as well as generally. Larger territories were taken to be those whose populations exceeded 1,000,000. This category was subdivided into developed and developing territories. The smaller jurisdictions were subdivided into those with specialist law drafting positions and those without such positions. Only the 5 smallest territories, each with a population under 100,000, had no such positions. Four of the 5 were in the Pacific.

David Hull summarizes the findings of the survey as follows.

1. There is a continuing and substantial shortage of drafters in developing territories.
2. This shortage is most acute in the larger developing territories and the smaller Pacific territories. In these jurisdictions the shortages had increased substantially during the 5-year period (1978-82) preceding the survey. Throughout the 32 territories

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taken as a whole the average vacancy rate in drafting establishments at the time of the survey was about 21% and the average vacancy rate during the preceding 5-year period was also about 21%. Among the 8 territories constituting the group of larger developing territories the average current vacancy rate was about 41% and the average vacancy rate during the preceding 5-year period was about 30%. Among the 8 territories constituting the group of larger developed countries the average current vacancy rate was about 6% and the average vacancy rate for the preceding 5-year period was about 8%. Among the smaller territories (excluding those that had no specific legislative drafting positions) the average current vacancy rate and the average vacancy rate during the preceding 5-year period were about 25%.

3. The shortages in the larger developing countries were greatest in Africa and these shortages had increased substantially during the preceding 5-year period (from an average vacancy rate during that period of about 24% to a current rate of about 35%).
4. In the Caribbean the shortages had also remained substantial, but the situation had improved considerably over the preceding 5-year period (from an average vacancy rate of over 39% to an average current vacancy rate of under 24%). Currently the Caribbean had a lower vacancy rate than either Africa or the Pacific.
5. The only territories dependent partly on overseas recruitment of drafters were the larger developing countries and some of the smaller territories. Some smaller territories were wholly dependent on overseas recruitment.
6. There was a definite correlation between shortages in drafting establishments and the salary of the principal drafter compared to the salaries of members of the judiciary and senior government lawyers in the jurisdiction. In the larger developed jurisdictions, which had no shortages in their drafting establishments, principal drafters had markedly better relativity than in other jurisdictions. The conclusion could not, however, be drawn from the survey that shortages of drafters tend to be found where commencing salaries of drafters are lowest.

The survey conducted by the Commonwealth Secretariat is an extremely valuable source of information on the terms and conditions of service of drafters throughout the jurisdictions of the Commonwealth.

Access to the statute law currently in force

No jurisdiction in the Commonwealth seems to have found an entirely satisfactory method of making available to the legal profession and other interested persons the whole of the statute law of the jurisdiction currently in force in an up-to-date form consisting of the text of each law as originally enacted and incorporating all amendments of that law up to the present. This note considers briefly the problem confronting all jurisdictions of keeping the published statute law up to date in an easily accessible form with special reference to Hong Kong's recent consideration of the problem.

Every year in every jurisdiction more laws are enacted. Many are complex and very detailed and, as a result, tend to require more frequent amendment. In jurisdictions where the textual method of amendment is used, it is difficult and time-consuming for lawyers and non-lawyers alike to have to understand and apply a law that consists of the statute or statutory instrument as originally enacted or re-enacted and several sets of amendments. In jurisdictions where the referential or indirect method of amendment is used, it is generally considered even more difficult to ascertain the law currently in force with respect to a particular matter. As the referential method of amendment is used in very few jurisdictions, and is not, so far as I know, used exclusively in any, this note takes no account of the special problems created by that method.

In some of the larger and wealthier jurisdictions the need to search manually through many statutes and statutory instruments to find the law currently in force on a particular subject has been obviated in part by the availability of a computer data base containing most statutory materials. But even in these jurisdictions not everyone who needs to consult the laws has access to such a data base. The data base may also be incomplete and may exclude, for example, some subordinate legislation and local government by-laws. In most federal systems a computer data base containing all State or provincial primary and subordinate legislation as well as federal legislation is unlikely to become available for several years. The computer data base may simply comprise all new legislation as it appears in the annual or sessional volumes and not be programmed so as to permit new amendments to be read into the existing text in the data base. If this is the case, the user is required to search several different documents in the same way he or she would peruse the original and amending statutes or statutory instruments in the published volumes. Even where the data base allows amendments to be read into the existing text to give an easily comprehensible text, it may be a few months rather than a few weeks after the amendments come into force before this is done.

Where the laws are available on a computer data base, it is still often more convenient and cheaper to use the published text. Computer data bases of statutory materials enable large masses of text to be searched quickly and thoroughly for relevant provisions.

However, it is often easier for the user who wants to examine closely the retrieved provisions to examine a printed text, and it is often cheaper to use the official publications of statutory materials for this purpose rather than to obtain a computer print-out of all the retrieved materials. Where the user needs also to consider the retrieved materials in their context, he or she will need an up-to-date published text.

In many smaller and less developed jurisdictions it will be many years before the laws can be transferred to a computer data base. In such jurisdictions the official text of the laws is the only text available as it is not profitable for commercial publishers to provide a service.

In the past most Commonwealth countries have periodically, often at intervals of 10 or more years, published in a consolidated form the whole of their statute law in force at a given date and then, until the next such comprehensive publication, published annual or sessional volumes containing all new legislation. Any person wanting to know the law in force with respect to a particular matter would have to read into the original enactment (whether contained in the last reprint of all the statute laws or, if enacted subsequently, in an annual or sessional volume) all amendments made in subsequent years or parliamentary sessions. Because of the length of time between consolidations of the whole of the statute law, users had often to consult several volumes and to read many sets of amendments into the original text. In Australia, for example, the last 2-consolidations of all federal Acts (but not statutory instruments) were published in 1952 and 1974 and they contained the statute law in force at 31 December 1950 and 31 December 1973 respectively. A person who, say, on 1 January 1979 wanted to ascertain the law in force on a particular subject matter would have had to consult the annual volumes from 1974 to 1978 if the principal act was contained in the 1974 consolidation or, if it was enacted during or after 1974, each of the annual volumes after the year in which it was enacted. This task was of course made easier by indexes to the statute law that were published annually and specified the laws which had been amended and the titles of the amending laws. The last consolidation in Australia of all federal Statutory Rules was published in 1958 and contained the law in force on 31 December 1956. In Canada the last consolidation of all federal Acts was published in 1970 and contained the laws as in force on 31 December 1969. It was originally proposed to publish a consolidated revision of all public and general Canadian federal Acts every 10 years. However, the Canadian Statute Revision Commission did not commence the next consolidated revision until 1981 and it is not expected to be completed until 1985. (The length of time necessary is in part due to the great effort being taken to ensure that the French language text of all the laws is of as high a standard as the English language text.)

In some jurisdictions, such as Canada, the authority responsible for preparing the periodic consolidations is authoriz

to revise the text of the laws, correcting errors and resolving ambiguities but not altering the substance. In other jurisdictions such as Australia, the periodic consolidations were not revised and merely reprinted the laws in force incorporating all amendments made up to a given date.

Some jurisdictions whose statute law is contained in periodic consolidations and annual or sessional volumes also reprint from time to time, between consolidations, the more important laws of the jurisdiction if they have been heavily amended. In some jurisdictions these reprints are authoritative and in other jurisdictions, for example Canada, they are merely informative.

Some jurisdictions are so dissatisfied with the system described above that they have decided to abandon periodic consolidations. Australia is one of these jurisdictions. In 1979 it was decided to adopt a new system of pamphlet reprints of all Acts and Statutory Rules from time to time in force. This system was intended to replace the periodic consolidations. The Acts and Statutory Rules that were most widely used and heavily amended were first reprinted in the pamphlet form, followed by any Acts and Statutory Rules that were out of stock. The remainder are being reprinted in alphabetical order. Each time a statute or Statutory Rule is amended substantially, it is intended to reprint the law incorporating the amendments and this reprint will then be substituted for the previous pamphlet reprint. On 1 December 1978 there were in force about 900 statutes (running to about 15,000 pages) and about 600 sets of Statutory Rules. Five years later about 350 of the original 900 statutes have still not been printed as separate pamphlets. However, these laws are those which have been only lightly amended, if at all, and for which there is little public demand. Since 1979 there have been 2 reprints of some statutes which have been substantially amended. Australia still publishes annual volumes of the statutes. Indexes are published specifying the laws which have been reprinted and any subsequent amendments. The pamphlet reprint system is generally regarded as an improvement on the one previously used. If a law contained in a pamphlet reprint has not been amended, it is necessary to refer only to the reprint. If it has been amended, it is seldom necessary to have to read more than a couple of amending acts or sets of rules with the reprint. Users may purchase all the pamphlet reprints (specially designed binders are provided with them) or the particular laws in which they are interested.

Instead of using a pamphlet reprint system, some jurisdictions, including some of the Canadian provinces, provide a loose-leaf service of consolidated statutes. Most of the Canadian provinces that provide a loose-leaf service also produce a periodic revised consolidation. A loose-leaf service would appear to offer the best means of providing up-to-date statute law but the number of replacement pages in a jurisdiction like the Australian federal jurisdiction

where at least 2,000 pages of statutes are enacted each year would be very large. In the larger jurisdictions commercial publishers often provide loose-leaf annotated services of the most important commercial and administrative laws and the government printer's loose-leaf version of such laws is really superfluous (as would be a reprint).

The Hong Kong drafting office has been considering for some time whether the form in which the colony's laws are published could be improved. This question arose for the office in the context of deciding what equipment is required to facilitate the preparation of legislation by drafters and how to provide for the use of drafters (and for other legal officers of the Hong Kong government) an up-to-date data base of the statute law in force. The Hong Kong drafting office needs therefore, in conjunction with the government printer, to make a number of related decisions concerning the preparation, storage and availability of legislation, both on a computer screen and in a printed text.

Nearly always decisions of this kind have to be implemented over a number of years. Creating a computer data base of all legislation of a particular jurisdiction is costly and time-consuming. Even when a data base is created, this may not result in the frequent updating of the official publication of the laws. In Canada, as noted above, amendments of federal Acts are incorporated quickly into the principal Acts held in the data base but the Acts as amended are not systematically and quickly reprinted by the government printer. The Quic/Law Revised Statutes of Canada data base is much more up-to-date than the last official consolidation of the federal laws and the availability of this data base may account for the apparent lack of criticism in Canada of the present system of publishing federal laws. (Quic/Law is a commercial system available throughout North America and it may also be accessed from Europe and Australia.)

The data base may also not contain the laws as textually amended. In the United Kingdom the LEXIS data base has been compiled by adding progressively to the data base all the laws in force relevant to a particular subject (see Harrison, "The Statutes on LEXIS", Statute Law Review, Spring 1982, pp. 51-5). The data base does not contain the laws as textually amended but can display the text of a particular provision together with any amendments of it. The data base of Australian federal laws available for use by government lawyers (but not yet available commercially) does not display the laws as textually amended and it is necessary to display consecutively the original provision and any amendments of it.

In order to decide whether changes should be made in Hong Kong in the preparation and publication of the laws, 2 members of the drafting office visited 8 legislative drafting offices in Canada and one in the United States in late 1983 to see how these matters were dealt with. They also obtained information on how New Zealand and some Australian jurisdictions dealt with these matters. Clearly

what is appropriate in one jurisdiction is not necessarily appropriate in another. The variety of systems used in the 8 Canadian jurisdictions that were studied indicates this forcefully.

The Hong Kong study concluded that its existing system of publishing the laws was "a very good system". However, it also recommended that consideration should be given to adopting a loose-leaf or pamphlet system, or a loose-leaf and a pamphlet system (described above as operating in some of the Canadian provinces and Australia respectively) and that there should be a biennial revision of all laws that have been amended to any extent. This proposed biennial revision would then constitute the authoritative statement of the statute law in force in Hong Kong. Annual volumes would also continue to be published.

The report produced by the 2 Hong Kong drafters, Messrs Pierce and Martin, is a very useful source of information about the practices of drafting offices in several Commonwealth jurisdictions and about the methods of publication of the laws of those jurisdictions. It is not proposed here to try to summarize the report, different parts of which will be of use to different drafting offices, depending on their problems. The report's recommendations extend from the type of word processing system that the Hong Kong office should acquire for preparing legislation to the manner in which, and the frequency with which, the laws should be published. Although the North American offices studied by Messrs Pierce and Martin were in wealthy developed jurisdictions, their study does not assume that computer access to the laws will make unnecessary an up-to-date printed text. Indeed, the study was concerned with how to keep the official publication of the laws up-to-date and may therefore be of use to smaller and less developed jurisdictions. The study does, however, assume that the government printer's typesetting will be by computer and therefore that a data base of legislation on tape will gradually be developed.

CALC members are invited to write to Gerry Nazareth, CALC's vice-president and the law draftsman in Hong Kong, for further details of the Hong Kong study and its findings and recommendations.

16
New Members

CALC is extremely pleased to welcome the following new members. Would other members please add the following names and addresses to their list of members of CALC.

| | |
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| Mr J. Leahy Ms A. Caine Mr V. Robinson | Office of Parliamentary Counsel Robert Garran Offices Kings Avenue Canberra. A.C.T. 2600 AUSTRALIA |
| Mr A.R. Rushford | 12 Chester Row Belgravia LONDON SW1W 9JH ENGLAND |
| Mr I.D. Izard | Law Clerk Clerk Assistant of the Legislative Assembly Parliament Buildings Victoria BC-V8V 1X4 CANADA |
| Ms D. Ray Mr M. Hawkins Mr G.A. Fox | c/- Parliamentary Counsel's Office Department of the Chief Minister GPO Box 3144 DARWIN NT 5794 |
| Mr M. Beaupré Ms D.R. Davidson | P.O. Box 1034 Wellington Building House of Commons Ottawa ONTARIO K1A 0A6 CANADA |
| M. M.R. Pelletier, c.r. | Légiste et conseiller parlementaire Pièce 451-N, éd. du centre Chambre des communes OTTAWA ONTARIO K1A 0A6 |
| Mr R. Du Plessis, Q.C. Mr M. Audcent | Law Clerk and Parliamentary Counsel The Senate of Canada OTTAWA ONTARIO K1A 0A4 |
| Mr A.G.H. Fordham | Howe Building, Ninth Floor P.O. Box 1116 HALIFAX NOVA SCOTIA B3J 2X1 CANADA |

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|---|--|
| Mr D. Revell Ms C. Schuh | Ministry of the Attorney-General Box 1, Legislative Building Queen's Park Toronto ONTARIO M7A 1A2 CANADA |
| M. R. Geoffrion, c.r. | Greffier en loi de la Législature Assemblée nationale du Québec Service de la législation 1er étage, chambre 131 Hôtel du Parlement QUEBEC QUEBEC G1A 1A4 |
| Mr M.C. Mitchell | Solicitor-General Crown Law Office, P.O. Box 494 Rarotonga COOK ISLANDS |
| Mr C.E. Borrowman | Acting First Parliamentary Counsel Crown Law Office, SUVA FIJI |
| Mr H. Roberts | St. James Chambers GUERNSEY |
| Mr T.R.O. Tetteh | Office of the Attorney-General Legal Drafting Division, Ministry of Justice P.O. Box M.60, Accra GHANA |
| Mr D.L. Mendis | Office of the Legal Draftsman, P.O. Box 164, Legal Department Government Headquarters St. Kitts, St. Christopher and Nevis |
| Mr T. Chitsiku Mr N.M. Dias Mr M. Gooneratne Ms B.M. Kahari Mr S. Karangizi Mr G. Liundi Ms D. Mandaza Mr M.J. Mutyavaviri Mr S.K. Williams | Ministry of Legal and Parliamentary Affairs Private Bag 7751 Causeway Harare ZIMBABWE |
| Mr A.B. Dikko | Ministry of Justice Sokoto Sokoto State NIGERIA |
| Mr V. Crabbe | Director Commonwealth Secretariat Legislative Drafting Course Ministry of Legal and Parliamentary Affairs Private Bag 7751, Causeway, Harare ZIMBABWE |

Ms Lydia Elliott

18
c/- Attorney-General's Chambers
Ministry of Legal Affairs
Cnr Micoud and Bridge Streets
Castries
SAINT LUCIA. WEST INDIES

Ms D. Kitching

P.O. Box 1100,
NORTH SYDNEY. NSW 2060

NEW CALC SECRETARY

Sandra Power, who has been Secretary of CALC since its foundation has left the Office of Parliamentary Counsel, Canberra, and has therefore resigned as Secretary. Sandra has been an excellent Secretary and everyone is very sorry that we are losing her services. I have agreed to act as Secretary and to accept appointment if the Counsel agrees. Any future correspondence to the Secretary should therefore be addressed to me c/o Office of Parliamentary Counsel, Robert Garran Offices Kings Avenue, Barton, ACT 2600, Australia.

GEOFF KOLTS

CALC TIES AND SCARVES

ORDER FORM FOR CALC MEMBERS IN THE UNITED KINGDOM

Please post to : Sir George Engle, KCB, Q.C.,
Parliamentary Counsel Office
36 Whitehall
LONDON SW1A 2AY
ENGLAND

Name:

Address:

I would like to order -

_____ ties (please state the number)

_____ - scarves (please state the number)

Enclosed is my cheque for UK £

The price for each tie, together with postage is UK £5.50
The price for each scarf, together with postage, is UK £6.50

ORDER FORM FOR CALC MEMBERS OUTSIDE THE UNITED KINGDOM

Please post to: The Secretary
Commonwealth Association of Legislative Counsel
c/o Office of Parliamentary Counsel
Robert Garran Offices
Kings Avenue
BARTON ACT 2600
Australia

Name:

Address:

I would like to order -

_____ ties (please state the number)

_____ scarves (please state the number)

Enclosed is my cheque/bank draft/money order for

UK £ (members in countries other than Australia)

Aust \$ (members in Australia may convert pounds
sterling to Australian dollars)

The price for each tie, together with airmail postage, is UK £6.50
The price for each scarf, together with airmail postage, is UK £7.50