legalese and sexism

In Paris they simply stared when I spoke to them in French; I never did succeed in making those idiots understand their own language.

Mark Twain

balaclava victory. Inveterate readers of this journal will know that, from the start, a recurrent theme has been the need for greater clarity in legal expression. See, for example, [1977] *Reform* 65 ('Down with legalese'). The ALRC has, like most LRCs in Australia and overseas, a statutory duty to 'simplify' the law. Easier said than done. Working within the framework of the Australian Constitution and an accepted style of legislative expression, there are limits on what law reformers alone can achieve. Nonetheless, the ALRC has marked up one noticeable success in the last few months. The Insurance Contracts Bill 1983, based on the ALRC report *Insurance Contracts* (ALRC 22) contains, for the first time in a Federal Bill, a provision empowering courts, in interpreting the reformed law, to have regard to the ALRC report upon which the law is based. Earlier proposals by the ALRC to this effect were not accepted and the decision in the Insurance Contracts Bill represents a 'breakthrough'. Some critics of current statutory drafting suggest that the 'clue' to simpler drafting is the provision of readier access for courts to background material.

In his latest book *The Closing Chapter*, Lord Denning, former Master of the Rolls, urges that Parliament should legislate only on general principles. It should leave it to the judiciary to match the facts to those principles. However, in a review of the book in the *Economist* (17 December 1983) the anonymous reviewer concludes:

> That would, perhaps, be all right if all judges were Lord Dennings. But they are not. Nor, for that matter, are all laws matters of broad principle (tax law or planning legislation is about stopping unpleasant people from finding holes in the principles: that is why both are intricate and often circumvented). The Denning crusade, like the charge at Balaclava, was magnificent, but it was not the common law.

Efforts to change the traditional approach of common law draftsmen are now beginning in earnest in Australia. The Federal Government has hired a Sydney University professor to teach plain English to the Federal Public Service. It has also hired a consultant and a communications expert from Flinders University to help eliminate 'gobbledegook' from government forms. In a statement issued on 23 February 1984, Special Minister of State, Mr MJ Young, said that 'unnecessary jargon' sometimes used in public and official forms occasionally resulted in citizens missing out on their entitlements.

The first project tackled under the direction of Professor Robertson Eagleson of Sydney University involved an examination of the major government publications to ensure that they are 'comprehensible'. As well, a special team is reviewing government forms, including the Australian Taxation Office's Form S used for most Australian income tax returns. According to the discussion paper prepared in the Department of the Special Minister of State, the real cost of forms in some departments amounts to tens of millions of dollars a year. Mr Young asserts that the simpler the form, the fewer the mistakes and the less time that has to be spent processing government business. In a remarkable operation, a number of departments of the Federal Administration, including the Australian Taxation Office and the Departments of Health, Veterans' Affairs, Social Security and Attorney-General, have agreed to take part in a 'pilot scheme to improve their forms'. In fact, the pressure comes from the very top. The Prime Minister, Mr RJ Hawke, has asked all Ministers to evaluate the effectiveness of their departmental forms and to report to Mr Young who will in turn report to the PM. Mr Young's mood is determined:

> All sorts of people (lawyers, computer people, systems managers) will tell you all sorts of reasons why forms cannot be simplified. Don't believe them.

plain english. According to Professor Eagleson, the movement for plain English in official documents has at last reached Australia from earlier efforts in the United States, United Kingdom and Canada. In a 1983 paper 'The Case for Plain English', Professor Eagleson says:

> It is receiving support from highly regarded bodies such as the Australian Law Reform Commission and the Task Force on Departmental Information. It constitutes a demand on the part of citizens to know their rights as consumers. Too often they are expected to enter into agreements and to sign contracts and leases without being able to comprehend the documents placed before them. Equally as important, many of the community do not take advantage of the benefits to which they are entitled because they cannot understand the written announcements setting out the details ... Many legal documents are now written with an eye for other members of the legal profession, and especially judges, in case the document ever has to be produced in court, rather than paying attention to the needs of the members of the public, whose legal rights and obligations are involved. The many are regularly deprived for the benefit of a few.

Professor Eagleson should know. He has taken part in recent years in efforts to reform the language of the insurance documentation of a major Australian insurer. Some of the experience he had gathered influenced the work of the ALRC in its proposals on insurance contracts. In that report (ALRC 20) there is a detailed examination of comprehensibility and legibility in insurance forms. Now, Professor Eagleson and the Task Force on Departmental Information are turning to the most forbidding of government forms. One illustration, given wide coverage (see eg *Sydney Morning Herald*, 28 February 1984) showed how, by layout of forms and simpler expressions, convoluted questions in the standard income tax return could be made much simpler. A business forms consultant engaged by the government project, Mr Robert Barnett, said that there were four essential elements in a good form:

- type that is easy to read, particularly larger print for pensioners or older persons;
- logical layout with easy to follow sequence of questions;
- clear colours. The trend is apparently to coloured paper with white spaces for answers;
- plain language. This involves the use of common expressions such as 'school' instead of 'educational institution'; 'live' instead of 'reside' and 'its contents' instead of 'the contents thereof'. Another expression to bite the dust is 'with respect to'.

sexism. In addition to the search for simpler language, an effort is now afoot to remove 'gender specific' expressions from legislation. The Victorian Legal and Constitutional Committee (VLCC) has delivered a major report on Interpretation Bill 1982. Amongst many innovative proposals for simplifying statutory language the committee recommended that all legislation in Victoria be reviewed to 'eliminate sexist language'. It has also suggested that all future legislation should be drafted in what it terms 'non gender specific' language. According to Margaret Jones, reviewing the Victorian committee's proposals (*Sydney Morning Herald*, 2 March 1984) the expression, 'non gender specific' is 'an admittedly rather ghastly way of saying neutral as far as the sexes are concerned'. In short, it means that legal language in Victoria will no longer recognise men as the 'dominant species' and women as a 'sub-species'. Ms Jones asserts that supporters of this reform of legal language are constantly reminded that the Acts Interpretation Acts in Australia typically provide that the masculine, where used in a statute, includes the feminine. However, they point out that these Australian Acts are themselves based on a statute passed in England in 1850. The hope of the reformers in Melbourne is that 'getting rid of sexist language from parliamentary Bills will have a beneficial flow-on effect in the community at large'.

Not content with the attack on legal language, in Acts of Parliament, Margaret Jones calls for other changes in sexism:

- dropping the references in descriptions of professional women to their marital status or progeny. Margaret Thatcher, it seems, was formerly described as 'the mother of twins', something not lately referred to in descriptions of 'the Iron Lady';
- dropping 'reverse sexism' such as describing the British Prime Minister as 'the best man in her Cabinet' – something which Ronald Reagan was said approvingly to have asserted. It is pointed out that Queen Elizabeth I, another 'iron lady', believed in 'gender neutral' expression insisting on describing herself not as a Princess but as a Prince, in the sense of sovereign;
- removing anomalous variations on common words such as 'authoress' and 'poetess'.

In February 1984 the very active Victorian Attorney-General, Jim Kennan, introduced into the Victorian Parliament the Interpretation of Legislation Bill 1984. It is designed to implement the innovative and largely bipartisan proposals of the VLCC. Its aim, he declared, is to 'shorten and simplify the language of Acts of Parliament'. The Bill and the VLCC report on which it is based are trail blazers for simpler laws in Australia.

judges at work. In addition to the professors and law reformers, the judges are also now at work on this problem:

- According to a report by Peter Samuel from Washington (NZ *Times*, 27 November 1983) Judge Marion Ladwig, a judge of the United States National Labor Relations Board, has taken to reports of the NLRB with a red pencil. To the delight of law schools and journalists, he has set out to show that cutting the verbiage of judges and reports in half actually makes them more easy to understand. According to the press reports, the good judge has taken the red pencil to 'legalese' phrases and to paragraphs in judgments which are then radically simplified by him. A pet hate is the continued use of Latin phrases which he regards as 'indefensible', serving to confuse rather than to inform. He suggests that lawyers write 'legalese' out of 'mindless habit because they think it is expected of them'.

- In New South Wales, some of the language of Justice Ronald Cross in his reports as Special Commissioner has raised a few editorial and judicial eyebrows. According to a profile of the judge written by Jenny Cook (*Sydney Morning Herald*, 20 January 1984) he is 'not one to be bound by legalese in his numerous judgments'. His turn of phrase delighted many editors, including the reference to the Spanish Inquisition objected to by Mr Sinclair (see above p ???). On the other hand, not everyone likes judicial penmanship. David McNicoll, premier Australian commentator, wrote in the *Bulletin* (14 February 1984) that he could not join in the 'apparent enjoyment of the language used by Justice Cross in the Sinclair report'. 'The judge sees himself as a wordsmith and he used one or two bobby-dazzlers', declared McNicholl. 'But surely he should realise that the duty of a judge is to use words understandable to the widest possible audience and not to include words which seem incomprehensible to all but a few. A castigating report is not the appropriate place for florid flights of written oneupmanship'.

Can legalese, verbosity and tedium be avoided without the use of offending 'bobby-dazzlers'?