companies and securities commission. One of the foremost Australian spokesmen in favour of a more realistic approach to economic issues in the law is Mr. Leigh Masel, Chairman of the new national Companies and Securities Commission. In an address on 'Regulation of Securities Markets' to the Committee for Economic Development of Australia in November 1980, he not only explained the scheme and objectives of the proposed uniform companies legislation. He also argued out the advantages of self-regulation, especially to uphold 'ethical standards beyond those any law can establish'. But he pointed out that a careful watch must be made for complaceny or the tendency 'for a self-regulatory organisation to carry on its business in an anti-competitive or monopolistic manner'.

In another address, to the Institute of Directors in Victoria, he called attention to the differing ways in which economists and lawyers tend to look upon take-overs:

> Whilst market forces tend to emphasise efficiency, regulation emphasises investor confidence. Legislation affecting take-overs has, therefore, been generally directed towards trying to achieve the best of both worlds, that is increasing investor confidence by ensuring a fair and informed market, but without detracting from its efficiency.

The economic critique of the Dawson report on Conveyancing Laws, Practices and Costs in Victoria contained in *The Australian Economic Review,* Third Quarter, 1980, 29, is a forerunner of what law reformers and legal administrators and institutions have to expect in the future. Like it or not, court decisions, reform reports and the exercise of discretion will be submitted to a new and somewhat unfamiliar analysis. Things until now left vague and inexplicit will probably, in the future, have to be spelt out.

> Men of legal background have always been important in Australian politics. ... In some European countries, lawyers also dominate the higher public service, but in Australia we prefer economists. Now I see from the graduation list that there is a formidable new breed of economist/lawyer emerging and who knows where they will lead us?
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> Prof. R.N. Spann, '*Law and Government*', Graduation Address, 28 February 1981, Sydney University.

legal gobbledygook

> 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. The result is a writing style that ... is (1) wordy (2) unclear (3) pompous and (4) dull.
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> Prof. R.C. Wydick, 'Plain English for Lawyers', 66 *Calif.L.Rev* 727 (1978)

shredding bad forms. According to *Time* magazine 'you would need to be a potential Nobel Prize physicist to fully understand the work that won the Nobel Prize for Physics this year. For all but a small group, scientific knowledge has reached the state that passes human understanding'. During the past quarter, outbursts in three common law countries have suggested that the scientists may not have a monopoly on obscurity. In England, according to the London Bureau of the *Australian* (25 April 1981) a number of moves are afoot to promote a Plain English Campaign which got off the ground in July 1979 with the public shredding of a number of specially complicated forms. The ceremony took place in Parliament Square and was declared 'a grand sight'. Now plain English awards are being offered and in May 1980 the National Consumer Council published *'Gobbledygook'*, a critical review of official forms and leaflets. The Council has now come up with a plain English training kit, devised for staff trainers in the public services, nationalised industries, companies, libraries and unions.

Tests of British adults are said to have revealed that 25% of them have a reading age of 14 years only. Another two million have a reading age of less than nine years. This group do not stand a chance when they come up against forms expressed in language which is perfectly 'plain' to the educated lawyer. Parallel problems exist in Australia. But defining the problem is easier than devising the solution.

At the New Zealand Law Conference, Mr. Ian McKay, a Wellington barrister, urged lawyers present to update their style to the 20th century. In a paper mercifully brief (four pages

only) he made the following points amongst others:

- laywers are usually lazy and timid in drafting and therefore stick to precedents inherited from earlier times and often encrusted with outmoded or unnecessary expressions;
- the educated client of today no longer believes that legal documents need to be obscure. 'He is not impressed by needless repetition and still less by clauses which even his lawyer cannot explain';
- good plain English 'with plenty of full stops, is capable both of accuracy of expression and ease of assimilation. We should aim for both';
- nostaligic fondness for beautiful old expressions must give way to modern translations which are more accurate and more effective; and
- there is an element of urgency. As more documents are transcribed to word processors, it is important to 'revise our precedents or seek new ones'.

Offering a number of rules for good drafting, Mr. McKay declared war on such legal favourites as 'aforesaid', 'hereinbefore', 'whatsoever' and so forth.

contaminated by common sense. In Australia, local commentators have also had a go. Addressing a seminar on criminal evidence law reform organised by the Institute of Criminology (Sydney University), a judge of the Supreme Court of New South Wales, Mr. Justice Adrian Roden, urged simplification of the laws of evidence and procedure to remove 'hopeless and unnecessary confusion'. He said that it was important that non-lawyers, including jurors, should understand the laws if they were to respect them:

> I am concerned in particular with the technical rules which exclude potentially valuable evidence and with the hopeless and unnecessary confusion to which juries must be subjected by rules which it is impossible to justify in terms of common sense.

Among specifics criticised were directions to juries to disregard evidence, despite its apparent relevance and directions instructing them to consider evidence admitted with regard to some issues but not others:

> In these cases it may appear to minds contaminated by common sense but not purified by learning in the law that respectively they have not been told the whole story; they are being asked to pretend that they do not know something which they in fact do know or they must make that pretence for one purpose but not for another.

Mr. Justice Roden summed up his appeal:

> So far as the law of evidence is concerned that should have us constantly on guard against over-indulgence in goggledygook. And the time now seems ripe for a valuable review of that law with that end in view.

Another participant in the seminar was Mr. Tim Smith, ALRC Commissioner in charge of the reference on evidence law reform. Mr. Smith described to the seminar the approach the ALRC was taking to its task, including the need for evidence law to have greater regard to reality but in ways consistent with the purpose of the trial, as it has developed in our legal tradition.

Encouraged by Mr. Justice Roden's candour, the *Sydney Morning Herald* (2 May 1981) reflected philosophically:

> The law has been an Aunt Sally for centuries. Most of the great writers, from Shakespeare through to Dickens, have railed at its inadequacies and the failings of lawyers. Not surprisingly, the legal profession has constructed defences against the criticism. The argument often put forward is that what we have is the best court system and that changes will create more problems than they solve. Change is seen as a thread which, if pulled too hard, will rip a giant hole in the carefully constructed robe of checks and balances designed over the centuries to equalise the competing interests involved in a legal action.

The *Herald* urged action on the NSWLRC's report recommending the reform of the hearsay rule. See [1978] *Reform* 69.

thicket of regulations. In Victoria, the first report to Parliament of the activities of the Public Bodies Review Committee (Dr. K.J. Foley, Chairman) records the beginning of its efforts to review the mass of legislation establishing water and sewerage authorities in Victoria. Astonishingly enough, the report discloses that there are now 375 such authorities. Only seven of them were established by Parliament. Simplification of the law and clarification of legal powers and duties will be an important result of the activities of the Public Bodies Review Committee. The committee is established under the Parliamentary Committees (Public Bodies Review) Act 1980 (Vic). It is a novel response to the mood of the times, that qangos must be contained and scrutinised.

In the High Court of Australia, in May, Mr. Justice Stephen was moved to criticise the 'intricacy and ambiguity' of the regulations made under the Students Assistance Act. He upheld an appeal by Dianne Emery against the rejection of her claim for benefits under the Tertiary Education Assistance Scheme. Mr. Justice Stephen was critical of the provisions of the 1973 Student Assistance Act under which the TEAS scheme operates:

> The price paid for the Act's economy of language lies in the complexity of the regulations which govern the grant of benefits. Amended on more than 40 occasions in their six years of existence, these regulations now represent an administrative scheme of great intricacy and much ambiguity.

The price of a simple statute may have been too high, if the regulation necessary to implement it led the tribunal astray. According to Mr. Justice Stephen, the tribunal:

> mistook its way through the thicket of regulations thereby erroneously denying Miss Emery her entitlement to benefit.

What can be done about obscure, dull, repetitious legal writing, in statutes and elsewhere? According to *Acta Cancellariae,* in 1596, the Lord Chancellor, when he had had enough, made an example of a particularly prolix document by ordering the unfortunate lawyer who wrote the turgid prose to have his head stuffed through a hole cut through the document, to be led around and exhibited to his colleagues in Westminster Hall. This effort at reform was short-lived and ultimately ineffective.

Robert Garran, in his *'Prosper the Commonwealth'*, recounts the thrill of drafting the first Federal statutes without commitment to the tiresome forms and idioms of a long line of predecessors. Amazingly, for modern readers, he declared that the first Income Tax Assessment Act was:

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

How did the vision fail? In part, it seems, the blame must rest with the greater complexities of life today. Some things just are not simple. But Garran had no doubt that part of the blame lay with the courts. He complained that:

> What seems crystal clear to draftsmen is not always clear to the High Court.

In part, the answer may be found in the new English and Australian legislation on interpretation of statutes. But that will address a small field of legalese and already some have expressed doubt that general commands will persuade committed adherents of the 'literalists' school on the Bench, or reassure dubious lawmakers determined to express their will in fastidious detail.

english: a powerful mixture. Part of the answer may be a recognition of the source of many of our problems. That source is the Norman-French impact on the English language, particularly legal English. According to the ALRC Chairman, in a Graduation Address at the University of Wollongong (7 May 1981):

> 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, nevertheless still suffers today from the Norman Conquest. William the Conquerer married a language of the Celts and of their Anglo-Saxon conquerers 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 the 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 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'. If we recognise the problem, we are on our way to its solution. Short sentences can help the reader through complex ideas. The full stop is the special friend of plain English.

a l r c efforts. In a number of the projects before it, the ALRC is examining 'plain English' in law reform.

- in the inquiry into Aboriginal customary laws, the Commission had a further special summary of its discussion papers prepared in a 'simple English version'. This was done with the assistance of Mr. Stephen Muecke, a linguist at the Hartley College of Advanced Education, Adelaide. It aided the process of consultation described above (see p. 79) and supplemented separate tape cassettes prepared for Aboriginal men and women, sent to 157 communities in a variety of Aboriginal languages.
- a similar translation of the discussion paper proposals on debt recovery law reform was also distributed two years ago. The importance of simple forms in debt recovery process and the incomprehensibility of many currently used forms was described in the ALRC discussion paper, *Debt Recovery and Insolvency* (ALRC DP 6, p.18)
- in connection with the current inquiry on the reform of the law governing insurance contracts, the ALRC is examining insurance documents and the various tests available to test the ability of ordinary people to read standard provisions. With the assistance of Professor R.D. Eagleson of the English Department of the University of Sydney and experts in opthalmology, the ALRC is approaching readability and comprehensiveness in a new way. Those blessed with high intelligence and good education may scoff. Those concerned about gobbledygook law and cynicism in the community about its laws will take seriously every step on the path towards greater clarity of our laws.

adversary trial on trial?

> Amongst the procedural systems the common law [adversary] procedure is what a shining Rolls Royce car is amongst automobiles whereas the German procedure may be compared with a dusty small Volkswagen. I agree. But the question remains: what is it you can afford to pay for, and how often and in what situations are you in need of a Rolls Royce or of a Volkswagen?
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> Professor Dr. W. Zeidler, citing Professor Kötz to the Australian Legal Convention, Hobart, July 1981).

There was a time when no respectable common lawyer would have questioned the adversary trial. It was part of British freedom which Wordsworth reassured us 'earned the world's praise'. Tennyson, in *'The Revenge'* equated the 'Inquisition dogs' with the 'devildoms of Spain'. The Star Chamber and its inquisitorial procedures reinforced by the dread methods of the Inquisition reinforced common law insistence on active advocates and neutral judges.

In the past decade, the growing realisation of the cost-intensive features of the adversary trial system and the way in which it deprived people of effective access to justice, has led thoughtful commentators to look again across the Channel to the system of judicial inquiry operating in Europe. Lord Devlin, one of the foremost legal thinkers of the English judiciary this century, in his 1979 monograph *'The Judge'*, asked whether we would not have to move to grafting onto our legal system some elements of the procedures of judicial inquiry, to ensure a more equal access to justice and