

Legislative Drafting: A New Approach by SIR WILLIAM DALE, K.C.M.G., of Gray's Inn and Lincoln's Inn, Barrister; Visiting Fellow, Cambridge University Centre of International Studies, formerly Legal Adviser Commonwealth Office, General Counsel U.N.R.W.A. (Butterworths, 1977), pp. i-xix, 1-341. Cloth, recommended retail price \$32.50 (ISBN: 0 406 17403 2).

A. P. Herbert once wrote a poem which began:

I'm the parliamentary draftsman and I make the country's laws
And of half the litigation I'm undoubtedly the cause.

The poem concluded:

I'm the parliamentary draftsman and they tell me it's a fact
That I often make a muddle of a simple little Act
I'm the parliamentary draftsman and they take me in their stride
Oh how nice to be a critic of a job you've never tried.

Sir William Dale's book on legislative drafting also seems to start by castigating the draftsman and conclude by determining that much of the problem lies elsewhere.

Sir William Dale has tried to demonstrate, by comparing legislative drafting in France, Germany and Sweden with that in the United Kingdom, that United Kingdom drafting is deficient in many respects. He does this by citing a number of examples of legislation dealing with like topics in the four countries chosen for his models. In each instance he endeavours to show that the United Kingdom version is the least intelligible and most inelegant. He succeeds admirably in his purpose. Regrettably, however, the examples tend to outweigh the interest in the book. Well over half the book is devoted to sections of comparative legislation to which is appended a limited amount of commentary by the author pointing out the benefits and weaknesses in the particular Acts chosen. It is something of a pity that this makes the book rather boring as the content of the rest of the book is particularly interesting.

Sir William surveys the law-making process in France, Sweden and Germany and these chapters go far towards undermining the rather complacent attitude adopted in Westminster systems that the law-making process there followed is superior to that of other countries. There is also a most pointed chapter on statutory interpretation that reviews the differing approaches of the courts to legislation in the jurisdictions chosen. The concluding chapters rebut many of the ill-informed criticisms levelled against European legislation while demonstrating the numerous defects to be found in English legislation. The book concludes with a number of interesting suggestions for change.

The criticisms levelled by Sir William at the present position fall primarily under two headings. First, in regard to the process of law-making itself and, secondly, in regard to the structure of legislation. As far as the law-making process is concerned, the author's examination of other jurisdictions shows that legislation goes through three stages—the drafting stage, the revising stage and the enacting stage.

The omission from the law-making process in the United Kingdom of the second stage, the revising stage, is the notable distinction between that country and the European models. In France, for example, after initial drafting all proposed laws are examined and revised as necessary by the Conseil d'Etat. In Sweden many Bills are referred to the Law Council—a body comprising four senior judges. In addition, in all the Continental jurisdictions, parliamentary committees scrutinise draft Bills and discuss them with ministers and civil servants *before* the Bills are introduced into the Parliament. The author suggests that it is this stage of review by outside bodies that results in the removal from legislation of much of its obscurity. Certainly it means that the draftsman is forced to indicate why a provision may have been expressed in a particular way. In the Westminster system countries the draftsman is very much a law unto himself in terms of form. Even the department for whom he is preparing the legislation cannot effectively assert that the legislation should have been drafted in another and perhaps less obscure way. The instructing department can determine the content of legislation but it is the draftsman's prerogative to determine the way in which the legislation is expressed.

Obscurity in drafting, however, is not entirely the fault of the draftsman. This is the second point of Sir William Dale's thesis. He quite properly points out that United Kingdom legislation is usually much more detailed than that of the European countries that he cites as his models. (On the other hand, not all European legislation is as attenuated as one is often led to believe. The examples cited by the author show that, in Germany in particular, detailed legislation is a relatively common practice.) The enormous detail that is frequently to be found in United Kingdom legislation is there largely because of the attitude of the courts to the interpretation of legislation. Sir William quite properly indicates that English judges have declined to look for the spirit of legislation and have been fascinated by the words used in it. If the words do not expressly cover the situation before the courts, then the legislation is held not to apply to that situation. Inevitably this means that legislation must deal explicitly with more and more individual fact situations. The courts complain bitterly about detail in legislation but they produce the result themselves because of their approach to interpretation.

This is not to say that legislation could not be expressed more clearly. The author indicates a number of matters relating to the style of drafting followed in the United Kingdom that have the effect of obfuscating the meaning of legislation: long involved sentences; an indirect approach to the subject matter; excessive use of definitions and interpretation clauses; legislation by reference; frequent subtraction from a stated principle by use of "subject to" and "provided that", *etcetera*. Draftsmen often become so pre-occupied by the technical way in which a piece of legislation is presented that they overlook the rights of the ultimate reader.

This book should be read by any persons interested in legislation—and this should be every lawyer in the community because legislation

is steadily moving into all fields of law. A reader will probably feel inclined to skip substantial parts of the book and it is unfortunate that the author felt constrained to include so many examples of contrasting legislative styles. However, he had a point to make and his examples bear him out. Draftsmen in the United Kingdom ought to feel uncomfortable as the result of this examination.

Is there a lesson in the book for Australia? In my view, Australian legislation is, in many cases, better drafted than it is in the United Kingdom and it is something of a pity that Sir William Dale's examination of contrasting legislation should not have included a reference to the legislation of Commonwealth countries. However, much of what he has to say is pertinent to the drafting of legislation in Australia—obscurity abounds here also. But it is no use simply casting all odium on the draftsman. As Sir William properly points out, if legislation is to be more clearly expressed, it is necessary to look at the whole system of legislation and in particular to the method by which it is made and the approach of the courts to its interpretation.

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