DEVELOPMENTS IN STATUTORY INTERPRETATION

Memorandum by
THE GOVERNMENT OF AUSTRALIA

The annexed discussion paper, "Extrinsic Aids to Statutory Interpretation", was tabled in the Australian Parliament on 14 October 1982. It was tabled with the intention that the paper be studied and debated inside and outside the Parliament before any of its proposals are put forward as legislation.

2. The paper examines the extent to which, in interpreting Acts of Parliament, regard can properly and usefully be had to reports, explanatory memoranda and other materials that do not themselves form part of the Act. For this purpose the paper examines the extent to which the courts already use such extrinsic materials. It goes on to consider whether the range of such extrinsic materials need to be broadened, and how that could be brought about in a way that would be satisfactory and acceptable from the point of view of the courts and of the audience to which the Act is directed. Finally, the paper sets forth for consideration and discussion a possible procedure and programme for the use of specially prepared explanatory memoranda limited, initially at least, to selected Acts considered by their sponsors to be appropriate for this purpose.

3. The discussion paper arises out of an initiative announced by the Attorney-General in 1981 at the time he introduced the Bill to insert section 15AA in the Acts Interpretation Act 1901 (Act No.61 of 1981). At the time of introducing that measure the Attorney-General stated that an examination would be undertaken of the topic, with a view to developing proposals that would be brought into the Parliament for further consideration. There has also been considerable interest in the exercise by groups outside Parliament and indeed overseas as well, and it is hoped and expected that the paper will produce a vigorous and fruitful debate.

4. No official examination of this kind has taken place since Federation in 1901, although there have been some distinguished precursors. The paper is also timely in view of the quite remarkable way in which the problems of statutory interpretation have engaged the attention of both Australia's highest courts and the wider Australian community in recent times.

5. One thing that clearly emerges from the paper is that the courts already can refer to extrinsic materials in certain cases under the existing rules of interpretation. Legislation is not made in a vacuum and each Act must be read in its context. Courts may, and on occasion do, look at reports and other materials leading to the legislation in question. Recently, individual judges of the High Court have gone to the extent of looking at Hansard to identify the problem the Act addresses or even to ascertain directly what was the parliamentary intent. The judicial developments are of great significance. However, other judges take a more restricted view, and this in itself raises a problem. There are other problems. Often these materials will not be readily accessible to the ordinary users of statutes. They are not necessarily self-explanatory and often require a difficult exercise of evaluation. Finally, overall there has been much greater reluctance to use parliamentary materials than to use other materials, such as reports, that in fact are more remote from the law-making process than Hansard.

6. In these circumstances, the paper proposes for consideration the use in selected cases of a specially prepared explanatory memorandum or statement that would be submitted to Parliament along with the legislation in question. The memorandum when approved would be made as accessible to the users of the legislation as the legislation itself. One of the most interesting points that emerges from the paper is that the idea of such a special explanatory statement has received wide interest or support over a considerable period as is outlined in Chapter IV of the paper.

7. There has not yet been parliamentary debate on the paper. However, the Opposition's initial reactions to the paper are supportive of the initiatives taken. It is likely therefore that the debate will concentrate on the priciples involved in the proposals and the translation of those principles to legislative form.

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EXTRINSIC AIDS TO STATUTORY INTERPRETATION

Chapter 1: Introduction

Terms of reference

1.1 The terms of reference of this discussion paper are to consider what extrinsic materials should be taken into account in the interpretation of Acts of the Federal Parliament.

The scope and nature of the problem

1.2 No official examination of this kind has taken place since Federation in 1901. The volume and complexity of legislation by the Federal Parliament has increased enormously in recent years. In the year 1950 there were eighty Acts, running to 281 pages in the annual volume of Acts. In 1980 the number of Acts had grown to 177, covering 1859 pages. The range of topics covered by the legislation has undergone a similar growth. The interpretation of statutes has become a major part of the judicial function. The recent volumes of law reports give ample evidence of the importance of statutory interpretation and of the extent to which it now occupies the attention of the courts.

1.3 The ideal would be a situation in which the words of every Act were in themselves precise and unambiguous in all the circumstances to which its provisions applied. There is little basis, however, for believing that this ideal corresponds always or indeed often with reality. It may be said that this is due in measure to defects in drafting, but the fact is that modern legislative texts are drafted by skilled people whose aim is to spell out in a logical and consistent manner the full detail of the legislative scheme, with a strong reliance on the literal rule of interpretation. The Federal Parliament has been well served by the level of professional competence of its Parliamentary Counsel. While no doubt there is always room for improvement, there are practical limits to what can be done in this regard, when account is taken of the inherent frailty of language and the difficulty of foreseeing and providing for all contingencies.

1.4 Moreover, it is an oversimplification to look solely to the drafting of Acts without regard to the rules of interpretation which have been developed by the courts. There is an interaction between the form of a communication and the rules by which it is to be interpreted. The intelligibility of Acts from the point of view of both ordinary citizens and their expert advisers cannot be disassociated from the rules of interpretation followed by the courts. The ability properly to understand an Act depends in ultimate analysis on intelligent anticipation of the way in which it would be interpreted by the courts.

The framework of Acts

1.5 An examination of extrinsic aids to the interpretation of Acts should begin with a description of what matters actually form part of the Act itself. The body of an Act consists of numbered sections introduced by the enacting formula - 'Be it enacted by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows.' Each Act also contains one or more of the following subsidiary elements:

(a) a heading, called the long title, consisting of the introducory phrase 'An Act to' or 'An Act relating to', followed by words very briefly describing its object (at one stage the long title was not regarded as forming part of the Act, but now a different view is taken)[1] ;

(b) in rare cases, a preamble giving the reasons why the passing of the Act has become desirable [2] (The preamble precedes the enacting formula, which is altered to read 'Be it therefore enacted');

(c) headings of the Parts, Divisions and Sub-Divisions into which the Act is divided [3] ;and

(d) a schedule or schedules. [4]

In appropriate cases regard may be had to each of these subsidiary elements in interpreting the operative sections of an Act. They are, or are deemed to be, part of the Act.

1.6 A long tradition has it that punctuation is not part of an Act. It may rest, to some extent at least, on a judicial misconception that punctuation may be supplied in whole or in part by the printer or proof reader [5], whereas in fact it is carefully supplied by Parliamentary Counsel responsible for the drafting of the Act and is in the text of the Bill considered by Parliament. Marginal notes and section headings are not part of an Act, although they too are supplied by Parliamentary Counsel and are in the text of the Bill considered by Parliament. [6] The General view has been that these potential aids to interpretation are to be completely disregarded but there has been a shift by judges on their use, particularly in the case of punctuation. [7]

Revision and reform

1.7 There has been growing appreciation of the importance of statutory interpretation and a growing concern to identify shortcomings with a view to correcting them. Under our legal traditions, the principles of interpretation have rested largely on a body of flexible doctrine developed by the practice of the courts. In this regard, the judges have shown in recent times an awareness of the responsibilities involved in exercising the function of interpreting Parliament's intent. [8] This has been one significant development. However, a development of at least equal significance is the quite remarkable way in which the problems of statutory interpretation have engaged the attention of the wider Australian community in recent times. This can only be regarded as a healthy development, but it does raise the question of what are the proper limits of revision and reform in this area.

1.8 Under the constitutional provisions that apply to Federal legislation it is the function of an independent judiciary to interpret the law. Clearly, no proposals could or should be implemented that would undermine the freedom that this function requires. However, this is quite consistent with a limited degree of statutory intervention in the process of interpretation. The Acts Interpretation Act 1901 and its numerous amendments since that date provide many examples that show the legitimacy of such measures. Section 15AA, inserted in the Acts Interpretation Act in 1981, is the most recent example. [9] The effect of the provision is to confirm that in interpreting provisions regard is to be had to the object or purpose underlying the Act in question. It reads in full as follows:

"Regard to be had to purpose or object of Act

15AA.(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(2) Nothing in sub-section (1) shall be construed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section"

1.9 This provision was not intended to affect the existing position in relation to the use of extrinsic materials to assist in the interpretation of statutes and sub-section (2) of section 15AA was enacted to make this clear. The second reading speech of the Attorney-General introducing section 15AA indicated, however, that an examination would be undertaken of what extrinsic aids should be able to be used in interpreting statutes beyond those allowed under present judicial practices, and that proposals in that regard would be brought forward for consideration. [10] The present discussion paper is part of that exercise.

1.10 Sub-section (2) is therefore limited to negating what section 15AA(1) might be thought otherwise to have authorised. It left judges free, in the meantime, in the application of the flexible principles of interpretation embodied in the practice of

the courts to enlarge, or for that matter to narrow, the range of extrinsic materials to which regard might be had. As will be seen in what follows, there has, over recent times, been greater use by judges of extrinsic materials, quite independently of any legislative direction on the matter.

Chapter II: The Process of Interpretation

The role of interpretation

2.1 Every occasion for taking decisions by reference to the applicability or the non-applicabiliy of an Act to a particular situation involves the process of statutory interpretation, even if no dispute has arisen as to how the Act should apply. Whether the decision is taken by a private citizen or a public servant, by a company or by a public authority, he or she or it is engaging in the process. Statutory interpretation is not the preserve of lawyers or the courts. It directly concerns all those whose activities are affected by Acts of Parliament. In modern society this means, in effect, everyone.

2.2 The particular group affected by a particular statute may be called the audience or the users of the Act. Another 'special interest' group needs to be identified. It consists of the law makers - those responsible for the drawing up and enactment of statutes. Under our constitutional system, the initiative for most, though not all, Acts rests with the government of the day. In other cases, the initiative will be that of a private member of Parliament. The Office of Parliamentary Counsel is responsible for ensuring, as far as possible, that government Acts give effect to the intention of the government and, to the extent that the resources of the Office permit, they perform the same role for private members' Bills. Members of Parliament are obviously and properly concerned that Acts passed by them give effect to their understanding and expectations of what the Acts mean. Ultimately, the legitimacy of the concern of the law makers in statutory interpretation rests upon their role in communicating the will of society, as articulated by democratic processes, to society's members, telling them how they should and should not behave or what consequences are to attach to certain actions or events.

2.3 The special role of the courts is that, under our constitutional arrangements, only they can give a final and authoritative interpretation of statute law. All groups affected - whether the law makers responsible for the Act or the audience of the Act - need to take account of the answers that would be given when and if the interpretation of the Act comes before the courts. However, this does not seem to be a one-way relationship. Courts should, and do, take account of the intention of the law makers and also of the interests of the Act's audience, within proper limits. The problem, in a sense, is: what are those limits?

Choice between 'intent' and 'meaning'?

2.4 It has been said that a choice has to be made between following the 'legislative intent' and seeking instead the 'meaning' of the words of the statute. [1] If 'legislative intent' is the criterion for interpretation, the primary emphasis should rest on the intention of the law makers. Inquiry as to the 'meaning' of the statute suggests greater concern to find out how the statute is understood by the audience at which it is aimed. The difference between these two criteria is obviously important for present purposes because of the way in which the criterion adopted may influence what extrinsic materials will be used as aids for interpretation. It seems to be a mistake, however, to regard these two approaches as being necessarily opposed, with the unsatisfactory consequence that an absolute choice has to be made between them. In principle, there should be a correspondence between what the law makers intend and what the audience of the statute perceives. If there are breakdowns in communication, this would be one of the strongest arguments for the availability, in appropriate cases, of satisfactory extrinsic aids that would make that correspondence more likely to occur. On the other hand, questions of balance and degree are obviously involved.

2.5 More recent pronouncements of the High Court of Australia have illuminated, but not exhausted, this question. These pronouncements have rightly rejected too rigid an application of the literal construction rule under which the meaning of the language of

an Act is to be applied - however improbable it was that the Parliament intended the result that meaning produces. However, while acknowledging unequivocally that a statute is to be expounded according to the intent of the Parliament that made it, the emphasis remained on ascertaining that intention by reference to the 'meaning' of the words in the context of the Act in question. [2]

2.6 Two particular matters call for further examination. One is the extent to which, notwithstanding the emphasis referred to, our courts in fact seek assistance in interpretation from materials and considerations extrinsic to the Act itself. The other matter is whether the range of admissible extrinsic materials needs to be broadened, and if so how that could be brought about in a way that would be satisfactory and acceptable from the point of view of the courts and the audience of the statute.

Divining the legislative intent

2.7 Before these matters are examined, it is as well to recall a basic principle to be applied to the interpretation of all written instruments, including statutes. The object is to see what is the intention expressed by the words used.

> "But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." [3]

2.8 This was said in the courts in 1877, and reaffirmed in 1975 in similar language [4] :

> "One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself 'in the shoes' of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that is not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind."

2.9 The courts are not, if they ever were, confined to the four corners of the Act. The desirability that extrinsic materials that are taken into account should be not only publicly available but readily available is taken up below. The main point to be noted at this stage is that words must be read in their overall context.

2.10 Thus, words in a statute have to be read in the context of the whole Act in which they appear. It is elementary that no one should profess to understand any part of a statute or any other document before he has read the whole of it, and that until he has done so he is not entitled to say that it or any part of it is clear or unambiguous. [5] Also, the courts can take into account the wider context in which the Act is placed. Legislation is not made in a vacuum, and a judge, in interpreting it, is entitled to take judicial notice of information relating to legal, social, economic and other aspects of the society in which the statute is made and in which it is to operate. [6]

2.11 In drawing attention to the need to consider the context of the Act, it should be emphasised that the problems of interpretation are not solved by simply relaxing the restrictions on the range of contextual material to which the courts may have resource in construing a legislative provision. The point is well expressed in the 1969 Report on the Interpretation of Statutes by the English and Scottish Law Commission. [7]

> "One of the difficulties which sometimes faces the courts in interpreting statutes is the lack of any material about the underlying policy of the statute in question. When the meaning of a provision may vary according to the view taken of the general purpose of the legislation, such a lack of information may put a court in an invidious position; it may have to

make a choice between rival social assumptions, argued before it, with little fuller guidance than can be derived from those matters of which it can take judicial notice and such indications, which may be indecisive, as can be gathered from the language of the statute. In the result the interpretation of a provision may seem to depend on the choice and pattern of the language of the Act, when these may in fact have been chosen in the light of instructions to the draftsman which did not, and perhaps could not , anticipate the point being argued. In reality the court may have had to reach its decision as best it can, even if it is expressed in terms of an analysis of the language used. Thus the question arises whether the courts and the public should, where appropriate and practicable, be provided with some further authoritative aid to the construction of statutes."

Chapter III: Existing Use of Extrinsic Materials

Categories of materials

3.1 In considering what extrinsic materials are used by the courts at present, a distinction must be made between Parliamentary and other materials. These other materials will be considered first. Paradoxical though it may seem, there has been much greater reluctance to use Parliamentary materials than to use other materials that are more remote from the law-making process.

Reports of committees

3.2 The courts can consult the prior reports of committees of inquiry, law reform commissions and other similar bodies that have investigated the subject matter of the legislation to ascertain the 'mischief' which Parliament is concerned to remedy. The term 'mischief' comes from the celebrated resolutions of the Barons of the Exchequer in 1584 in Heydons case [1], in which judges are enjoined to consider the mischief or defect being dealt with, the remedy appointed by the Parliament, and then to make such interpretation as shall suppress the mischief and advance the remedy according to the true intent of the makers of the Act pro bono publico. These propositions, though they have an archaic flavour, are recognised by Australian courts as rules of continuing validity and practical importance.

3.3 While the admissibility of such reports is beyond question, difficult refinements and disagreements have developed in relation to their use. Thus, the balance of judicial opinion is that such reports can only be used to ascertain the mischief being dealt with and not for the direct purpose of ascertaining what Parliament meant in its statute. [2] Some judges have found this distinction unreal and unhelpful - since ascertaining the mischief is part of the process of ascertaining the legislative intent it is pointless to draw a distinction between the two. [3]

3.4 The limitation on the use to be made of the report becomes particularly troublesome where, as is frequently the case, the report contains recommendations or annexes a draft Bill to give effect to the report. This has led some judges to decline to look at recommendations or the Bill annexed to the report, even though the report is otherwise regarded as admissible. However, Australian practice seems to be developing in favour of looking at the Bill if only for the negative purpose of ascertaining whether the Act so departed from the draft Bill as to make reference to the report irrelevant. [4]

Other non-Parliamentary documents

3.5 The range of non-Parliamentary materials extends beyond such reports, and can include in appropriate cases other non-Parliamentary materials that must be taken to have been within the knowledge of the Parliament when passing the Act or which otherwise illuminate the mischief Parliament was dealing with. On this basis, in recent times reference has been made, in relation to 19th century Acts, to Colonial Office records, to despatches of Colonial Governors and to the opinions of Law Officers. [5] These instances are all the more interesting because they related to documents that on the whole emanated from the executive branch of government. In principle, such reference could not be confined to materials that are dignified by the

passage of time and that relate to Acts passed a long time ago, and there is no suggestion in the judgments that there is any such limit.

3.6 Reference to such materials will be facilitated where the Act expressly refers to them. Thus, the record of a premiers' conference has been looked at where the preamble of the Act referred to the conference. [6]

3.7 Also, if an Act purports to give effect to an international convention, the courts are at liberty to look at the convention in an endeavour to resolve any ambiguity. The convention may be referred to although it is not expressly mentioned in the Act that has to be interpreted and even where the Act is enacted before ratification of the convention. [7]

3.8 Under the international rules of interpretation, recourse may be had to the preparatory work (travaux préparatoires), leading to the conclusion of an international convention to confirm the meaning of the convention or where the meaning is otherwise ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. [8] There can be no doubt in principle that in interpreting an Act that implements a convention a court should have regard to the meaning the convention has under international law, and it seems inevitable that the courts will thereby become involved in examining travaux préparatoires. English courts have already given approval to cautious reference to such materials [9] and it seems highly likely that Australian courts will adopt a similar approach.

Parliamentary materials

3.9 The rule of exclusion: The established rule has been that courts will not look at proceedings in Parliament or to Parliamentary debates as an aid to the interpretation of a statute [10], though it is to be noted that this rule of exclusion was a relatively modern development in the legal system we have inherited from England. [11] Under the rule of exclusion as usually stated, no distinction is made between using such references to ascertain the mischief being dealt with and as direct evidence of the legislative intent.

3.10 References to Parliamentary debates: The fact, however, is that some Australian judges have, notwithstanding the currency of the rule of exclusion, referred to debates to ascertain the mischief, and the practice, though still exceptional, seems to be growing. [12] If reports which are even more removed from value as evidence of the intention of Parliament are admissible, the Minister's speech would be equally admissible on the same basis. [13] In at least one instance, Parliamentary debates have been used as direct evidence of the intention of Parliament, but with the caution that such evidence should be disregarded unless it clearly discloses the legislative intent. [14] The material in question consisted of the Minister's second reading speech introducing the Act being interpreted. If the rules of interpretation consist of the practice of judges on the matter, there is no longer any rule of absolute exclusion.

3.11 Amendments to Bills: It has been noted judicially that there could be profit in knowing what amendments were made to a Bill betwen introduction and passage. [15] Such amendments constitute legislative history in the strictest sense, and would provide cogent evidence of legislative intent. Existing provisions contained in section 7 of the Evidence Act 1905 facilitate proof of both the original Bill and any amendments that are made; the latter are published in the Votes & Proceedings of the House of Representatives and in the Senate Journals. In practice, such materials are normally excluded except for one major exception, consisting of the draft Bills leading to the enactment of the Australian Constitution. [16] However, legislative history has also been looked at to confirm whether a report which annexed a Bill was in fact used as the basis of the legislation. [17]

3.12 Explanatory memoranda: Explanatory memoranda are normally circulated in the Federal Parliament on the introduction of a Bill for the purpose of explaining to legislators the purpose and details of the provisions of the Bill. They are not prepared or settled by Parliamentary Counsel. They are available for purchase, and are used by legal publicists to explain the legal effect of legislation, particularly in the tax field. While it has been noted judicially in England that such material could be useful in assisting the courts in their task of interpretation [18], the general practice of the courts is to exclude such materials but there have begun to be exceptions. One recent High Court judgment referred to the explanatory memoranda

circulated in the Parliament and mentioned in the Minister's second reading speech. It was used as evidence of the mischief aimed at by the legislation. [19]

Legislative references

3.13 The above are instances where extrinsic materials have been referred to as a matter of judicial practice. Instances are now emerging of legislative authorisation of references to extrinsic materials in interpreting Acts.

3.14 A proposal to this effect was moved, but after debate withdrawn, in the United Kingdom Parliament in 1968 in the debate on the Theft Bill. [20] The proposed amendment was moved by Lord Wilberforce and read:

> "Reference may be made, for the interpretation of this Act, to the notes on Draft Theft Bill contained in Annexe 2 of Command 2977[i.e. the 8th Report of the Criminal Law Revision Committee] but this commentary shall be for guidance only and shall have no binding force."

In 1969, Lord Wilberforce moved to amend the Animals Bill 1969 (since lapsed) by adding the following [21]:

> "In ascertaining the meaning of any provision of this Act, regard may be had to the Report of the Law Commission on Civil Liability for Animals (Law Commission No 13)."

Professor Reed Dickerson has commented [22]:

> "This approach avoids many of the pitfalls of a blanket adoption of legislative history and, by referring to a specific factual study, impliedly supports the conclusion that the Bill is intended to implement the objectives of that study and not some variation of them. (Where a variation has been made, its extent could be defined.) Also, having predated the legislative process and been found to be satisfactory, such a study is likely to throw light mainly on legislative purpose and not to include the type of interpretative materials, often found in committee reports, that tend to compete with the working provisions of the Bill and whose self-serving aspects undermine their credibility."

3.15 The Members of Parliament (Register of Interests) Act 1978 of Victoria enacts a code of conduct for Members of the Victorian Parliament. The code is set forth in section 3(1) of the Act, and is Mosaic in its brevity though containing nine commandments rather than ten. Sub-section (2) provides:

> "(2) Without limiting the generality of the foregoing in the application and interpretation of the code regard shall be had to the recommendation of the Joint Select Committee of the Victorian Parliament appointed pursuant to The Constitution Act Amendment (Qualifications Joint Select Committee) Act 1973 presented to the Legislative Assembly on the 23rd day of April, 1974 (D.14/1973-74) contained in paragraph 12 of that report."

3.16 The Civil Jurisdiction and Judgments Bill 1982 which at the time of writing is before the United Kingdom Parliament deals in part with the implementation of certain European Conventions. Clause 3(3) of the Bill provideds that in interpreting the conventions - which are given the force of law in the United Kingdom by the Act - reference may be made to specified reports that were specially prepared to explain the Conventions. These reports go in some detail into the reasons for the various provisions in the Conventions. The sub-clause reads:

> "(3) Without prejudice to the generality of subsection (1), the following reports (which are reproduced in the Official Journal of the Communities), namely -
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> (a) the reports by Mr. P. Jenard on the 1968 Convention and the 1971 Protocol; and
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> (b) the report by Professor Peter Schlosser on the Accession Convention.
>
> may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances".

3.17 These are instances of provisions referring to specific extrinsic materials. The Ghana Interpretation Act, 1960 referred to further in Chapter IV contains a provision of a more general character, which comes from a time when there was a great deal of activity in the field of codification and re-enactment of law in Ghana. Section 19 provides:

> "19.(1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly."

3.18 This provision was itself explained in the memorandum to the Bill in the following terms:

> "Clause 19 is new to statute law and rationalises the present judicial principles governing the use of external aids to interpretation. The present rules regarding the use of text-books are vague and unsatisfactory. A Court may have regard to a text-book written by an author of established reputation. It is, in practice, much more difficult to gain acceptance for a living than for a dead author. The rational solution is to allow the Court to make formal use of text-books generally, just as they are in fact consulted by judges and practitioners for the purpose of informing themselves as to the law on a given subject, attaching such weight to the opinion of the writer as the merits of his book seem to warrant. For the same reasons, and because of the scarcity of text-books, it is proposed to extend the rule to the use of other works of reference, such as legal encyclopaedias and legal journals, to the reports of commissions of inquiry into the state of the law and to official memoranda. The reports of commissions of inquiry are of particular value in showing the state of the law prior to the making of the enactment in question and indicating the particular mischief and defect which the enactment was made to cure."
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> "It is expressely enacted that reference may not be made in Court to the debates in the National Assembly. There are two cogent reasons for their exclusion: first, it would not be conducive to the respect which one organ of State owes to another that its deliberations should be open to discussion in Court; and, secondly it would greatly interfere with the freedom of debate if members had to speak in the knowledge that every remark might be subject to judicial analysis."

3.19 The normal practice in Ghana is that the memorandum to a Bill is not published when the Bill becomes an Act although, in the case of the Interpretation Act, 1960, itself, the memorandum was reproduced and published together with the Act as a note on the Act. The operation of section 19 does not appear to have been the subject of any adverse comment. Especially in cases arising under the Ghana Companies Code, 1963, counsel have freely used the Report of the Gower Commission on the Administration of the Company Law.

3.20 The above examples serve to illustrate the possibility of reference to extrinsic materials on a more organised basis than at present, either generally or in selected cases. They provide a suitable introduction to the next chapter of this paper, which considers a number of proposals that have been made in that regard.

Chapter IV: Proposals for Use of Special Explanatory Material

A recurring theme

4.1 In discussions for reform in relation to extrinsic aids to interpretation, the proposal that has had greatest currency has been the use of an explanatory statement, either for all Acts or at least in specially selected cases. It should be added that some of the proposals have been tentative or exploratory in character.

1932 Report of the Committee on Ministers' Powers

4.2 In an annexe to the 1932 Report of the Committee on Ministers' Powers, Professor Harold J Laski suggested that a memorandum of explanation might set forth the purposes of a Bill and that authority could be conferred on the courts to utilise the memorandum as an aid in the work of interpretation, a judge not being bound thereby but having it available 'as an invaluable guide'. He said [1]:

> "In the absence of any guidance beyond the words of the statute itself, I venture therefore, to doubt whether the judge has in fact a sufficient clue to the policy which is behind the legislation. He must as Heydon's case sought to insist, take proper account of the end the statute was intended to serve. Our legal tradition assumes that training in the law alone will enable him to do this; a proposition I have difficulty in accepting. But I agree that the strength of that tradition would make it difficult to persuade the judiciary to embark upon the examination of material for the elucidation of that end to which neither judicial nor legislative authority attaches. Indeed the result of such an adventure might be to widen, rather than to narrow, the present discretion of the judge."
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> "But it seems to me that there is a middle way. If statutes do not plainly avow their intention by their words, the desirable thing is, I submit, to attach to them an authoritative explanation of intention. This could be done in one of two ways: (1) as was so often the case in the Tudor period, by way or preamble to the statute itself. There would here be set out, as clearly as draftmanship will permit, the end the statute has in view; or (2) by way of memorandum in explanation of the statute. It is well known that it has become increasingly the practice in modern legislation to issue to members of Parliament a memorandum in explanation of any complex legislation that is laid before them: a good example is the explanatory memorandum which accompanies the Children's Bill now under discussion by Parliament. The value of these memoranda is great, and they would, I suggest, be of real assistance to the judge in discovering the purpose the statute is intended to serve."

4.3 Professor Laski envisaged that the memorandum could be revised after a Bill had gone through all its stages, so as to take account of any changes made during passage.

1961 Australian Legal Convention

4.4 The former Chief Justice of the High Court of Australia, Sir Garfield Barwick, delivered a paper at the 1961 Australian Legal Convention which contained a survey of proposals in this area. [2] He referred to Professor Laski's proposal and to the Ghana Interpretation Act,1960 [3] and also to comments by Professor C.K. Allen referring to an article by Sir William Graham Harrison, former British Parliamentary Counsel. [4] Professor Allen said of the article [5]:

> "Any Bill which imposes a charge on public funds must, by the rules of the House of Commons, be accompanied by a memorandum of this kind, or by a White Paper in the case of a pure Money Bill. White Papers and Notes on Clauses are issued in connexion with certain highly technical measures. Sir William Graham Harrison asks, with much reason, whether the courts might not look at least for guidance to such carefuly regulated aids, without any serious danger of becoming lost in a wilderness of loose speculations. He asks, again, whether the courts could not, with propriety, take cognisance of certain Parliamentary rules of procedure which in some cases would be conclusive evidence of the true scope of statutes or clauses..."

"Whether or not new expedients would really assist interpretation would depend upon the spirit in which judges accepted them. If they were regarded as friends and guides in a process of interpretation which was liberal without being loose, they could render good service, and there seems to be no reason why they should not do so. If, on the other hand, they were regarded with suspicion (as some judges would certainly regard them) as being too vaguely 'extrinsic' or 'extra-legal', or even 'tendentious' or as 'usurpation', they would be either neglected or treated with hostility; and certainly, if they were regarded as additional specimens for the judicial microscope, they would merely add another stage to the rigours of literal interpretation."

4.5 Sir Garfield Barwick concluded [6]:

"The provision of a memorandum explanatory of a Bill well drawn may, of course, permit of a fuller expression of the purposes of the Legislature than the language of a properly drafted statute permits."
"The question I leave with you is, does the expedient which has been adopted in Ghana, and which is not so far from preamble, perhaps, not so far from other practices to which I have called your attention, offer any promise as an aid to interpretation - not, of course, as a binding command to the court, but as an assistance in times of ambiguity or doubt, or where policy may govern the meaning to be assigned to some operative words?"
"Who doubts that the ascertainment of the legislative intent is at times an exercise in divination? And is there not some room to increase the material by reference to which the judge may discover the parliamentary intent and not be left to imagine it, or to give rein to what he would himself do if he were the legislator, and legislating in the times that he knows, or perhaps in the times which he but remembers?"

1969 Report on the Interpretation of Statutes

4.6 The 1969 Report on the Interpretation of Statutes by the English and Scottish Law Commissions recommended legislation to encourage the preparation in selected cases of explanatory material for use by the court. To this end, it proposed standing legislation providing that, in ascertaining the meaning of any provision of an Act, the matters which may be considered shall include, inter alia, the following: any document which is declared by the Act to be a relevant document for the purposes of the legislation. It would also be provided that the weight to be given to any such matter was to be no more than is appropriate in the circumstances. [7]

4.7 The Report stated that the basic rationale of such a proposal is that an explanatory statement available with the Bill on its introduction could be a useful aid in determining the meaning of its provisions. It would enable the interpreter of an Act to take into account considerations which were before the legislature when the relevant Bill was under discussion. The Report considered that it would not give rise to the problems of availability that existed in connection with the use of parliamentary history of a Bill, as a statement could without undue difficulty be made available to the users of statutes. [8]

4.8 The Report points out that such explanatory statements would be even more useful if they could be amended at successive stages of the Bill's passage in the light of amendments made at the committee and report stages. It added that it would be more valuable still if the amended statement could be given some form of Parliamentary approval. Therefore, it considered possible procedures for amending the explanatory statement in the course of the Bill's passage and for obtaining a measure of Parliamentary approval for its contents, pointing out at the same time that these were matters ultimately for Parliament itself to consider and decide. The Report set forth four possibilitites with comments thereon [9]:

(a) The explanatory statement might be incorporated in the Bill by way of a comment on the Bill as a whole or on particular provisions or groups of provisions. It would be amendable in consequence of changes made in the substantive provisions of the Bill and would be transmuted into a statement of the intention of Parliament. Thus, it would in effect be treated in the same way as a preamble under present Parliamentary procedure, and would have

the same degree of authority on the courts. It is clear that this proposal would give the highest degree of Parliamentary approval to the statement. On the other hand it would involve a radical departure from the accepted conventions as to the content of preambles and it could not be assumed that Commons practice (which precludes amendments to preambles other than those consequential on amendments to the body of the Bill) would be appropriate. Accordingly, at least in a case where a relatively lengthy and detailed statement might be needed (e.g. a commentary on a code), the burden on Parliamentary time might be unacceptable.

(b) The statement, originally published with the Bill, might be revised after enactment by officials for the limited purpose of bringing it into line with the final Act. The revised statement, certified by the Clerk of the Parliaments, would be published by the Queen's Printer. The precedent for this responsibility would be the semi-editorial functions which draftsmen and Parliamentary officials already exercise in respect of such matters as headings, marginal notes and punctuation. But the precedent is inexact: the adjustment of an explanatory statement might have more far-reaching consequences on the ultimate interpretation of a statute and therefore require a closer degree of Parliamentary control.

(c) The statement, after adjustment by officials to take account of amendments to the Bill in each House, might be submitted for approval by each House on Third Reading. While this procedure would like proposal (a) ensure Parliamentary control, it might similarly raise problems of Parliamentary time, especially if provision were made for debating amendments to the statement.

(d) It might be the responsibility of the promoters (or of some specified authority, such as the Lord Chancellor) after the enactment of the Bill to lay before both Houses a draft of the adjusted explanatory statement, possibly under a procedure which would allow for approval with modifications. The pressure on Parliamentary time might be alleviated by the prior scrutiny of the revised statement by a Joint Committee of both Houses.

4.9 The Report went on to point out that, even if the explanatory statements were amended during the course of the Bill's passage and given some measure of Parliamentary approval, it would be no more binding on the courts than are other contextual material. It considered that initially at least such explanatory statements, having regard to the time and labour that would be involved if they had to be prepared for all legislation, should be used only as a selective device to be adopted in relation to Bills considered by their sponsors to be appropriate for this purpose. The Report had particularly in mind Bills giving effect to the reports of the Law Commission or to those of comparable bodies, such as the Law Reform Committee and the Criminal Law Revision committee. This would facilitate the preparation of a satisfactory explanatory statement. [10]

4.10 Finally, the Report acknowledged that a standing provision was not required in order to enable the Parliament to follow the recommended practice in relation to selected Acts. It would be possible to authorise reference to the explanatory statement in the particular Act in question. The Report added [11]:

> "But we think that anticipatory provision in a statute of a possible course of action by Parliament in a future statute may be not without value, particularly as regards bodies such as the Law Commissions; they may thereby be encouraged to prepare their reports in a way facilitating the preparation of an explanatory statement for use with Bills based on the draft clauses attached to the reports. Moreover, if a particular Bill included provision for an explanatory statement as an aid to interpretation, Parliament would have the advantage of an earlier debate on the technique in principle and be able to give more attention to its propriety in the particular instance."

1975 Report on the Preparation of Legislation

4.11 This Report was prepared by a committee appointed in the United Kingdom to review the form in which public Bills are drafted, with a view to achieving greater simplicity

and clarity in statute law. The committee considered the provision of explanatory material external to the text of an Act, either at the Bill stage or later, and commented [12]:

> "The degree of complexity in legislation and the specialisation of its subject matter vary greatly. So too.... does the nature of the audience to whom aids to its understanding have to be addressed. Whereas in all cases due weight must be given to the needs of Parliament, the range of other persons whose needs require to be taken into account may extend from members of the public who want a broad, general picture of what is involved, to specialised, professional or trade interests which require a highly technical and precise explanation to enable them to assess the detailed legal effect of the legislation. The question whether any, and if so, what kind of external explanatory material should be provided is best considered separately for each statute, and we are told by the Lord President of the Council that this is the Government's practice."

4.12 However, while making these recommendations about the development of specially prepared explanatory materials, the committee thought that in general such materials should not be declared to be admissible for the purposes of judicial interpretation. It said [13]:

> "to do so would be to create what Professor Reed Dickerson has called a 'split-level statute', of which only the primary level would have been fully debated in Parliament, and would, as a distinguished member of the judiciary put it, be asking the courts 'to ride two horses, to construe technical draftman's language and layman's language'."

4.13 That is to say, the committee took a different view from that recommended by the 1969 Report on the Interpretation of Statutes. It also differed from the 1969 Report in relation to the desirability of enacting a standing provision as proposed by the 1969 Report for facilitating reference to such explanatory material in particular cases. The 1975 Report considered that such a provision may be 'superfluous' in that Parliament can in any Act declare specific material outside the Act to be admissible for interpreting it. Also, however, it thought that this power should be exercised 'with restraint' for reasons of the kind quoted above. [14]

Suggestion by Sir Stanley Burbury

4.14 The use of an explanatory statement was taken up by Sir Stanley Burbury, on the occasion of his retirement as Chief Justice of the Supreme Court of Tasmania in 1973 to become Governor of Tasmania. He said [15]:

> "More fundamentally, I would like to have had the time to put into detailed form some ideas which I have had for many years about the court's proper role in the interpretation of Acts of Parliament. It is, I think, not sufficiently realised that with the ever increasing legislative activity of Parliament, the daily work of the courts is now much more concerned with interpretation of Acts of Parliament than with the common law precedents. The legal problems which mainly arise in the courts, are concerned with disputes about the meaning of words in statutes. Broadly, the courts are still bound to interpret statutes according to their literal construction, and words remain our masters - even though they are but labels for ideas. We are still beset by the demon of formalism in this area of the law. The application of traditional principles of interpretation frequently leads to decisions which laymen most understandably regard as technical rather than just. I have thought for a long time that without sacrificing the basic principle that Parliament makes the law and the court interprets and applies it, it should be possible by appropriate legislation to emancipate the courts from the tyranny of words in their literal meaning and to enable the courts on a broad basis of justice to give effect to Parliament's purpose. A proposal by the late Dean Roscoe Pound has always appealed to me: that there should be attached to every Act of Parliament an official memorandum approved by Parliament itself, setting out the purposes of the legislation, and that the court should be required to interpret the Act in the light of those purposes, even if departure from literal meanings of words is involved."

Attorney-General's speech: "Ruling the Regulators"

4.15 In an address by the Attorney-General, Senator Durack, to the Australian Society of Senior Executives in Sydney on 19 September 1980, the theme of the use of an explanatory memorandum was again taken up:

> "The draftsman's search for exactness of expression is due to the fact that legal rights and duties depend upon which side of a given statutory expression a particular set of circumstances falls. It is also very much related to our system of government under which the courts, as a non-representative body, should not make but only interpret the law. The greater the generality of expression the greater the discretion in the courts. Nevertheless exactness of expression may produce complexities. Complexity in turn creates its own difficulties in interpretation of the law. This is particularly so in the case of regulatory legislation. It is also of course the case with the Income Tax Act. The truth is that the capacity of words to convey meaning is finite."
>
> "And so the draftsman has a problem. If he chooses a simple but general expression it may be that circumstances never intended by Parliament to be caught by the legislation will in fact be covered."
>
> "Suggestions have been made that the problems of complexity could be minimised to some extent if legislation is expressed in more general terms setting out the purpose to be achieved and the courts were left to work out the details. Courts would have to be permitted to use to a greater extent than at present extrinsic aids to interpretation."
>
> "I would not wish to comment upon that possibility at this stage except to note that we would not want a proliferation of material for the courts' consideration. But I do wonder if a more selective application of this idea would not be of greater effect."
>
> "There is particular legislation, regulatory in nature, where we might be able to reduce complexity by the insertion of a provision in the Act directing the courts to have regard to an explanatory memorandum which would be submitted to the Parliament and attached to the legislation."
>
> "The words in the memorandum would not be controlling. But it may be that the draftsman when faced with the difficult choice in inherently complex legislation of either using general language which might however be construed too widely or of introducing lengthy qualifying provisions could feel some security in choosing the former course if he knew that a memorandum approved by Parliament would embody its intent. The courts, although not bound, would be obliged to have regard to it in construing the general provisions."

4.16 In commending the Attorney-General's suggestion, the Australian Law Journal made one caveat, namely that the courts should be debarred from construing the explanatory memorandum itself; 'the memorandum should be regarded as self-speaking'. [16]

Professor D. C. Pearce's comments

4.17 Professor D.C. Pearce commented on the proposal, in a seminar on Statutory Interpretation in March 1981, as being one that addressed an issue that had to be faced up to by law makers, by policy makers and the courts. [17] He said [18]:

> "What one needs to recognise is that there are problem areas for draftsmen and interpreters. One of the difficulties about purposive approaches, and I think that it is one of the difficulties that objects clauses give rise to, is....you've got a 200 page Act and you are supposed to say in five lines what its purpose is and hope that it has some magical effect on interpretation..."
>
> "I thought that it was interesting that the Australian Law Reform Commission Report on Alcohol, Drugs and Driving had a try at this by including in the draft Ordinance a provision that said that in

interpreting this Ordinance and the regulations a court may have regard to the report by the Law Reform Commission on alcohol, drugs and driving tabled in the House of Representatives on such and such a day. That provision was not in the Act or the Ordinance, and I wonder why. I think that, if one is going to oblige courts and users of legislation to place meanings on expressions of this vague nature, then surely they ought to be given some guidance about the intended effect of the words. ICI [19] would, I am sure, dearly love to know before they got underway whether their salt extraction process was mining because obviously the taxation implications would be enormous. I think that we've got to realise that by use of these sorts of vague expressions, many and perhaps unfair obligations are being imposed on persons who are subject to the Act....."

4.18 He referred to the problem of who was to issue and approve such a memorandum [20]:

"Ideally of course it should come from the Parliament, because it's a document that is relating to an Act which the Parliament has passed, and the UK Law Commission talks about this and talks in terms of the possibility of it being in a sense passed or approved in the same way as the Bill is, and I think that's totally unrealistic - you are just not going to find Parliamentary time for that sort of document that has got to be debated the same way as the Act. The UK Law Commission has proposed a variation that may be possible and that is that the document be prepared in advance and as a statement of the Government's policy, the Government's understanding or explanation of the Bill, and that it only needs to be altered if the Bill is altered in the course of the passage through the Parliament. As a further variation, it might be possible to table the statement and to have it subject to disallowance or referral to a Parliamentary Committee. I think these are possibilities....."

"Another alternative is of course just for the Government to issue a statement of its understanding and explanation of legislation..."

4.19 The comments went on to refer to objections to the proposal [21]:

"I think these are the three most important ones. One is the question of the workload in the preparation of a document of this kind...I would have thought...that it would be based on the notes on clauses or the explanatory memorandum which is prepared in regard to legislation..."

"The other, and I think perhaps the major problem, or perhaps there are two major problems, is what is often termed the split level statute - that you are really going to end up with two documents that you have to look to, to find your law. The Law Commission recognised this and had this to say about it and I think it's worth just reading the passage in its entirety, if you'll bear with me. It says 'Even if the explanatory statement were amended during the course of the Bill's passage and given some measure of Parliamentary approval, it would be no more binding on the courts than much other contextual material, for example, other provisions of the statute, earlier legislation dealing with the same subject-matter and non-statutory material dealing with the mischief which under the existing law the courts are entitled to take account of. It might, however, give assistance to the courts in making more explicit the contextual assumptions which at present have to be gleaned sometimes with great difficulty from a number of sources of varying reliability. No interpreting device can relieve the courts of their ultimate responsibility for considering the different contexts in which the words of a provision might be read and in making a choice between the different meanings which emerge from that consideration. The existence of an explanatory statement would not prevent a court from regarding the meaning of the words in an Act or provision in the light of other relevant contexts as so compelling that it must be preferred to a means suggested by the statement. In other words the Act obviously must prevail. [22] But if you've got the capacity to go one way or the other then the statement will give the guide to the direction to proceed.

"The third major problem is the question of the prolongation of court hearings and of the task of interpretation. Would the position be that all counsel would have to analyse two documents with the meticulous degree with which counsel presently go through an Act? I wonder if they would? I think that what these sorts of documents would certainly be wishing to achieve is to avoid much of the speculation that is presently engaged in by counsel when looking at a particular Act."

4.20 Professor Pearce referred to two further points. One was the question of accessibility. First, explanatory memorandum of the kind proposed would have to be available with the Act as a published document, in contrast to Parliamentary debates of Bills which are not so available. Secondly, it was not fair or proper to ask the courts to interpret Acts setting out general principles without guidance as to what those general principles were intended to cover or without bounds on the direction in which they could point the legislation. [23]

Chapter V: Wider Use of Other Aids?

Evaluation of extrinsic aids

5.1 An American commentator has proposed four factors to evaluate extrinsic aids [1]:

(a) Credibility (reliability): This includes an inquiry into whether a given source is a reliable indication of legislative action or understanding. Also, is the material analytical and explanatory, as opposed to being politically or otherwise potentially biased? The character of the source is an important consideration.

(b) Contemporaneity: The Bill and the extrinsic material should be so close that the extrinsic aid actually plays a part in the thinking process of the legislators during the enactment process.

(c) Proximity: This has been defined as the closeness of the aid to the 'essence of the legislative action'. Thus, a legislative committee that considers the Bill would be closer to the legislative process than an outside organisation.

(d) Context: This is less clearly defined but seems to refer to whether the extrinsic material contributed to the historical context in which the statute was made.

Not all factors need be present. Also, there is overlapping between some of them.

5.2 These factors have been developed with reference to the United States situation, where free use is made of legislative history in interpreting statutes, but they are a helpful guide in evaluating the materiality and usefulness of extrinsic aids in the Australian context, provided one further factor is added:

(e) Accessibility: This means that the material is not only publicly available but also readily available to the users of the Act, their advisers and all courts.

Parliamentary debates

5.3 Considered in the light of some of these factors, Parliamentary debates obviously merit consideration. It has been said [2]:

"If we are to take into account evidence of Parliament's intention, the first thing we must do is to reverse our present practice with regard to [not] consulting Hansard."

If reports tabled in Parliament have value as evidence bearing on legislative intent, Parliamentary debates have at least equal value. Also, if reference to Parliamentary debates is excluded, how the courts ascertain whether a report or other contextual

material formed the basis of the legislation becomes something of a mystery. Some reference to Parliamentary proceedings may be necessary. This seems a more satisfactory course than relying on a presumption as to what occurred. [3]

5.4 A question has been raised, however, about the reliability of resort to Parliamentary debates in Australia compared to the quite different legislative environment in the United States where legislation emerges in committee reports for which it is said there is no local equivalent. [4] This perhaps overrates the guidance provided by the American materials and underrates the assistance that can be derived in Australia from, for example the Minister's second reading speech and, where it exists, a report of a select committee on the legislation. Few in Australia would disagree, however, with the view that at the most they should be used only where clear and convincing guidance can be derived from them. Also, unless special compilations of the Parliamentary history were available as in the United States, the objective of accessibility, as explained above, would not begin to be met.

5.5 Reference should also be made to a more intangible consideration referred to in the memorandum to the Ghana Interpretation Act, 1960, which expressly prohibited reference to debates in the Legislature. [5] It based this exclusion on two reasons, the first of which was that it would not be conducive to the respect which one organ of State owes to another that its deliberations should be open to discussion in court. In a debate in the House of Lords in 1980, the Lord Chancellor said it is a matter of 'comity' between the courts and the Houses of Parliament not to refer to Hansard. [6]

Amendments to Bills

5.6 Reference to amendments to Bills would satisfy most of the factors referred to, including reliability, since they represent a formal decision of the whole House concerned. However, though publicly available [7], they would not be 'accessible' unless a special compilation of the legislative history that included them was freely available. The guidance provided would be limited to the scope of the amendment or amendments, and where there were no amendments no guidance would be provided.

Reports and other contextual material of a non-Parliamentary nature

5.7 The relative remoteness of this material from the law-making processes has already been noted in this paper, as have the refinements and differences of views as to the manner of its use. Wider reliance on this source, where it was available, would make it necessary to resolve these difficulties and differences. 'Accessibility' will often be a real problem. It is possible, and proper, for appellate courts to consider and evaluate the relevance of such material, but it offers little or no guidance to the ordinary users of an Act. It is of the nature of this material, and indeed also of legislative history considered in the earlier part of this chapter, that they are not self-explanatory and require an often difficult exercise of evaluation. The 'raw materials' of which they consist are by themselves deficient as a means of communication between the law makers and the citizen, and they are not even satisfactory as a general means of communication between the legislator and his or her professional adviser.

Objects clauses

5.8 The Committee on the Preparation of Legislation which reported in the United Kingdom in 1975 seems to have been persuaded by Professor Reed Dickerson away from the idea of a special explanatory statement. [8] The Committee favoured instead [9]:

- drafting Acts in a simpler, less detailed and less elaborate style;
- setting out general principles in the body of a statute and detailed provisions of a permanent kind in schedules; and
- including statements of purpose in objects clauses when they are the most convenient method of clarifying the scope and effect of legislation.

The Committee concluded that interpretation of Acts drafted in a simpler, less detailed and less elaborate style than at present, would present no great problems provided that the underlying purpose of the general principles of the legislation were adequately and concisely formulated. The real problem was one of confidence. Would Parliament be

prepared to trust the courts? The Committee itself thought that judges could be trusted to give effect to clear statements of principle. [10]

5.9 The views of Professor Reed Dickerson that use of any explanatory memorandum would produce a sort of 'split level' statute have already been referred to. [11] He also considered that anything that can be stated helpfully outside the statute, including the purpose of the statute and examples and needed explanations, can be stated as helpfully and with greater reliability inside the statute. [12]

5.10 While there are examples of innovative drafting that included examples and illustrations, they have proved to be most exceptional. The most famous example is Lord Macaulay's Indian Penal Code, drafted between 1835 and 1837, and now in force in most of the Asian countries that are or were members of the Commonwealth as well as in parts of Africa. The Consumer Credit Act 1974 of the United Kingdom contains a schedule with examples, explanations and illustrations of the effect of the Act. The advantages of using such techniques in appropriate cases have perhaps been ignored or undervalued, or both. Even if, however, the sponsors and draftsmen of Acts could be presuaded to use them more, the question remains whether they would provided the flexibility afforded by the use of special explanatory material, for example to state the contextual assumptions of the Act, to set forth its object or purpose, to identify the 'mischief', or to indicate other matters that guide and assist the user of an Act in making decisons under it.

Chapter VI: Explanatory Memoranda - A Possible Procedure and Programme

A possible procedure

6.1 Drawing on the discussions to date, the following is an outline of a possible procedure that could be adopted for selected cases where it was decided to have an explanatory memorandum to be used as an aid in interpreting an Act:

(a) Purpose: This would need to be clearly identified beforehand. It could include the following:

(i) to state the purpose or object of the Act -
- where the purpose or object can be appropriately set out in the Act itself, that course may be preferable to a special explanatory memorandum
- however, cases could arise where a memorandum would be preferable e.g.
  - where there are diverse objects in the Act
  - when the history of the topic is relevant
  - when there are other contextual assumptions that are

(ii) to explain the particular provisions, particularly those of a complex, novel, or specialised character, e.g. by -
- identifying the 'mischief'
- explaining the rationale of the provision illustrating its application

(iii) to give guidance for the application in particular cases of general provisions.

(b) Standards of preparation: High standards should be set and should include accuracy, impartiality and completeness.

(c) Preparation: While the responsibility for preparing such a memorandum should not rest with Parliamentary Counsel, they would need to be aware at the earliest possible stage of the proposed use of a special explanatory memorandum, and have an opportunity to comment on it.

(d) Circulation: The memorandum would be circulated with the Bill, with a suitable reference being made in the Minister's second reading speech.

(e) Approval by Parliament: Approval is important if the memorandum is to be seen as possessing Parliamentary authority. The call on Parliamentary time might be alleviated by prior scrutiny by a committee which could also be responsible for examining adjustments required by amendments.

(f) Issue: It is basic to the proposal that the memorandum should be freely accessible. This would mean that it should be available with the Act to which it relates.

(g) Weight to be given to the memorandum: It should be made clear that the memorandum is not part of the Act, but if Parliamentary approval is part of the scheme it would be appropriate to require that, in interpreting the Act, regard is to be had to the memorandum. The alternative is to provide that regard may be had to it.

A possible programme

6.2 Initially, at least, such a procedure should be used only for selected Bills considered by their sponsors to be appropriate for this purpose. The most likely possibilities may be Bills to give effect to a report by the Law Reform Commission or by a similar body. The time and labour involved in preparing the memorandum would be considerably lightened by the existence of the relevant report. If possible, the report should be prepared in a form suitable for ready adoption as an explanatory memorandum.

6.3 As part of such a programme, the insertion of a standing provision in the Acts Interpretation Act 1901 to provide for the use by the courts of such memoranda should be considered. Such a provision would apply only to a particular Bill where Parliament so decided but, as was pointed out by the 1969 Report on the Interpretation of Statutes, Parliament would then have the advantage of an earlier debate on the technique in principle, and be able to give more attention to its propriety in the particular instance. Also, the appropriate procedures of each House and both Houses jointly for dealing with the approval and amendments of memoranda could then be settled before a particular instance arose. The nature of those procedures is of course a matter for the Houses to consider and decide.

Concluding comments

6.4 A vital factor would be the spirit in which the courts accepted such aids to interpretation. The ultimate success of the programme would depend on the extent to which the procedures involved were seen to be, and were, means of providing more answers than the present system does to the problems of interpreting statutes.

Notes and references

Chapter I

1. Fielding v Morley Corporation [1899] 1.Ch.1, at pp.3-4. See also the paper by A.R. Neaves in Another Look at Statutory Interpretation, AGPS, Canberra, 1982,pp.10-11.

2. Neaves, ibid, at pp.11-12.

3. Acts Interpretation Act 1901, s.13(1).

4. Ibid.,p.13(2)

5. See Deputy Federal Commissioner of Taxation v Carpenter [1959] VR470,at p.471.

6. Acts Interpretation Act 1901, s.13(3).

7. '....the day is long past when the courts would pay no heed to punctuation in an Act of Parliament': Marshall v Cottingham [1981] 3 All ER 8, at p.12. See also Hanlon v Law Society [1981] AC124 at pp.197-8, and Gibbs A.C.J. in Ryde Municipal Council v Macquarie University (1978) 139 CLR 633, at p.636. The better view is

that marginal notes and section headings are not to be rejected completely (R v Schildkamp [1971] AC1, at pp.10,28;cf at p.20) but the contrary view was acted upon in Bradley v Commonwealth (1973) 128 CLR 557, at p.577, relying on s.13(3) of the Acts Interpretations Act 1901 (note 6 above). See the discussion in D.C. Pearce, Statutory Interpretation in Australia, 2nd edn. Butterworths, Sydney, 1981, para.73.

8. See, for example, Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151

9. Similar provisions to s.15AA have long existed in other common law jurisdictions. See the speech by R. Jacobi, M.P., in H.ofR., Weekly Hansard, 10June 1981, p.3437, referring to the provision appearing in the Canadian Revised Acts 1886 (see now Interpretation Act, 1967-68, R.S.C. 1970,c.1-23, s.11) and to the new Zealand Interpretation Act, 1888 (see now Acts Interpretation Act, 1924, s.5(j))

10. Senate, Daily Hansard, 27 May 1981, pp.2166-7.

Chapter II

1. See Holmes J, Collected Legal Papers, Harcourt, Brace & Howe, New York, 1920, p.207: "...we do not inquire what the legislature meant; we only ask what the statute means". Cf the same Judge in Johnson v United States (1908) 163 Fed R. 30, at p.32. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: "We see what you are driving at, but you have not said it, and therefore we shall go on as before."

2. See for example, Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151, at pp.156-7 and 169-71.

3. Lord Blackburn in River Wear Commissioners v Adamson (1876-77) App. Cas 743, at p.763

4. Lord Reid in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg [1975] AC591, at pp.613-4.

5. Attorney-General v Prince Ernst Augustus of Hanover [1957] AC436, at p.463.

6. Merchant Service Guild of Australasia v Archibald Currie & Co. Pty Ltd (1908) 5 CLR 737, at p.745.

7. (Law Com No.21)(Scot. Law Com. No.11) para.16.

Chapter III

1. (1584) 3 Co. Rep. 7a; 76 E.R. 637.

2. See Wacal Developments Pty Ltd v Realty Developments Pty Ltd (1978)140 CLR 503, at p.509, and also the discussion in Pearce , op. cit., para.81.

3. Murphy J. in Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd (1975) 132 CLR, 323, at p.332, and see also Viscount Dilhorne and Lord Simon of Glaisdale in the Black-Clawson Case [1975] AC 591, at pp.622-3, 647,651.

4. Pearce, op. cit., para.81.

5. Ward v R (1980) 142 CLR 308, esp. at pp.322, 332; Wacando v Commonwealth (1981) 37 ALR 317, esp. at p.328.

6. Deputy Federal Commissioner of Taxation v W.R. Moran Pty Ltd (1939) 61 CLR 735.

7. Pearce, op. cit., para.103.

8. Article 32 of the Vienna Convention on the Law of Treaties, Australian Treaty Series, 1974, No.2.

9. Fothergill v Monarch Airlines [1981] AC 251.

10. South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd (1977) 139 CLR 449. The rule of exclusion has been recently reaffirmed in England by the House of Lords: Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042.

11. P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1961) 4Univ QLJ, p.1.

12. See Pearce, op. cit., para.78, and now Mason J. in Wacando v Commonwealth (1981) 37 ALR 317, at pp.335-6 and in Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 39 ALR 521, at pp.533-4. Not all the instances cited are recent. See, for example, Sydney Municipal Council v Commonwealth (1904) 1 CLR 208, at pp.213-14; Engineers Case (1920) 28 CLR 129, at p.147;T.M. Burke Pty Ltd v City of Horsham [1958] VR 209, at p.216.

13. See Mason J in the cases cited in note 12.

14. Sillery v R (1981) 35 ALR 277, at pp.232-3 (per Murphy J).

15. Per Barwick CJ in S.A. Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd (1977) 139 CLR, 449, at p.457: "....I would wish to say that whilst I am quite clear that no relevant assistance can be obtained from speeches in the legislature, even from the second reading speech of the Minister introducing the Bill, I can see the possibility of relevant profit in knowing the changes which take place in the Bill between its introduction and its passage. These, unlike the speeches, result from action of the legislature itself. The changes may well be classified as travaux preparatoires to which heed is paid in other systems of law. However, authorities of long standing would not allow of this possible advantage being taken."

16. Tasmania v Commonwealth (1904) 1 CLR 329, at p.333; Seamen's Union of Australia v Utah Development Co., (1978) 144 CLR 120, at pp.142-4 (per Stephen J).

17. Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583, at pp.595-600.

18. Lord Simon of Glaisdale in Ealing London Borough Council v Race Relations Board [1972] A.C. 342, at p.361.

19. Mason J in Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 39 ALR, at pp.533-4.

20. See 290 HL Debates, cols 897-913.

21. Referred to in Reed Dickerson, The Interpretation and Application of Statutes, Little, Brown & Co., Toronto, 1975, pp.166-7.

22. Ibid.,p.167.

Chapter IV

1. Cmnd. 4060, See pp.136-7(Annexe V).

2. Sir Garfield Barwick, "Divining the Legislative Intent", (1961) 35 ALJ 197.

3. See para.3.17 ante.

4. Sir William Graham Harrison, "Criticisms of the Statute Book" [1935] Journal of the Society of Public Teachers of Law, pp. 9-45.

5. C.K. Allen, Law in the Making, 6th edn. OUP, 1958, pp.513-15.

6. Barwick, ibid.,p.204.

7. (Law Com. No.21)(Scot. Law Com. No.11), para.81(d) and Appendix A.

8. Ibid.,para.63

9. Ibid.,para.69

10. Ibid.,para.71

11. Ibid.,para.72

12. Cmnd. 6053,para. 15.2.

13. Ibid.,paras.19.18.19.24.

14. Ibid.,para.19.41.

15. [1973] Tas LR, pp.xiii-xv.

16. (1981) 55 ALJ,p.176.

17. Paper by D.C. Pearce, "The use of Explanatory Memoranda", in Another Look at Statutory Interpretation, AGPS, Canberra, 1981, p.22

18. Pearce, ibid.,pp.22.23.

19. Commissioner of Taxation v ICI Australia Ltd (1972) 127 CLR 529.

20. Pearce, ibid.,p.25.

21. Pearce, ibid.,pp.25-6.

22. (Law Com. No.21)(Scot. Law com. No.11), para.70.

23. Pearce, ibid.,p.26.

Chapter V

1. W.K. Hurst, "The Use of Extrinsic Aids in Determining Legislative Intention in California; The Need for Standardized Criteria" (1980) 12 Pacific LJ, 190.

2. Lord Reid in Black-Clawson's Case [1975] AC 591, at p.614.

3. Compare the differing approaches of Gibbs CJ and Mason J in Wacando v Commonwealth (1981) 37 ALR, 317 at pp.328, 335-6.

4. Stephen J in Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583, at pp.600-1.

5. See para. 3.17 of this paper.

6. 405 HL Debates, cols 303-4.

7. In Votes & Proceedings of the House of Representatives and the Senate Journals, see para.,3.11 of this paper.

8. See para.4.12 of this paper.

9. Cmnd.6053. paras 19.41,11.25,11.8.

10. Ibid., para 19.41.

11. See para. 4.12 of this paper.

12. Reed Dickerson, The Interpretation and Application of Statutes, Little, Brown & Co., Toronto, 1975, p.173.