Preliminary Paper No.8

LEGISLATION AND ITS INTERPRETATION
Discussion and seminar papers

The Law Commission welcomes your comments on the methods of interpretation and other issues raised in the Discussion Paper and seeks your response to the questions raised.

These should be forwarded to:

The Director, Law Commission, PO Box 2590, Wellington

by Tuesday, 28 February 1989

December 1988
Wellington, New Zealand

Preliminary Paper/Law Commission Wellington, 1988

ISSN 0113-2245

This preliminary paper may be cited as: NZLC PP8

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the Law of New Zealand. Its role is also to advise on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

The Rt Hon Sir Owen Woodhouse, KBE, DSC - President
Jim Cameron CMG
Sian Elias QC
Jack Hodder
Sir Kenneth Keith KBE
Margaret A Wilson

The Director of the Law Commission is Alison Quentin-Baxter. The offices of the Law Commission are at Fletcher Challenge House, 87-91 The Terrace, Wellington. Telephone (04)733-453. Postal address: PO Box 2590, Wellington, New Zealand.

Use of submissions

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request, and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.

Other Law Commission Publications:

REPORT SERIES

NZLC R1	Imperial Legislation in Force in New Zealand
NZLC R2	Annual Reports for the years ended 31 March 1986 and 31 March 1987
NZLC R3	The Accident Compensation Scheme (Interim Report on Aspects of Funding)
NZLC R4	Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme)
NZLC R5	Annual Report 1988
NZLC R6	Limitation Defences in Civil Proceedings

PRELIMINARY PAPER SERIES

NZLC PP1	Legislation and its Interpretation: The Acts Interpretation Act 1924 and related legislation (discussion paper and questionnaire)
NZLC PP2	The Accident Compensation Scheme (discussion paper)
NZLC PP3	The Limitation Act 1950 (discussion paper)
NZLC PP4	The Structure of the Courts (discussion paper)
NZLC PP5	Company Law (discussion paper)
NZLC PP6	Reform of Personal Property Security Law (report by Prof J H Farrar and M A O'Regan)
NZLC PP7	Arbitration (discussion paper)

TERMS OF REFERENCE

The Minister of Justice has made a reference to the Law Commission on legislation and its interpretation. The reference is as follows:

Purposes of reference

1. To propose ways of making legislation as understandable and accessible as practicable and of ensuring that it is kept under review in a systematic way.

2. To ascertain what changes, if any, are necessary or desirable in the law relating to the interpretation of legislation.

Reference

With these purposes in mind, the Commission is asked to examine and review -

1. The language and structure of legislation

2. Arrangements for the systematic monitoring and review of legislation

3. The law relating to the interpretation of legislation

4. The provisions of the Acts Interpretation Act 1924 and related legislation

and to recommend changes, as appropriate, to the relevant law and practice.

S U M M A R Y O F C O N T E N T S

C O N T E N T S

TABLE OF INTERPRETATION PROVISIONS

INTRODUCTION

Legislation - the role of the Commission

Legislation is central to our legal system. It is the dominant source of law. It has an essential and pervasive role in our national life. It is accordingly not surprising that it has a central part in the Law Commission Act 1985 and in the work of the Law Commission. So the Commission is to advise on making the law as understandable and accessible as practicable and on making its expression and content as simple as practicable. And the reference made to the Commission by the Minister of Justice on legislation and its interpretation gives the matter further and particular emphasis.

This volume includes the proceedings of a seminar organised by the Commission on the broad topic of legislation and its interpretation. The papers and discussions at the seminar are to be seen along with related developments in New Zealand and elsewhere. The New Zealand developments include

- the discussion paper and questionnaire on The Acts Interpretation Act 1924 and Related Legislation (June 1987) NZLC PP1 issued by the Law Commission; the Commission has had a number of valuable responses

- the adoption by Cabinet of the Report of the Legislation Advisory Committee, Legislative Change : Guidelines on Process and Content (August 1987) setting out standards which are to be met in the preparation of Bills

- the enactment in July 1988 of the Imperial Laws Application Act 1988 and related legislation; that Act provides a definitive list of English and Imperial Legislation which continues to be part of the law of New Zealand; the Law Commission's first report, Imperial Legislation in Force in New Zealand (NZLC, R1, 1987) proposed changes in the list of statutes included in the Bill then before Parliament (almost all being accepted by Parliament), proposed a more direct, clear statute

(a recommendation which in large measure was also accepted) and printed the texts of the relevant legislation

- the further development of the legislative work of parliamentary select committees (in part following the change in standing orders in 1985), including the Regulations Review Committee

The papers in this volume mention some of those matters and refer to other important developments as well.

Interpretation in the courts

Prominent among other developments are the many cases decided by the courts involving statutory interpretation - some of them very important. A scan of 119 cases in recent parts of the New Zealand Law Reports shows that in only about 27 of them was legislation not relevant, in 17 it was of relatively minor importance, and in the remaining 75 it was central to the case (although in a number the issues are of application and the exercise of statutory discretions rather than of interpretation). The cases on interpretation raise a great variety of questions, for instance about the meaning of "the principles of the Treaty of Waitangi", the interpretation of legislation by reference to relevant international conventions, the use of Hansard, of departmental reports submitted to a select committee, of the reports of a law reform committee and of the Criminal Code Commissioners, of the explanatory note to a Bill, the use of the principle that statutes are always speaking, as well as recurrent issues about strict liability under criminal statutes, the meaning of tax statutes, and limits on statutory powers in the administrative law area.

The extent of legislation

Such a heavy statutory component in the reported cases - and we suspect in the practice of many lawyers as well - is not surprising when the size and scope of the statute book is considered. Each year over 3000 pages of legislation - subordinate as well as primary - are passed. (Twenty years ago the figure was about the same, 30 years ago about 2200, 40 years about 1550 and 50 years ago 1200.) Much of it does of course replace earlier legislation, but the bulk of the statute book has undoubtedly been increasing and along with it other (probably more important) factors such as the increase in the complexity of life, in disputes and in litigation. So too has the likelihood of controversy about the meaning and effect of relevant legislation.

Legislative and judicial changes

Surveys of such litigation indicate not just the range and variety of disputes about statutory interpretation but also

suggest changes in judicial approaches to such matters. Those or similar changes have been occurring in other common law jurisdictions, in some cases in association with changes in the legislation relating to interpretation. Those judicial and legislative changes are one major subject of this publication. We see one important reason for this publication - the seminar and related meetings - the wider dissemination of knowledge of the developments, especially in the courts. As Justice Frankfurter indicated in his famous reflections on the reading of statutes, important lessons in this area are gained by observing the Judges at work: "the answers to the problems of an art are in its exercise" (1947) 47 Columb L Rev 527. A second reason for the publication is to raise specific questions about legislative directions or guides to those interpreting statutes.

Those changes - indeed the whole question of interpretation - have also been discussed by many commentators who, especially in the United States, increasingly draw on the parallels to literary interpretation. (A recent notable contribution is by Ronald Dworkin, the Professor of Jurisprudence at Oxford and Professor of Law at New York University, The Law's Empire (1986).) That writing offers important lessons.

Expertise in communication

The lessons arise from the simple fact that legislators are like novelists or poets or advertising copy writers ... in one basic sense. They are trying to speak to an audience. They are attempting to communicate a message. The lawmakers' message is usually different in its effect from the others - it has legal consequences. But it uses essentially the same methods - of words and grammar - and uses them in the same or a similar societal context. In a general sense at least the ways of understanding the messages of the poet or Parliament, the conveyancer or the copywriter should be the same. The Solicitor-General of the United States has recently made the point very elegantly in an essay on Shakespeare's "Sonnet LXV and the 'Black Ink' of the Framers' Intention" (1987) 100 Harv L Rev 751.

Consider the example given by Chief Parliamentary Counsel of the electoral forms - forms of great legal and constitutional importance in which the voter is directly engaged in exercising critical democratic rights through the legal means established by Parliament (p 80). That case demonstrates the range of professional advice - of form designers as well as of lawyers and politicians with experience of many elections - that can help improve that particular legislative product. The courts too have shown that they can help give effect to what they see as the

broader democratic purpose of such legislation - they can collaborate with the legislature in the working out of that purpose, e.g. Wybrow v Chief Electoral Officer [1980] 1 NZLR 147, CA. But the preferable course is obviously to try to get such forms (and the related law) right at the outset.

Among the lessons that can be learned from the wider experience of communication are accordingly such technical ones as form design, including such matters, also discussed in this volume, as the setting of words and sentences on the pages of the statute book. (The Commission's Reports on Personal Injury: Prevention and Recovery (R4) and Limitation Defences in Civil Proceedings (R6) demonstrate different methods of setting out legislation.)

Broader lessons are about the reading of a text in its wider context - the context provided by related writing, the (changing) language, and the society in which the text has been written and is being read. We mention these matters in this rather general way in part to indicate the advantages that wider experience and learning about language offer to us and in part to warn against the temptation, often seen in discussions of statutory interpretation, to plunge immediately into the middle of technical rules (or 'so called "rules"' as Lord Evershed once said, "The Impact of Statute on the Law of England" (1956) 42 Proc B A 247).

We mention these matters as well to emphasise that the writing and the reading of legislation are not separate activities. They can be - and usually should be - collaborative. They can however involve tensions, particularly when there are values external to the text to which the reader wants to give weight. And those values may have differing significance in different areas of law and for different types of statutes. Consider for instance the specific approaches to interpretation which are found in criminal law (as appears from the relevant paper in this volume), taxation, property, and administrative law.

Constitutional principles

These different approaches often reflect values about state power and individual rights or interests (especially the latter). They may often also reflect basic constitutional principles. One central one is that the law must be known - or at least capable of being known to a professional adviser. That is in some ways a counsel of perfection since language and human imagination cannot capture all the detail in advance. And in any event, even if they could, later experience and the particular facts will often be considered to be properly relevant to the specific judgment to be made in the instant case. Consider for instance the very broad direction in the Family Protection Act 1955 that if a

testator does not make "adequate provision" for the "proper maintenance and support" of those protected by the Act the court is to make such provision "as it thinks fit".

The law establishing criminal offences provides a clear contrast. In that area legislation and our treaty obligations say alike that individuals must be able to act with full advance knowledge of their criminal liability stated in statute and that retrospective criminal liability is unjust, Criminal Justice Act 1985, s4, International Covenant on Civil and Political Rights, Article 15. Similar contentions are made - without the same wide support - about commercial transactions and the incidence of taxation. They relate closely to the emphasis of the Rule of Law in one of its many versions on the certainty of the law and to its distrust of arbitrary discretions. They relate as well to the practical and just day by day operation of the law. In the words of a major American writer we cannot have a moral obligation to obey a legal rule that does not exist, or is kept secret from us, or that comes into existence only after we have acted, or is unintelligible, or is contradicted by another rule of the same system, or commands the impossible, or changes every minute, Lon Fuller, The Morality of Law (1964) 39.

Such an emphasis on the law being known, on its being accessible, is relevant not just to the substantive law. It is relevant as well to the law about the law, as indeed Professor Fuller's list indicates. Consider the rules requiring publication of legislation and providing for reprints and revisions, and the law about the approaches to interpretation. A failure to print the law or a perverse set of interpretation rules can defeat the communication which is necessary to an effective and fair legal system. We have already emphasised that matter for instance in our discussion of the temporal scope of legislation and its publication in the paper on the Acts Interpretation Act (paras 26-89). Publication is discussed further in this volume which of course also addresses the question of approaches to interpretation.

Some questions for the reader

It is to approaches to interpretation that we turn in the next paper. In it we ask two major questions about the general legislation relating to interpretation.

- **Should an interpretation statute give a general direction or general guidance to those interpreting legislation, for instance along the lines currently provided by section 5(j) of the Acts Interpretation Act 1924 or in other ways (para 10-45)?**

- **Should it regulate the material additional to the printed words of the statute to which the interpreter may have regard (para 46-62)?**

New Zealand and most Canadian jurisdictions have for the last century or so given positive answers (at least in part) to the first and, recently, some Australian legislatures have given positive answers to the second. The next paper also asks related questions about provisions currently included in Section 5 of the Acts Interpretation Act (paras 63-110).

Comments on the papers and answers to those particular questions are very welcome. Please send them to

The Director
Law Commission
PO Box 2590
Wellington, New Zealand

by 28 February 1989.

With the material it has already gathered on the other issues arising from the Acts Interpretation Act (including the valuable responses to the first discussion paper), the Law Commission will then be in a position to complete its proposals for a new interpretation statute. While important, such a statute is of course only part of the Commission's continuing work on legislation.

PART A

METHODS OF INTERPRETATION

DO LEGISLATIVE DIRECTIONS HAVE A ROLE?

Introduction

1 The reference from the Minister of Justice asks the Law Commission to examine and review

> the law relating to the interpretation of legislation, and
>
> the provisions of the Acts Interpretation Act 1924 and related legislation.

and to recommend changes, as appropriate, to the relevant law and practice.

2 The Commission's discussion paper, Legislation and Its Interpretation : The Acts Interpretation Act 1924 and Related Legislation (1987) NZLC PP1, does not fully address central provisions of the Acts Interpretation Act which relate to general approaches to interpretation (p.viii; for brief discussions of Section 5(d)-(h) and (j), see paras 90, 93, 94, 95 and 99). It is much more concerned with other aspects of the Acts Interpretation Act - such as those which regulate the entry into effect and temporal scope of legislation and its publication and proof, which provide a standard dictionary for recurring words, and which confer powers.

3 As the preface mentions, the Commission considered that the general matter of approaches to interpretation called for more extensive treatment, in part through the preparation of papers on it and on related drafting questions, and also through wider discussion. Accordingly, it arranged a seminar held in Wellington on 18 and 19 March 1988 at which the papers contained in this volume were presented.

4 The papers survey relevant developments in New Zealand and elsewhere, especially in Australia, relating to the drafting of legislation and its interpretation. Debate at that well attended seminar and subsequently at Law Society seminars led by Professor John Burrows throughout New Zealand has also helped to further define the issues and to suggest ways of resolving them. (See his Recent Developments in Statutes and their Interpretation, New Zealand Law Society, 1988.) As we have already said, the

seminars and this publication have a second function. Because legislation can give only very limited help to the process - indeed the art - of interpretation, the Commission considers that one important thing it can do is to bring together current developments in that whole process and comments on them. A wider knowledge of such developments is probably of more importance than the detail of particular legislative directions about interpretation. Thus there have been significant changes in approaches to interpretation in several jurisdictions in recent years without any legislative prompt leading to those changes. We may often gain in considering these issues from an examination of the interpretation process elsewhere in the law (contracts and wills for instance) and beyond it. To the opinion of Justice Frankfurter quoted in the preface can be added that of Lord Wilberforce: "It is a matter for educating the Judges and practitioner and hoping that the work is better done." He did not think that statutory interpretation could be helped by general law reform, 277 H L Debs (Ser 5) col 1294 (1966). But it is the case that legislative reform has been considered and in some countries adopted. Parliaments have indicated how their legislation is to be interpreted.

5 Our main concern in this paper is with such legislative directions. (They are set out in an appendix, pp 239-245.) In the next paragraph we identify the two main questions about such legislative material relevant to interpretation. But to stress the point the legislative answers can at best cover only a very small part of the field. It is commonplace that the process of interpreting legislation cannot be captured in a few rules which easily and automatically produce results in disputed cases. In the first place even one particular rule or principle or approach will not always produce a clear answer: does the "natural and ordinary" or "plain" meaning of "vehicle" include a ship or aircraft or skateboard? or to take a recent case, is a dredge a ship under the Admiralty Act? The comment will usually be made that such a question is meaningful only if the context of the word in the legislation and perhaps more generally, its purpose, or both are also known. That comment indicates three (and not just one) elements possibly relevant to interpretation - (a) the (ordinary) meaning of the words, (b) the context (statutory and wider) in which they are used, and (c) the purpose of the provision. As well, the comment raises a further issue, the relative weight to be given the different elements. Thus if the "plain" meaning of a word is narrow and the context or purpose suggests a wider meaning which element is to be preferred? Should there be a standard answer to that question - a rule about priority - or will the answer vary according to other relevant principles and approaches (such as the protection of the liberty of the subject)?

6 In proposing a new interpretation statute, the Commission has to answer two principal questions. The first concerns the general character of the interpretative task, and the second the materials to be considered by the interpreter:

(1) What, if anything, should an Interpretation Act say about the basic approach or approaches to interpretation? What should it say about the (ordinary) meaning of the words, the context of the legislation and its purpose? Should it, for instance, direct those interpreting statutes to have regard to the purpose of the particular statute? (The present section 5(j) of the Acts Interpretation Act 1924 does that, of course.) Should it direct or encourage or allow those interpreting statutes to protect other values in our legal and broader political system - values which might contradict the purpose of the particular statute? (Consider a direction to interpret legislation consistently with the principles of the Treaty of Waitangi and the proposal made by the Justice and Law Reform Committee in its September 1988 report for an interpretative Bill of Rights, 1988 AJHR I 8C.)

(2) What, if anything, should the Interpretation Act say about the material which the interpreter can or cannot use? The present section 5 for instance says that a preamble is part of the Act in issue "intended to assist in explaining the purpose and object of the Act", while on the other hand "the division of any Act into parts ... and the headings of such parts ... shall not affect the interpretation of the Act".

7 Our two questions are about a general interpretation statute applying across the whole statute book. A particular statute may sometimes answer or at least address those two questions. Thus specific statutes increasingly contain statements of purpose or object in their titles, in a preamble, or in sections early in the Act or in the relevant part (see respectively the Matrimonial Property Act 1976, the Maori Language Act 1987, the Law Commission Act 1985, s.3, and the Labour Relations Act 1987, ss.3, 36, 58, 98, 132, 133, 186, 209, 230). It must be implicit that those interpreting such statutes are to have regard to the formal statements of purpose. And, to move to the second question, particular statutes in New Zealand and elsewhere require or allow reference for the purpose of their interpretation to a relevant treaty, to interpretations

given elsewhere, and to interpretative material prepared by an international organisation (e.g. Civil Jurisdiction and Judgments Act 1982 (UK), s3, Customs Act 1966, s.19D(2) (NZ) as enacted in 1987, and International Commercial Arbitration Act 1986 (Alberta), s.12(2); s.12(1) essentially follows the wording of article 31(1) of the Vienna Convention or the Law of Treaties, quoted in para 15 below).

8 The previous paragraph makes the important point that the two general questions asked in paragraph 5 must be considered not only in themselves but in particular contexts. In many cases the specific legislation may resolve the matter. And the two general questions are also linked. The second after all is about the means to be used to pursue the ends indicated by the answers to the first question.

9 There are important links as well between the drafting of legislation - included in the first item in the Ministerial reference - and approaches to and methods of interpretation. Para 7 mentions one aspect of this link. We return to the drafting connection later (para 111).

The general interpretative task: A purposive approach v constitutional principles?

10 One hundred years ago Parliament directed interpreters to adopt a purposive approach. In its 1888 version, the present section 5(j) of the Acts Interpretation Act 1924 read as follows:

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning, and spirit. (Interpretation Act 1888, s.5(7) emphasis added.)

With the smallest of drafting changes - the deletion of "which" (twice) in 1908, and of the comma between "enactment" and "according" in 1924 - this provision has been carried forward to the present.

11 The only earlier provision of a comparable scope in the New Zealand statute book was section 3 of the Interpretation Ordinance enacted in 1851 which provides an interesting contrast to section 5(j):

> the language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof.

12 A provision like section 5(j) appeared as early as 1849 in legislation in Upper Canada and since then Canadian provincial legislatures and the Canadian Federal Parliament have enacted similar provisions. The Uniform Law Conference of Canada at its 1984 Conference recommended for enactment the following provisions:

> 10. Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> Chaque texte est censé reparateur et s'interprète de la façon juste, large et liberale la plus propre à assurer la réalisation de son objet.
>
> (Uniform Interpretation Act, Proceedings of the Sixty-Sixth Annual Meeting 125)

13 Of the Australian colonies only South Australia appears to have had a similar provision; and it has since abandoned it in favour of the recent Australian model, first introduced by the Federal Parliament in 1981. The model has two parts - the first purposive, the second about "extrinsic" materials. We consider the second in the following section of this paper. The first provision, enacted in 1981 as s.15AA of the Commonwealth Acts Interpretation Act 1901, reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether the 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.

It follows quite closely one of the provisions proposed by the Law Commissions in Britain in 1969, the Law Commission and the Scottish Law Commission, The Interpretation of Statutes (1969) 51.

14 The parallel state provisions are the Interpretation of Legislation Act 1984 (Vic), s.35(a), the Interpretation Act 1984 (WA), s.18, the Acts Interpretation Act 1915 (SA), s22, and the Acts Interpretation Act 1987 (NSW), s.33. Section 15AB of the Commonwealth Act, enacted in 1984 and discussed later (paras 46-62), refers as well to the "ascertainment of the meaning of the provision" as a central element in the process of interpretation. At the

Commonwealth level, there was also an associated amendment in 1981 to the taxation legislation, see e.g. (1981) 55 ALJ 175, 711 and 887. While both sets of legislation were still in the House the High Court refused to give a literal interpretation to provisions of income tax legislation which produced a capricious and irrational result and instead gave effect to its object, Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151. See also Richardson, "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Australian Tax Forum 3.

15 The texts of the Australian provisions and the debates that led to them are related to and parallel closely similar debates in the 1950s and 1960s in the international legal community about the interpretation of treaties. The Vienna Convention on the Law of Treaties adopted in 1969, in its articles on the interpretation of treaties, first sets out the "General rule of interpretation":

> 31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The article goes on to define the context rather restrictively, but by contrast it does not give any indication of where information about the object or purpose is to be found. In that second respect it is the same as section 5(j) and its equivalents, and similar to section 15AA of the Australian Act which rather more directly indicates that the search for purpose or object can go outside the text of the Act. (For a valuable account of the process that lead to the interpretation provisions and commentary on them see Sir Ian Sinclair The Vienna Convention on the Law of Treaties (2nd ed 1984) Ch V; see also the instructive commentary by the International Law Commission to the draft provisions which were adopted virtually without change in the Vienna Convention, 1966 Yearbook of the ILC, Vol II, 217-223.)

16 The above account and list of legislative change may give the wrong impression. Many jurisdictions similar to ours contain no provisions like section 5(j) (nor, to anticipate, provisions dealing on a broad basis with the use of materials extrinsic to the Act). That was the general Australian case until very recently and is still the case for Queensland, Tasmania, the Australian Capital Territory and the Northern Territory (whose Law Reform Committee has just reported against changes of the 2 types adopted elsewhere in Australia Report No.12, Report on Statutory Interpretation (December 1987)). It remains the case in the United Kingdom, notwithstanding the proposals of the Law Commission there and the subsequent efforts of Lord Scarman and others (see para 13 above); and such legislation appears

to be rare if not non-existent in the United States and in other parts of the Commonwealth. Accordingly it is not surprising that the valuable draft Interpretation Bill prepared by Mr G C Thornton for the Commonwealth Secretariat does not contain model provisions on the two principal matters we are discussing.

17 The statutory provisions which we have already set out raise several questions, including the following

(1) are they accurate statements of approaches to, or rules of, interpretation which are in fact used or should be used by those interpreting legislation?

(2) are they helpful statements (for even if they are accurate they might have no practical consequences)?

(3) do they have significant omissions?

18 The papers delivered to the seminar, other writing on the New Zealand, Canadian and international provisions and especially the experience of the courts are relevant to those questions. It would be impossible to summarise that material. Rather we draw on some of it to illuminate the answers to the questions.

19 We begin with an aspect of question 3 about omissions. The aspect is indicated by the heading to this section of the paper. We must state - even if we cannot resolve - a continuing conflict in the role of a court interpreting legislation. All the emphasis in the provisions - Canadian/New Zealand, international, Australian - is on giving effect to the meaning of the terms of the particular legal instrument itself in its context according to its purpose. They refer in no way at all (at least not expressly) to relevant values or principles which stand independently of the legislation (or treaty) and which indeed might contradict it. And yet of course a large part of the process of interpretation does have specific regard to such external values and principles. (Canada of course does have a supreme law entrenching fundamental values.) As the paper on criminal law shows, provisions creating criminal offences will generally be read in the context of the body of general principles about criminal liability. The interpreter might refer to such general principles because, for instance, statute directly requires that (as with the statutory reservation of common law defences in the Crimes Act 1961, s.20), or the statute uses words which are drawn from the common law and continue to have a common law meaning (such as "wilfully" and "recklessly"), or the central question of liability cannot be resolved simply by looking at the words in question, even in their statutory

context and by reference to their purpose. In that last case the general body of law about the factual and mental elements of a crime has to be employed. That general body of non-statutory law is assumed to exist and to underlie the particular legislation creating the offence.

20 The relationship between particular statutes and general law also frequently arises in institutional and remedial contexts. Consider a breach of a statutory requirement -

- can a person aggrieved by that breach seek an injunction or damages although the legislation expressly provides only for criminal prosecution?
- does the breach make invalid the relevant decisions or actions, or can the breach be excused in some way?
- in which court and subject to what procedures can a prosecution be brought?

21 The last question will of course be answered by specific statutory provisions and section 5(j) of the Acts Interpretation Act may be relevant to the second. But often the second and generally the first will be handled under the common law. Several, among them the Law Commissions in the United Kingdom, have argued that Parliament should deal with the first (see Report, referred to in para 13 above, paras 38, 78, 81(c) and draft clause 4, p.51). That matter in general is however left to the courts. The discussion of generally relevant legislation mentioned in Part X of the discussion paper on the Acts Interpretation Act 1924 is also relevant.

22 Many other parts of the law also have their own developed body of approaches and understandings. Consider property law, taxation or family law. And the law of judicial review can in part be seen as an appendix - a sophisticated one - to the law of statutory interpretation. That last example helps illustrate the conflict set up in the heading to this part of the paper. Take Professor Burrows' example of "privative clauses" (p 129 below). On their face they appear to be designed to prevent or at least limit review by the courts of administrative decisions. What may be involved in their interpretation is restraining, rather than giving effect to, the meaning of the legislation in context according to its purpose.

23 The most famous modern case on "privative clauses", Anisminic v Foreign Compensation Commission [1969] 2AC 147, illustrates the conflict very well. On the one side is the general judicial attitude to such provisions as shown by the

very words judges and lawyers use - the clauses appear to "deprive" the court of jurisdiction or to "oust" that jurisdiction (even if the courts had never been involved in the area) - and by the traditional narrow judicial reading of such provisions which gives them very limited, if any, effect. That reading is supported by references to the constitutional right of citizens to go to court to have their rights protected and their legal disputes determined.

24 On the other side is the wording, context and apparent purpose of the particular statute. After the Second World War countries settled some of their disputes about the taking by one country of the property of the citizens of the other by way of a lump sum payment. That was taken in full settlement of the individuals' claims against the taking state and it was then for their state to arrange for its allocation among the claimants. To determine the distribution among successful claimants to such funds the United Kingdom Parliament established the Foreign Compensation Commission (consisting of members appointed by the Lord Chancellor) . That distribution would often be on a pro rata basis. It also provided that determinations of the Commission were not to be "called in question in any court of law" (Foreign Compensation Act 1950, ss.1, 2, 3 and 4(4)). Seven years later the Franks Committee in its Report on Tribunals and Inquiries recommended that no statute should contain such words as those just quoted purporting to oust the prerogative remedies, used for the control of administrative powers (Cmnd 218, para 117). Parliament so provided in the Tribunals and Inquiries Act 1958, s.11(1). That is to say it acted in conformity with the traditional position of the courts and legal principle. But in the same section it maintained specific parts of the earlier protective legislation:

> (3) Nothing in this section shall [i] affect section 26 of the British Nationality Act 1948 [which provided that Ministerial and similar decisions under that Act were not to be subject to review] or [ii] apply to any order or determination of a court of law or [iii] the Foreign Compensation Commission or [iv] where an Act makes special provision for application to the High Court ... within a time limited by the Act.

25 The fourth exception gives priority to particular legislative provisions already made for access to the courts and the second shows that the basic removal of privative clauses does not extend beyond tribunals to courts. The first and third are therefore the only real exceptions to the wholesale repeal of provisions which protect the decisions of tribunals and officials from court review (or purport to) and indeed the Commission is as at 1958 (and

1963 when the Commission ruled in the Anisminic case) the only tribunal so protected. To the extent that lines are drawn (as they are) in deciding on a new and very limited scope to the protection provided by the "privative clause", what significance is to be given to that legislative history? How is that narrow exception written in very direct terms to be seen against the general removal of the protective provisions and in the light of the long established attitude of the courts?

26 The particular answer given in the House of Lords is not important for us here (consistently with that long established attitude it read the provision narrowly). What is important is that such conflicts between particular statute and general legal or constitutional principle do arise in the interpretative process and that they will continue to. Can general legislation help in an appropriate way to resolve them? A provision like section 5(j) pushes the matter in just one direction, that of the legislation's purpose. The practice of the courts can do that too.

27 Indeed the courts might move in such a direction and away say from an interpretation which prefers common law rights without any legislative direction or encouragement. Thus Lord Scarman speaking in Melbourne in September 1980 said that while Australian Judges had hesitated to apply a purposive construction, "in London, no-one would now dare to choose the literal rather than a purposive construction of a statute: and 'legalism' is currently a term of abuse", (1980) 7 Monash U L Rev 1, 6 [emphasis added]. At that time the Australian reform had not been introduced, although as we have already noted (para 14) attitudes did appear to begin to change significantly just a few months later.

28 A provision like section 5(j) has moreover never been seen in a general way as precluding arguments of the kind that succeeded in Anisminic. In that sense it is not a complete statement of approaches to legislation. For 2 leading observers of the English scene

> the judges seem to have in their minds an ideal constitution, comprising those fundamental rules of common law which seem essential to the liberties of the subject and the proper government of the country ... they do not override the statute, but are treated, as it were, as implied terms of the statute (Keir and Lawson Cases in Constitutional Law (5th ed 1967) 11)

That comment is made of course in a country without a provision like section 5(j). But Professor Burrows' comments (approving for instance of narrowing readings of privative clauses) and those of Mr Justice Gallen, along with say the development of the law of judicial review in

New Zealand, do not suggest that in that respect the position is necessarily different for a country that does have a purposive direction. For centuries the judges have been willing in greater or lesser degree to protect the "ideal constitution".

29 At bottom the matter is constitutional. Parliament, composed of the representatives of the people, has enacted the legislation in issue. It has done this usually on the proposal, and always with the agreement, of the Ministry which in turn has the confidence of the House. It has very large powers to make law. Democratic principle argues that its will is to be given affect to. On the other side are enduring principles (or at least so they appear to the courts) which are not to be ignored, at least unless Parliament has made itself very clear. The ideal constitution, the implicit Bill of Rights, can of course be made explicit, either in an entrenched form limiting the power of Parliament through ordinary process or in any interpretative, presumptive form as in the proposal just made by the Justice and Law Reform Committee of the House (Final Report ... on a White Paper on a Bill of Rights for New Zealand, 1988 AJHR I 8C). Such a Bill, according to the Committee, could give a direction along these lines:

> The interpretation of an enactment that will result in the meaning of the enactment being consistent with this Bill of Rights shall be preferred to any other interpretation.

30 Such a direction to the courts would relate to the civil and political rights included in the original (entrenched) draft - a set of rights in significant part based on New Zealand's treaty obligations as well as on the principles contained in Magna Carta and the Bill of Rights of 1688. See A Bill of Rights for New Zealand, 1985 AJHR A 6, paras 3.4, 4.21-23, 4.26, and the commentary to the draft Bill included in part 10, with its frequent references to the International Covenant on Civil and Political Rights. As Professor Burrows indicates, the courts are already increasingly willing to have regard to such obligations in interpreting legislation.

31 Four possibilities present themselves -

(1) a direction along the lines of section 5(j) to interpreters to have regard to the purposes of the legislation

(2) a direction to interpret legislation consistently with listed rights

(3) both or

(4) neither

32 No one position is plainly correct. Courts can and have adopted either purposive or protective approaches (or both at the same time) without legislative direction, the choice between conflicting approaches will often have to be left to them, and at times such directions appear to have had little effect. They have also adapted their methods of interpretation over time without the direction having altered. This can be seen in New Zealand from recent judgments such as Northern Milk Ltd v Northland Milk Vendors Assn (1988) 7 NZAR 229, CA, and in and from the writings of Ward, Burrows and Granville Glover, referred to by Burrows. Furthermore even if the courts are alert to such directions, they may not in fact be helpful. So against the decisions of the Canadian Supreme Court using the purposive provision referred to in this volume can be set another recent judgment in which the provision was not helpful, Re Trustees of St Peter's Evangelical Lutheran Church and the City of Ottawa (1983) 140 DLR (3d) 577, very interestingly discussed by Eric Tucker (1985) 35 UTLJ 113. Very often the statute will indicate no purpose, or at least none that is sufficient to the task (the judges, it has been said, need a detailed guide rather than merely a general sense of direction). And to turn to protective statements, much legislation of course does not trench on protected rights. Too rapid an adoption of "an approach" may also deny or diminish the significance of the particular statute in its specific context and the words used in it.

33 And yet strong arguments can be made for directions or guides of both types. Those in the rights protection category are well rehearsed in the writing on bills of rights, and are being discussed in another context as well. Accordingly only a very brief mention is needed here - New Zealanders have fundamental rights and freedoms which are broadly agreed and arise from our strong and diverse heritage and which should in general be protected against the power of the state, at least as exercised through the usual majority decision making.

34 The basic constitutional argument for the section 5(j) type of direction is the democratic one. The courts are to give effect to the law enacted by Parliament. True, it is for the courts to determine the meaning of the words that Parliament writes. That is their constitutional role. Are directions or guides of the section 5(j) type needed or helpful in that context? Does experience show that they can in some situations provide a useful reminder of the need of the interpreter to pursue the purpose of the law maker? That reminder can refer the interpreter to the relevant statements of the law maker's purpose and meaning. It can help rebut the unthinking use of presumptions which might be

used to defeat Parliamentary purpose. The direction can enhance the likelihood of an interpretation consistent with democratic theory.

35 The experience of many courts supports that view. So in Canada to the Ombudsman cases (discussed below, pp207-228) might be added another recent unanimous judgment of the Supreme Court of Canada in which the Canadian Human Rights Act was in issue. Parliament had included a specific statement of purpose in the Act. The Court, again speaking through Dickson CJC, made the following comment on "the proper interpretive attitude towards human rights codes and acts":

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a Court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem common place, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act, R.S.C. 1970, c.I-23, which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s.11 of the Interpretation Act, as amended. As E.A. Driedger, Construction of Statutes (2nd ed 1983) p87 has written:
>
> > "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."
>
> The purposes of the Act would appear to be patently obvious, in light of the powerful language of s.2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, inter alia, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.
>
> (CNR v Canadian Human Rights Commission (1987) 27 Adm LR 172, 191-192)

(The Court referred to earlier judgments in which the special character of the legislation was emphasised.)

36 A final point is that an adverse inference might also be drawn from a repeal of such a broad direction after it has been on the statute book for 100 years. Our inclination is accordingly to propose that our interpretation legislation should continue to include a provision with some similarities to section 5(j). We recognise however that the arguments to the contrary are weighty. We welcome comment on this issue.

37 How should such a provision be worded? Should we retain the Canadian drafting of 140 years ago? The Canadians have themselves of course shortened it (see para 10 above). The various texts include 4 common elements -

- the idea of interpretation (or construction),
- the meaning (or purport) (ordinary or natural or special or unadorned) of the terms,
- the context of the terms or of the legislation, and
- the purpose (or object or spirit) of the legislation.

Before we take up those matters and suggest a text, we mention two matters not included in that list. The first is the remedial emphasis in the first part of the Canadian/New Zealand provisions. The passage is interesting for its preambular character (the New Zealand provision still runs on in its second part "and shall <u>accordingly</u> receive such fair, large, and liberal interpretation ..."). That is of course unusual in legislative provisions. The provision in any event directs that the intent (or object in the present Canadian formulation) is to be given effect to in the interpretation of the terms of the legislation. Meeting that direction must require reference to the mischief and to the remedy. There is also the difficulty that not all legislation <u>is</u> remedial. Some is merely declaratory or consolidating. Accordingly we do not think that the preambular language is needed if there is sufficient reference to purpose in the text.

38 A second exclusion from the list of 4 common elements is the word "intention". The word is often associated with the legislators or legislature (as in "the intention of the legislators"). This is problematical as a matter of fact (e.g. different knowledge, interest, and for that matter intent, unforeseen situations and changing attitudes and technology) and the word does not, in any event, appear to add anything to the other elements: is not the relevant intention (so far as it actually exists) to be found

manifested in the "words" in "context" and reflected in the "purpose" of the text (however that is to be discovered)?

A proposed purposive provision

39 We propose the following wording -

> Every enactment is to be interpreted so as to ascertain the meaning of its terms in their context and in the light of its purpose.

40 We comment first on the provision as a whole and then on some of its elements. This draft contains the 4 items mentioned in para 37 - interpretation, the meaning of the terms in question, the context, and the purpose. In the first and last cases one word has been preferred to another: "interpretation" is more commonly used than "construction", and the adjectival form of the noun "purpose" gives it an edge over "object". The text does not give any particular weight to the 3 subject matters of the process of interpretation - the meaning of the words (or terms), the context, and the purpose. Again much is left to the interpreter (although see para 44). Against that however the very idea of interpretation with its emphasis on the meaning of the text does indicate a limit on the process. The more direct and less cluttered reference to "meaning" and the inclusion of "context" give the suggested provision, we think, a usefully wider content than the present section 5(j).

41 The word "enactment" requires some explanation . As the Discussion Paper on the Acts Interpretation Act 1924 shows (paras 10, 19, 55, 68) we need greater consistency in usage in an interpretation statute (and probably more widely) in references to legislation - Act or regulation, whole or part ... . Our present approach is to use the word "enactment" in a general way as meaning, according to context, an Act or a set of regulations (or indeed a set of Acts or of regulations or an Act and the regulations), or a Part, or a section (or regulation) (or a group of provisions), or a subsection (or clause) ... . Accordingly, in the present context, "enactment" might relate say to environmental statutes as a group, or the Town and Country Planning Act 1977, or one part of the Local Government Act 1974 (given that that large Act has quite disparate parts and purposes), a group of sections, a section, a subsection or even a group of words - and that is so as well of the final words: "in the light of its purpose". The reference is to the purpose of the enactment as variously understood. The Canadian Uniform Interpretation Act might provide a useful precedent. It defines "enactment" as "an Act or a regulation or any portion of an Act or regulation".

42 Our next comment on the text is on an omission - of

"fair, large, and liberal". We have 2 reasons for not including those words. First, they do not appear to have helped in a significant way. They do not appear to add to that part of the direction emphasising object and spirit. The second reason is that some times a purposive interpretation will be narrower than one emphasising just the (literal) meaning and that may be difficult to reconcile with a "large" (or even a "liberal") interpretation, e.g. Holy Trinity Church v United States (1891-2) 143 US 457, Mullan v O'Rourke [1967] NZLR 295, 298.

43 Some have suggested that the reference to meaning is not necessary since it is implicit in the very word "interpret" (commonly defined as to explain the meaning of something ...). Further, the reference might give undue emphasis to the literal meaning of the words. An answer to the second point is of course the reference in the proposed text to purpose. And to the first it can be said that the terms and their meaning are at the heart of the enterprise of interpretation.

44 The word "context" is deliberately left without qualifying or defining words. The context might be other provisions in the particular statute or in the statute book as a whole, the wider legal context (including the earlier state of the law), or the wider societal and historical context. And the purpose might also appear from an extensive range of sources. Before we move onto that matter we stress the preposition in the final phrase. The meaning of the words is to be determined in the light of the purpose. The purpose does not determine the interpretation in an unfettered way. As Justice Frankfurter said in his 1947 paper, while the interpreter is not confined to the text, the interpreter is confined by it.

45 We now turn to consider the materials the interpreter may use in finding the meaning in context and in the light of the purpose, or, we should say for reasons given in the preface and repeated in paras 47 and 48, aspects of that matter.

Material relevant to interpretation

46 Section 5 of the Acts Interpretation Act 1924 lists some aspects of the printed Act that may and may not be taken into account in interpreting it: the preamble (s.5(e)); divisions and their headings (s.5(f)); marginal notes (s.5(g)); and schedules and appendices (s.5(h)). Other interpretation statutes with their origins in the last century contain similar provisions. (See e.g. clauses 11 and 12 of the Uniform Interpretation Act adopted in 1984 by the Uniform Law Conference of Canada, para 12 above.)

47 The Vienna Convention on the Law of Treaties regulates the matter on a broader basis, and, in the last few years, several Australian jurisdictions have moved in a similar way, using identical phrasing on some of the critical matters. The relevant provisions are set out in an appendix (pp 241-245). Those legislative changes in some cases follow changes in judicial practice. Before entering the detail of the judicial and legislative changes and at the risk of wearisome repetition, we again stress the broader view of the reading of statutes and the process of interpretation made in the preface. We have found there is a danger in immediate immersion in particular debates about say the use of Hansard and of committee reports. Any reading of any text draws on material outside the marks on the page, on knowledge of the language (its structure and system, its grammar, the meaning of words, possibly assisted by dictionaries), the society, the particular subject matter, the development of the law in that area, and the broader constitutional and political principles against which the text is to be read. (Once again we see the close link between the two questions we have stated.)

48 Very often that general knowledge and experience is simply taken for granted and used. Indeed lawyers and judges (and other users of the legislation) could not put it to one side. They know the language, the society, its history and the law (both generally and in the particular area). The extent of that knowledge - especially of the law in a particular area - will of course vary from one person to another. It is however to be supplemented by evidence and counsels' argument, and by the reading of law reports, text books and other relevant materials. The extent of that usage and the extent of express references to it in judgments obviously vary from one time to another and from one context to another. Those variations in practice can sometimes be important for the style and scope of reasoning and for the decisions reached. The Ombudsmen cases help make that point (pp below). The point we wish to stress here is however that for much of the time this usage is inevitable and non-controversial.

49 It is against that wider context that the recent limited legislative and judicial developments are to be seen. The developments relate to (1) a relatively narrow range of material, (2) which may possibly be used only in defined circumstances, and (3) possibly for specified purposes only, and (4) in respect of which questions of proof may arise.

(1) <u>The material</u>

50 The material in issue in the recent judicial and legislative developments relates closely to the preparation of the particular statute being interpreted, especially

(a) reports from which the statute arises

(b) the Bill as introduced into the House and as amended in the course of its progress

(c) the explanatory note to the Bill

(d) speeches made in the course of Parliamentary debate or the Bill (in particular of those with some responsibility including the Minister in charge of the Bill and the member who chaired a select committee which considered it)

(That list might be compared with the matters mentioned in paras 47 and 48 above.) Judges in New Zealand and Australia, with or without the aid of legislation, have used such material. As Professor Burrows notes, New Zealand Judges have done this without indicating why they have abandoned long recognised prohibitions (pp 134ff below).

(2) The circumstances

51 The Australian legislation, following the exact words as well as the policy of the Vienna Convention on the Law of Treaties, allows reference to supplementary means of interpretation including the legislative history in 3 circumstances - (1) where that history confirms the meaning already reached by looking at the text in its context (defined narrowly) and in the light of its purpose; (2) where that confined process leaves the meaning ambiguous or obscure; and (3) where the confined process leads to a meaning which is manifestly absurd or unreasonable. That is to say the legislation states a threshold which is also to be found in some judgments. In many cases however courts have used a great variety of contextual material without mentioning or claiming to overcome such a threshold.

(3) The purposes

52 That legislation and those judgments also indicate the purposes of the reference to the material - to confirm the meaning of the text in the first case and to determine the meaning in the other two. In some jurisdictions the courts, but no Parliaments that we are aware of, have imposed another limit on the purpose : the material could be used to identify only the mischief which the law was designed to remedy, but not the remedy (and its meaning) itself. That line is sometimes impossible to maintain, and has been abandoned by some who promoted it.

53 The Australian legislation sets out 2 negative balancing factors - one of principle, the other more practical - which the interpreter is to have regard to in

deciding whether to consider the material or the weight to give to it. The first factor goes back to the function of interpretation and to the constitutional importance of the words Parliament uses -

> the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provisions taking into account its context in the Act and the purpose or object underlying the Act

That essentially recalls, perhaps with a change of emphasis, the 3 main elements involved in interpretation - the (ordinary) meaning of the words, the context (perhaps limited to the Act), and the purpose of the Act. It is also a practical factor, avoiding the inconvenience and cost of a wider search.

54 The other factor is of a more focused practical kind -

> the need to avoid prolonging legal or other proceedings without compensating advantage.

The advantage is of course in the interpreter having on hand material relevant to the determination of meaning. Its value to the court can also be enhanced and some practical problems relieved by the kinds of procedural steps by way of the giving of notice to which Mr Brazil, Secretary of the Commonwealth Attorney-General's Department, Canberra, calls attention.

(4) Proof of the material

55 In general, the material mentioned has been introduced in argument and used without any question about its proof. But questions have been and can be raised as the Clerk of the House indicates (p 235 below). The Evidence Act 1908 provides for the proof of the Journals of the House of Representatives by way of copies purporting to be printed by the Government Printer (s.30), but not expressly for any other House documents, including Bills and Hansard. The treaties of any country may be proved by the production of a copy authenticated with the seal of that country, or texts of them may be used if they are thought to be authentic (ss.37 and 38). (Those provisions do not appear on their face to apply to treaties to which New Zealand is a party.) And the Act allows the use of such published books as are considered to be of authority in matters of public history (s.42). These express provisions do not appear to be exhaustive; the issue of proof usually arises only if the point is taken by a party (and it appears not to have been a problem in practice); and there is a question whether the issue is one of proof of evidence anyway: is it simply a matter of argument?

56 The question for the Law Commission once again is whether legislation can serve a valuable purpose in this area. As Mr Brazil indicates, the Australian legislation does appear to have been helpful (pp 151ff below). Legislation could prohibit, control or permit the use of certain material relevant to interpretation. We say "certain" material since, to repeat, it is not possible - even if it were desirable - to regulate the use of all the material relevant to the reading and interpretation of statutes (e.g. paras 47 and 48). The "certain" material is such as is indicated in the Australian enactments (e.g. para 50). A possible prohibitory rule would prevent the use say of Hansard, as was thought to be the law or at least the practice until recently. A rule controlling use could have threshold and purposive statements as in the general Australian provisions and specify (probably non exhaustively) the material subject to it. A permissive rule would similarly specify the material but would not control its use.

57 A prohibitory rule would presumably prevent the use of some of the newly used material such as Hansard. We do not think that such a prohibition can be justified. The courts have long used closely related material such as reports of law reform bodies which lead to the legislation in issue. They might be misled by not considering just one category of immediately relevant and helpful material. And experience shows that the material can be helpful. There appears to be no good reason for separating off just some particular categories of information by legislative rule. Rather the tests appear to us to be the general ones of relevance and weight - is the material in point and will it help? - questions which arise of course at the moment when any material such as other legislation, case authority from here and elsewhere and, legal writing, is used in argument about the meaning of a statute.

58 But what about a permissive rule? It could not be exhaustive. Rather it would remove any doubt that might remain about the use of the particular material it specifies. It would put on the statute book the practice which has recently developed. It would in that sense give the practice greater notice and perhaps greater authority, by precluding the denial of the reference which the practice now allows. The Victorian legislation provides the example. (For a valuable account see Scutt, (1984) 58 ALJ 483.) We are not persuaded by this reasoning. The time for freeing the courts from any relevant prohibition appears to us to have passed. They have freed themselves. Adequate notice of the more liberal practice has now been given, in reported cases and the discussions of them.

59 A controlling rule would go further than merely allowing use and authorising it. Like the other Australian

provisions, it would allow the use of certain material only in certain circumstances for limited purposes.

60 The Australian experience does suggest that the legislative rules are helpful. But that experience also shows that courts can make use of the material in issue without the permission or guidance or both provided by such rules. Much North American and international experience, as well as recent New Zealand practice, shows that as well. Moreover, just how valuable is the guidance provided by the Australian legislation? Note that in the first place the list of material which can be considered is not exhaustively listed. Second, it tends to assume a divided process of hearing and argument which does not always (or even often) occur in practice: that the court will reach a meaning of the text based simply on the words in issue, and before it knows about, and gives significance to, material not forming part of the Act. Third, it assumes that a court can find that a meaning of a text is manifestly absurd or unreasonable simply by looking at the text and without going beyond it. And it allows reference to confirm but not to contradict the textual meaning. We recognise that the last 3 features mentioned are to be found in the Vienna Convention and in various judicial statements - statements which for the most part precede legislative statements as the courts were developing their practice.

61 Are those limits appropriate and useful ones to place on the exercise of the powers of an interpreter. We do not think that they are, at least at this stage. As we have noted, the Australian legislation does not provide a full list of the material which can be used or expressly exclude any. And insofar as it attempts to place limits on the purposes to which the material can be put the limits do not appear to us to be appropriate ones which can operate effectively in practice. Moreover at this stage these matters are probably better left to judicial development. That development we expect will stress caution, for instance in respect of extensive, costly and unhelpful searches of supplementary material.

62 Accordingly, we do not propose at present to include in a draft interpretation Bill a general provision relating to the use of material found outside the Act in question.

Special Elements of the Act

63 A more specific question arising from paras (e)-(h) of section 5 of the Acts Interpretation Act 1924 still remains for us. Should a new Act make express references to the various parts of the printed Act which might or might not be thought to be part of the Act - the preamble, the various divisions and their headings, the marginal notes, and schedules and appendices?

The Canadian Uniform Act also mentions references to former enactments added as a historical record at the end of provisions. (Such references are routinely included in New Zealand Acts.) The Canadian Act makes it clear that those matters "form no part of the enactment but shall be construed as being inserted for convenience of reference only".

What, if anything, should a new Act say about all these matters?

(1) Preambles

64 Historically, preambles have been used to describe the object or reason for an Act. Under section 5(e) of the Acts Interpretation Act 1924 the

> "... preamble of every Act shall be deemed to be part thereof, intended to assist in explaining the purport and object of the Act."

From time to time preambles have been both praised and criticised.[1]

Depending on the nature of the preamble and the question to be determined by a court, a preamble may either expand or restrict the interpretation of a provision, if it is referred to at all.

65 Although preambles are not common they regularly appear in certain New Zealand Acts. In particular

- private or local Acts
- Finance Acts
- Acts of international significance
- Acts of constitutional significance
- Acts of an historic or ceremonial nature.

66 In general we are of the view that where a preamble seeks to state an object or purpose, that can be better achieved by a substantial provision of the Act. However, from time to time preambles can serve a useful function.

67 The original need for section 5(e) presumably arose

- because of doubt about whether a preamble forms part of an Act, and
- because of doubt about its effect on subsequent provisions of the Act in which it is contained.

68 The present section 5(e) answers those questions. We do not quarrel with the answers but question the need for them at all. Preambles are part of a Bill. They are included as part of a Bill that is before Parliament. We think Courts should and will take them into consideration without the need for a specific legislative direction. It would not appear to be necessary to say (or worse to deem) that they are part of the Act and relevant to the interpretation of it.

69 The common law rule about preambles is that they may only be considered when the words of an Act are ambiguous. Repeal of section 5(e) would not, of itself, revive the common law rule. But would the courts tend to that view if only because the accepted authorities are British based and have had no equivalent to our section 5(e)? On balance we think not, but solicit views on this point.

70 A preamble is not "enacted" - it comes before the enacting words. It is an introduction but is not a part of the Act in the same way that a section is. But section 5(e) says that a preamble <u>is</u> part of an Act. Without a section 5(e) we would leave the courts to decide what a preamble was and what its effect on later provisions should be.

71 It is possible (probable?) that a court would tend to adopt the common law approach and say preambles are only referred to if there is ambiguity in the text. It is equally possible (probably?) that the proposed purposive provision would lead them back to what section 5(e) now says.

72 A mid course might say that a preamble is part of the enactment to which it is attached - leaving the court to give it appropriate consideration but avoiding arguments about whether it is a part of an enactment and the implications if it is not. We solicit views on this matter.

(2) <u>Division of an Act into parts, divisions ... and headings etc not to affect interpretation</u>.

73 Section 5(f) of the Acts Interpretation Act 1924 reads:

> (f) The division of any Act into parts, titles,divisions, or subdivisions, and the headings of any such parts, titles, divisions, or subdivisions, shall be deemed for the purpose of reference to be part of the Act, but the said headings shall not affect the interpretation of the Act:

74 Early English legislation was drafted in "blocks" of text. There were few headings or divisions which aided the

reader. (See for example the old statutes reproduced in the Commission's Report No 1 Imperial Legislation in Force in New Zealand.) Similarly early New Zealand legislation contained few divisions of the text.

75 Over time the practice developed of creating parts and including headings after a Bill had been enacted by Parliament. The work was done by officers of Parliament (the Clerk and Parliamentary Counsel). However, Parliament did not explicitly approve of the divisions and headings and so they were not to "affect the interpretation" of the words enacted by Parliament.

76 Modern drafting practice now includes parts and headings in a Bill as a matter of course. Sometimes these are amended in the course of the passage of a Bill through Parliament.

77 We are not aware that parts or headings are created or changed after a Bill is given third reading and accordingly see no reason why the structure and headings should not be a part of the Act. The structure of legislation can aid in interpretation and courts increasingly refer to the scheme of legislation notwithstanding the present statutory prohibition about divisions and headings. Our preliminary view is that there should not be an equivalent to section 5(f) in the new Act.

(3) Marginal notes

78 We use the term "marginal notes" as it is well known even if inaccurate. Marginal notes now no longer appear in the margin of an Act, but in bold type immediately following the section number. Marginal notes have traditionally been used as an indication of the contents of the section to which they refer. They enable the reader to find what is sought quickly and comprise the analysis placed at the beginning of Acts.

Thornton comments on marginal notes as follows:

> "... a marginal note must be terse and it must be accurate. Its language must be consistent with that of the section to which it refers. It must describe, but it should not attempt to summarise. It should inform the reader of the subject of a section."[2]

79 Section 5(g) of the Acts Interpretation Act 1924 says

> "(g) Marginal notes to an Act shall not be deemed to be part of such Act;"

Despite this legislative direction they are placed on a page of an Act in such a way as to appear to form part of the

section to which they relate. They are in bold type and it is impossible not to read them in the course of reading a section.

80 In Parliamentary Practice in New Zealand (1985) Government Printer p 222 by David McGee, now Clerk of the House of Representatives, Mr McGee says:

> "Neither the marginal note nor the Analysis (of the Bill) form part of the Act as passed, and consequential amendments and corrections to these are made by the Clerk of the House when preparing the bill for the Royal Assent, not by the House during its passage."

We understand that any changes to marginal notes made by the Clerk are invariably done in co-operation with the Parliamentary Counsel Office.

81 Our preliminary view is that it is not necessary to retain an equivalent to section 5(g), nor should a court be prohibited from using a marginal note to assist it in interpreting a section when the court considers it appropriate to do so.

82 Without section 5(g) marginal notes would become part of an Act. The question then arises whether the Clerk should have authority to make consequential changes to marginal notes in Bills as a result of amendments made during the passage of a Bill through Parliament. We think the Clerk should have that authority even though the marginal note would be part of the Act under our preliminary recommendation. The matter could be satisfactorily covered by an appropriate Rule of Parliament authorising the revision or addition of "marginal notes" by the Clerk in appropriate cases. However the constitutional issues are important and we solicit views.

83 Even though marginal notes are not deemed to be part of an Act the judiciary have regard to them. Cooke J said in Daganayasi v Minister of Immigration [1980] 2 NZLR 150 at p 142

> "It is necessary to be on guard against allowing a marginal note to control the interpretation of a section ... At best it can be some indication of the main subject with which the section deals ... Here, however, there is no reason to treat the note with suspicion."

84 The judiciary do look at marginal notes. When necessary, they also look at material that is not on the printed page of an Act. They will properly ascribe whatever weight they consider appropriate to the material they read in assisting them to interpret an Act.

In our view marginal notes can have some value as an aid to interpretation and there should be no legislative impediment to that aid.

Our preliminary view accords with Bennion's commentary:[3]

> "A side-note or marginal note to a section is part of the Act. It may be considered in construing the section or any other provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the content of the section."

(4) Schedule or appendices

85 Section 5(h) of the Acts Interpretation Act 1924 reads:

> (h) Every Schedule or Appendix to an Act shall be deemed to be part of such Act:

If a schedule or appendix is enacted by Parliament we see no need to say that it is or deem it to "be part of" an Act. It is part of the Act by virtue of its enactment.

86 If there is any doubt about the matter the body of the Act should refer to the matters in the appendix to make it clear they are part of the Act. We see no need to retain an equivalent to section 5(h).

87 We conclude our remarks on Preambles, headings, marginal notes and schedules by saying that in our view courts should be able to use all the material mentioned to the extent that they are helpful. No doubt they will do that in the knowledge that while they are not confined to the text of the legislation, they are in general confined by it. That is, they cannot by using non statutory material reach meanings which contradict the legislation. That general approach is relevant as well to judicial reference to earlier legislation. Such reference to the history obviously can be helpful. An Interpretation Act is not however needed to facilitate that. Our inclination accordingly is that no provisions along the lines of the present paras (e) to (h) of section 5 are needed.

(5) "The law is always speaking"

88 Section 5(d) of the Acts Interpretation Act 1924 presently reads:

> (d) The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied

> to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning:

89 Described as a "quaint statement" by the editors of Cross on Statutory Interpretation (2nd edition) the expression "the law shall be considered as always speaking" touches on a number of interesting issues. Some examples will help to uncover them.

90 Is a word in an Act to be given the meaning it has on the day it becomes law or on the meaning it has on the day on which a court interprets the Act some time later?

91 In Commonwealth v Welosky 276 Mass 398, 177 NE 656 (1931) an American statute said that

> "a person qualified to vote for representatives to the general court shall be liable to serve as juror."

At the time the statute was passed women were not "qualified to vote". The question that subsequently arose was whether, after women became qualified to vote, they also became liable for jury service.

92 The court was faced with interpreting the words "a person qualified to vote" either as having the meaning they had when the Act was passed (in which case women were not liable for jury service) or interpreting the words in light of the changed circumstances of who was qualified to vote.

The court said the words must have the original meaning, women were not liable for jury service.

93 In McCulloch v Anderson [1962] NZLR 130 the court had to decide whether a land agent was "acting as a conveyancer" contrary to the Law Practitioners Act 1955. The court traced the meaning of the word back to 1842 and then 1804 to find the "key to the question". A conveyancer in 1804 was a "drafter of deeds". The court held that as a tenancy agreement was not a deed no offence was committed.

94 These are two examples of the "historical" or "static" approach to interpretation. The approach to interpretation that says the meaning of words in a statute is frozen at the date on which the Act comes into force.

95 In contrast there is the "ambulatory" "mobile" or "dynamic" approach to interpretation which says that words in an Act are to be given their current meaning, the meaning understood by the modern reader.

Two examples will suffice.

96 In Lake Macquarie Shire Council v Alberdare County Council (1970) 123 CLR 327 the word "gas" as it was used in a statute could only have meant coal gas when the Act was passed. The question to be answered by the court was whether, some years later, the word "gas" also meant liquified petroleum gas. A majority of the court said.

> "I can see no reason why, whilst the connotation of the word "gas" will be fixed, its denotation cannot change with changing technologies."[4]

97 Professor John Burrows neatly sums up a debatable point as to the extent to which a court should give words their "current" meaning by reference to the English Case of Dyson Holdings Ltd v Fox [1976] QB 503. Professor Burrows describes the issue in this way:[5]

> "... a tenancy act gave security of tenure to members of the "family" of a deceased tenant who had been residing with him at the time of his death. The question was whether the tenant's de facto spouse was a member of his family. A Court of Appeal decision in 1949 had held not. In 1975, however, the Court of Appeal felt able to say that the term of "family" did include a de facto spouse. As a result of material changes in social attitudes in the intervening years, the word "family" had effectively changed its meaning, and would now be taken by ordinary people to include de factos ..."
>
> Since the word must be given its present day meaning, this case is excellent for material debate. In its favour it may be argued that if a statute really should speak as at the moment it is read, and if it is to be given its ordinary meaning, the meaning arrived at in Dyson Holdings was right; it may well have been the meaning the ordinary citizen, reading the act in 1975, would have given it. On the other hand it may be argued that the decision takes too cavalier an attitude to precedent, and that it is undesirable for a court to unsettle established interpretations; if the court's job is to divine parliamentary intent, how could that have changed with time? Moreover in a matter of such social consequence, it may well be that this change could have been seen as one of policy for parliament rather than the courts.
>
> In any event the case has not been warmly received. The tendency of later comment in the Court of Appeal itself is that it went too far.[6] Yet the concept of Dyson Holdings - that old precedents interpreting statutes may get out of date - may be correct for

> some types of statutes. Lord Wilberforce has said that some statutes employ "mobile phrases", ie words and phrases embodying standards which shift with time.[7] No one would say, for instance, that a decision in 1900 that something was "indecent" should bind today: the very notion of indecency is something which offends contemporary standards.[8] The same is true of expressions such as "reasonable" and "just".

98 Our examples illustrate the first issue. Should statutes be interpreted using the meaning of words when they were enacted or using the current meaning of those words. Section 5(d) has bolstered decisions which support the "current meaning" approach.

The Editors of Cross say:[9]

> " ... the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required".

99 In a helpful review of cases in New Zealand in which section 5(d) was considered or commented on[10] Rupert Glover concludes:

> " ... a substantial line of New Zealand authority exists favouring the ambulatory approach ..."
>
> The historical approach is undoubtedly useful when a very old statute has to be considered, but this will rarely be the case in a country whose legislative history spans less than a century and a would have done if it had contemplated the conditions which have subsequently come into being. Indeed, the provisions of s5(j) can be applied to s5(d) and when this is done the remedial aspect of s5(d) becomes apparent.

The interplay between sections 5(j) and 5(d) are important. When read together a forceful argument for a dynamic

approach to statutory interpretation can be made. If we carry something similar to section 5(j) forward without an "always speaking" provision what is lost, if anything?

Consider also the inherent ambiguity of the words that an Act is "always speaking". They may be always speaking but from which date - the date of enactment or the date they must be interpreted by a court?

100 The rule that an Act is to be considered as always speaking has also been linked to the general demise of the rule of "contemporanea expositio"[11] which was expressed in modern form by Lord Esher in Sharpe v Wakefield (1988) 22 QBD 239.

> "the words of a statute must be construed as they would have been the day after the statute was passed."

101 Although the "always speaking" rule was not in statutory form in England the Court said in Asshelton Smith v Owen [1966] 1 Ch 179 213

> "I do not think that the doctrine of contemporanea expositio can be applied in construing Acts which are comparatively modern."

102 The origins of the "always speaking" rule are difficult to determine. The Editors of Cross say:

> "The somewhat quaint statement that a statute is 'always speaking' appears to have originated in Lord Thring's exhortations to draftsmen concerning the use of the word "shall": 'An Act of Parliament should be deemed to be always speaking and therefore the present or past tense should be adopted, and "shall" should be used as an imperative only, not as a future'.

103 George Coode, writing in 1842, exhorted drafters not to use the future tense

> "The attempt to express every action referred to in statute in a future tense renders the language complicate, anomalous, and difficult to be understood."[12]

104 To summarise some of the questions which arise when written law is to be applied to changing or new circumstances.

- Is a nineteenth century statute relating to "vehicles" to be applied to aircraft?

- Is an earlier twentieth century treaty banning the use of weapons causing indiscriminate methods of warfare applicable to the use of nuclear weapons?

- Does the meaning of "family" in tenancy legislation protecting members of the family of the deceased tenant change with changing social perceptions?

- How is the power of the Court under the Family Protection Act 1955 to make such order "as it thinks fit" for "the proper maintenance and support" against a deceased's estate to be seen as social attitudes change?

105 That last case - of standards of behaviour or judgment - is perhaps the most common. Consider legislation relating to indecency or obscenity, disorderly behaviour or professional misconduct, or which makes action criminal if it is unlawful or without colour of right.

106 How should such matters be handled? Does the law take a particular meaning or application (the 2 may not be the same) on enactment or can it change?

If the latter, when? And can general legislation like section 5(d) help? We conclude this part of the paper by summarising our preliminary views.

107 While we entirely agree that Acts should be drafted in the present tense we do not see the need for a statutory provision to support the practice.

108 While there is no doubt room for debate over whether a particular word or phrase should be given a particular meaning we do not doubt that the better approach, the one most likely to serve society best, and the one adopted by the New Zealand courts is the dynamic approach to statutory interpretation.

109 With that view in mind we are left to consider whether it is necessary to retain section 5(d) in order to support a dynamic approach to interpretation. On balance we think not, for these reasons:

(a) New Zealand courts have decided on the dynamic approach to interpretation without using section 5(d) as the basis for those decisions. Section 5(d) has tended to be used to bolster a decision already made but has not often provided the basis on which the decision was reached;

(b) English courts have adopted the dynamic approach without an equivalent section 5(d);

(c) The trend to a "purposive" approach to the interpretation of legislation by New Zealand courts makes it most unlikely that a "historical" approach will be used, except where the context so requires.

110 We conclude that there is no need to retain the provision that "the law is always speaking". We see no danger that the courts would apply the "contemporary exposition" rule in the absence of the "always speaking" provision. Properly understood the rule of contemporary exposition only applies after a court determines that an Act was intended to have a meaning fixed in time. When a court makes that determination the "contemporary exposition" rule is entirely appropriate.

The link between Drafting and interpretation : "plain drafting"

111 Accessibility of the law is a huge topic. We have a continuing responsibility in respect of it. At this stage we wish to emphasise just 2 points about "plain drafting" - 2 different meanings of the phrase, and some related aspects.

112 The first point can be introduced by one criticism of plain drafting - that the wording may be plain and in a general sense easy to understand but its meaning and application in a great variety of situations may be uncertain. This is commonly referred to as "open textured" drafting. The proposition may be clear in a broad sense but quite unclear in particular cases.

113 To mention one statute discussed from time to time at the seminar, consider the Matrimonial Property Act 1963 which gave the courts broad power to make such order as they thought fit about matrimonial property and mentioned only one matter ("the respective contributions" of the spouses to the property) to which the courts were to have regard. Family members, lawyer and judges had difficulty over the following 10 or so years in the application of that broad power. The Act which replaced it, the Matrimonial Property Act 1976, goes into much greater detail (it is 40 pages long rather than 5) and gives much more precise direction to the courts (for instance by providing for an equal division of property on the usual rule).

114 For the most part open textured drafting will leave the actual application of the section to the court. It will often involve the court deciding what is "reasonable" or "fair". This may create uncertainty over long periods of time. It shifts decision making to the judiciary. But it

also allows justice to be done in individual cases which may not be foreseen or could not possibly be foreseen when the legislation is drafted.

115 There is no doubt a place for open textured drafting. It is not new. Whether it is appropriate depends on the type of legislation under consideration. Open textured drafting involves another consideration. It involves a degree of trust between Parliament and the judiciary; trust that a legislative intent will be carried out.

Our seminar papers disclose some of the reasons for "distrust" by Parliamentarians of the judiciary.

116 The choice between those 2 methods - of conferring a broad discretion (or stating a general standard) and writing a precise rule - is a critical aspect of the preparation of legislation and its operation in practice. We return to it briefly at the end of this section. Before doing that we wish to mention a second meaning of plain drafting.

117 That second distinct meaning is to say in a more direct, less cluttered way exactly the same thing with the same degree of certainty and precision. More direct and less cluttered, that is, than might be employed following traditional drafting styles. The Public Trust Office provides an instance with its new plain English wills. Testators no longer "give, bequeath and devise" their property. They simply "give" it.

118 Another simple example of what might be done is provided by a routine set of provisions in a Bill currently before Parliament. The Telecommunications Amendment Bill would allow a network operator to lay telephone lines along, above and below streets. The relevant local authority may impose "reasonable conditions" on that action and an operator which objects to the conditions may appeal to the courts. The appeal provisions read as follows:

> **"15C. Appeals in relation to conditions imposed -**
>
> (1) Subject to section 15D of this Act, and to subsection (2) of this section, the network operator shall have a right of appeal to the District Court against any or all of the conditions imposed pursuant to section 15(2) of this Act by the local authority or other body or person having jurisdiction over the road.
>
> (2) Every such appeal shall be made by giving notice of appeal within 20 working days after the date of

notification of the conditions imposed or within such further time as the Court may allow.

15D. Determination of appeals - In its determination of any appeal the District Court may confirm or modify any or all of the conditions imposed."

119 The introduction qualifying phrases in the proposed s15C(1) are inapt or unnecessary since s15D does not limit s15C (but expands on it) and subsection (2) follows immediately. Moreover to make a more general point it is disconcerting to read a qualification to a proposition before the proposition has appeared.

120 "Shall have a right of appeal" can be replaced by "may appeal" a common formula. "The" court is legally inaccurate since there are many District Courts; and the final phrase goes without saying.

121 "Giving notice of the appeal" is not as clear as "filing" or "lodging" the appeal and "working days" appears not to be defined. And the Court might decide that a condition should be cancelled or even added to, and not merely modified.

122 Accordingly the provision could read something like this

15C Appeal against conditions

(1) A network operator may appeal to a District Court against any or all of the conditions imposed on it under section 15(2).

(2) The appeal must be filed within (28 days) of the notification to the network operator of the conditions or within such further time as the Court allows.

(3) The District Court may allow the appeal and modify (add to or cancel?) a condition imposed on the network operator.

123 This provision is not clear in respect of at least 2 matters - the procedure to be followed in the District Court and rights of further appeal from it. They should be addressed as well. That point, like 1 or 2 others noted above, go to the substance of the provision. It is a common experience that the use of plain drafting methods raises issues of substance which may not have been apparent before.

124 The process of plain drafting as undertaken by the Law Reform Commission of Victoria in respect of the Companies Takeover Code and mentioned by David Kelly,

Chairman of the Law Reform Commission of Victoria, evidences that experience and many other points about the clearer and better ordered statement of law.

125 To repeat the point, we distinguish between a decision to use legislation which confers broad discretions or sets standards or is open textured and drafting which is plain in the sense of being as clear and as direct as the subject matter allows. The first approach involves a deliberate decision (or it should) to confer wide powers on those who make decisions under that legislation (including the courts), while the second is not concerned with that choice at all. Rather, it attempts to make the law more accessible and comprehensible while maintaining whatever precision is seen as appropriate. It does not in itself change the interpretation issues - at least in the general case. It should present such issues more directly. We shall continue to give attention to that very important matter.

126 The distinction between open textured and detailed legislation is of course not sharp. There is a continuum. Legislation might combine broad principle with specific wording. The New Zealand ombudsman legislation provides a good example of the combining of general words and specific lists. Recent statutes, increasingly perhaps, begin with statement of principle.

127 Sir William Dale has been prominent in the debate over drafting using "principles". In a recent article he gave reasons for an enunciation of principles in legislation:

> "An enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the mind of the legislator, provides guidance to the Executive, explains the legislation to the public, and assists the courts when in doubt about the application of some specific provision.
>
> By a "principle" we mean ... a statement in general terms, showing on its face, so far as may be, the moral, social, or economic basis on which the statement itself, and the particular provisions which follow it, rest, and which is itself law-making." [1988] Stat LR 24.

128 Sir William recognises that many Acts do not lend themselves to a statement of principle. This may be true for instance of taxation legislation (where at least <u>in addition</u> precise language is needed) or of other legislation imposing heavy obligations on citizens. There are also potential dangers with statements of principle:

- subsequent amendments to an Act may put the "principle" section and later provisions in conflict.

- a principle section may affect a later provision in ways unintended by the drafter.

- courts may seize on a principle to give the legislation an unanticipated twist.

- "principle" sections provide room for an argument which, without them, may not arise.

129 Without denying the potential difficulties (which are often manageable) we make the point that the clearer the legislation is, the less likelihood there will be of litigation, or if there is litigation, the more likely the decision will be the right one. One way of achieving a clearer legislative intent is to include statements of principle as often as it is possible to do so.

130 The aim of an Act is clear communication. That can best be achieved:

(a) by organising the Act in a way in which the communication is as clear as possible.

(b) by presenting the words in ways in which the communication is enhanced;

(c) by approaching the subject directly - where possible with a positively stated principle followed by qualifications or particulars;

(d) by avoiding long sentences; reducing internal references and the use of "subject to" and "notwithstanding" to a minimum;

(e) by ridding drafting practice of habits which impede clear communication and a willingness to use new techniques to enhance communication.

131 Too often the link between drafting and interpretation is missed because each is considered in isolation. Yet properly understood, the process of communication through legislation is an ongoing one. The judiciary enunciates principles on which legislation is to be interpreted which the drafter takes into consideration when drafting (so, a Penal Act may prescribe with particularity matters which an Act providing for some social benefit may not).

The judiciary also must take account of directions about interpretation contained in Acts and are directly affected

by Parliament's words. Each touches and affects the other in a significant way.

132 It is with these considerations in mind that we must frame our proposals for a new Act.

FOOTNOTES

1 See for example G C Thornton, Legislative Drafting 3rd edition p 154-5

2 G C Thornton, Legislative Drafting 3rd edition (Butterworths) p 142

3 F Bennion, Statutory Interpretation, Butterworths 1984 p 591
See also Lord Reid's remarks in DPP v Schildkamp [1971] AC at 10 "But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act."

4 For other examples see The Problems of Time in Statutory Interpretation, NZLJ, July 18 1978 p 253 and Statutory Interpretation in Australia DC Pearce 2nd edition para 42 (Butterworths)

5 Recent Developments in Statutes and their Interpretation, NZLS Seminar by Professor J Burrows

6 Joram Developments Ltd v Sharratt [1979] 1 WLR 3; Helby v Rafferty [1979] 1 WLR 13. The Joram case was appealed to the Lords who did not pronounce on this topic: [1979] 12 WLR 928. See Hurst The Problem of the Elderly Statute (1983) 3 Legal Studies 21; Allott, The Limits of Statute (1983) 3 Legal Studies 21; Allott, The Limits of Law (1980) Ch.4

7 DPP v Jordan [1976] 3 All ER 775 at 780

8 "I should be reluctant, in deciding whether it was obscene to behave in a certain way in Christchurch in New Zealand on Anzac Day 1972 ... to be inhibited or restricted by what Chief Justice Cockburn said about the publication of a shilling pamphlet to the public in Wolverhampton in England in the year 1867"; Police v Drummond [1973] 2 NZLR 263 at 264 per Turner P

9 R Cross on Statutory Interpretation 2nd Edition Butterworths p 49-50

10 Rupert Granville Glover, The Statutes Statute (1986) 3 Canterbury LR 61 Dr John Bell, Sir George Engle: "Cross Staturory Interpretation" Sir Rupert Cross (dec'd) was original author

11 The rule of "contemporanea expositio" was first laid down by Coke, in speaking of Magna Carta, in the following terms:

> "This and the like were the forms of ancient Acts and graunts, and the ancient Acts and graunts must be construed and taken as the law was holden at that time when they were made."

See Craies on Statute Law 6th Edition p 80. Bennion's view is that "contemporanea exposition" applied to "fixed time" Acts rather than "on-going" Acts.

12 Coode on Legislative Expression; or, the Language of the Written Law, George Coode. (Reproduced as Appendix 1 to the Composition of Legislation, Legislative Forms and Precedents by Driedger (Department of Justice, Ottawa) in which the author goes on to urge that the law "be regarded while it remains in force as constantly speaking", in which case "we get a clear and simple rule of expression which will, whenever a case occurs for its application, accurately correspond with the then state of facts. The law will express in the present tense facts and conditions required to be concurrent with the legal action ....

PART B

LEGISLATION AND ITS INTERPRETATION

Proceedings of a two–day seminar held on
Friday and Saturday 18 and 19 March 1988

at the

National Library Auditorium, Wellington

OPENING REMARKS

The Rt Hon Sir Owen Woodhouse,
President, Law Commission

Deputy Prime Minister, Your Honours, Ladies and Gentlemen

The Law Commission is pleased to welcome so many interested participants to this seminar on legislation. We are especially grateful to those who have taken time and trouble to prepare a series of papers which will provide a valuable basis for discussion. I must mention as well those who are willing to act as commentators – may I say not only a high powered but a hard bitten team of commentators, which is a good thing in itself. We are pleased indeed that Mr Walter Iles, Chief Parliamentary Counsel, has been able to find time to take part in these discussions.

It is particularly generous of our Australian guests to travel here to offer assistance. Mr Patrick Brazil has come from Canberra leaving behind for a few days the demanding responsibilities of his office as Secretary of the Commonwealth Attorney General's Department. Professor David Kelly has joined us from Melbourne and as Head of the Law Reform Commission of Victoria. He has had the recent satisfaction of producing an elegant report upon the drafting of legislation and legal documents in plain English. Already we are making use of it. We are grateful of course to the Deputy Prime Minister and Attorney General who has made it possible to be here this morning to speak about writing and reading the law.

The Law Commission has functions under its Act which have particular regard to the systematic review and development of the law in New Zealand. Of particular relevance in the context of this seminar it has a further responsibility to advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. The brochure which outlines the programme of the seminar refers to this responsibility. It explains as well that the Commission has received a specific reference concerning the drafting of legislation and its interpretation. This seminar is bound to assist us in work on this project.

It happens that the first discussion paper of the Law Commission dealt with an aspect of the same important topic and I like to think that our first report, which is related to it, has been able to show how it is possible to abbreviate the form of some types of legislation. In place of an initial twenty page document which the

Law Commission examined, a proposed replacement is effectively of six clauses and extending only a little beyond one page.

It is not difficult for somebody on the sideline to spend time picking about through the statute book in order to hold up some diffuse or baffling provision for the criticism, amusement or even the ridicule of other great brains. It is an innocent enough exercise up to a point though it fails to do justice to the expertise and dedication of parliamentary counsel who day by day produce so much good work under hard constraints of time and changing instructions. So when there is to be a serious and professional review of drafting techniques and of problems associated with the product in the form of legislation it would be wrong to be hyper-critical or ignore the sudden pressures of time and the uncertain instructions which can afflict parliamentary counsel. Or the "U" turns of a policy nature which must leave even the most analytical mind – I have the ideal metaphors – reaching for the bottle or climbing up the wall.

Having said that I would simply add that the efficient and lucid communication of ideas is to be achieved not by loquacious attempts to foresee and deal with every aspect of the subject matter but by mental discipline and logic and adherence to the common-place rules of grammar that can be absorbed with much success from the Latin or learned by rote from English texts like Ogilvy and Albert.

The Law Commission extends a warm welcome to you all.

I LEGISLATION AND PLAIN DRAFTING

WRITING AND READING THE LAW

The Rt Hon Geoffrey Palmer
Deputy Prime Minister, Minister of Justice

In the novel 'Guy Mannering' (1815) Sir Walter Scott has his character Mrs Bertram say to her husband – "That sounds like nonsense my dear". To which he replies, "May be so, my dear: but it may be very good law for all that".

The exchange is tongue–in–cheek. But it tells us two sad things about the law then and today. Firstly, that ordinary people feel a lot of the law sounds like nonsense. And secondly, that this is the way they expect it to be. This situation cannot be right. Laws are for everybody. They touch every part of our lives. They regulate diverse daily activities such as driving to work, purchasing a stereo, incorporating a company, or getting married. Small or large, important or otherwise, society is bound together by our laws.

Ignorance of the law is no excuse except in very special and limited circumstances. The ordinary citizen can therefore reasonably expect to be able to order their affairs in accordance with laws which are *accessible*. But much of the law in New Zealand is incomprehensible to ordinary people. It is Mrs Bertram's "nonsense". Take wills for example. They used to be one complete sentence, no matter how long. They had no punctuation. I doubt very much whether they made sense to the signatory. Times are changing, however. Most wills are now collections of shorter paragraphs with some punctuation. But, they retain clauses which have come down through the ages unchanged. These clauses seem like gobbledegook to ordinary people. But a person's will is surely a most profound and important document to him or her.

> "I Give, Devise and Bequeath"
> "All my property, both real and personal, of any nature whatsoever, wheresoever ..."
> "Signed by the said Ignatious William Bertram in our presence and in the presence of each other both being present at the same time ..."

Much of this is surplusage. Practitioners tell me it has different effects –

> Despair: The majority of people just sign. Attempts to explain elicit glazed stares, nods, and the 'well, whatever you say, doctor' response.

> Conversely, anger and rejection. A few people walk out of their lawyer's office and refuse to sign. (They also often refuse to pay!)

They go home and write their own will on the back of a shopping list, or leave little notes pinned to pictures in the living room. This is dangerous, because although a court could probably determine their intention, invariably these home-made documents are not executed properly. Mortgage documents are another bad example.

The story is not all bad, however. The Public Trust has produced Plain English wills. Also, I understand, a Plain English Power of Attorney. These are encouraging signs.

Most people make a will, and most buy a house with the aid of a loan. Again, this has a profound and practical effect on their lives. They should be able to understand what they are doing. There has been a move to recognise this in the Credit Contracts Act 1981. The Act requires disclosures of the important aspects of the transaction to the borrower. This generally means giving the borrower a copy of the mortgage. But mortgages, especially bank mortgages, are documents of sublime mystery. They are set out in type which requires a magnifying glass. I am told the reaction generally is "Oh, my God, what's this? We never got one of these before". The copies are often left on the lawyer's desk once the appointment is over. People would rather not know than struggle with it. So the aim of the Credit Contracts Act is defeated. Lawyers had in fact begun to explain mortgage documents by paraphrasing, because the Credit Contracts Act encouraged it. But if the forms can be paraphrased, why cannot they be written clearly to being with? Again, I would be misrepresenting the situation if I did not mention that both the Housing Corporation and Postbank have produced mortgage forms which follow the Plain English principles.

Those are examples of documents drafted by lawyers which suffer from legalese. Some statutes are just as bad, if not worse. Examples abound. I will not go into them - they will no doubt come up later today. The main features making for obscurity and length in our statutes are:

- long and involved sentences and sections
- too much detail, too little principle
- an indirect approach to the subject matter
- subtraction - i.e. "subject to"s and "provided that"s
- centrifuge - a flight from the centre to definition and interpretation
- too many schedules, themselves too long
- cross references to other Acts.

The English approach to drafting, which we have adopted, is the detailed approach. If in doubt, put it in. Put in the principle, the exceptions, the provisos, define everything, refer to every other Act of even minute relevance and toss in the kitchen sink. Now the ordinary person understands the kitchen sink, but the rest just

defeats him or her. It also often defeats so-called experts – the legal advisor and even the judge, when it comes to interpretation. So how on earth does anybody, in a private or commercial context, order their affairs? The very purpose of the law is defeated. The sorry thing is that, as Mr Bertram says, it may be very good law for all that, and probably is. The problem is chronic because of fear. Fear of change, fear of being different, fear of using initiative, fear of finding out there is no real reason for half of what is done, fear of losing status, and fear of losing precious time. Or put another way, it is apathy – in the profession and in the Mr and Mrs Bertram's of this world. Apathy which denies access to the law.

The heading to which I address myself is "Writing and reading the law". To that I would add a dash and the words "Unjumble It".

In 1984 the Labour Party policy on legislative drafting said: "Labour will take steps to simplify laws to make them as readily understandable as possible and to reduce the total number of statutes and regulations. Outdated laws will be eliminated". In 1987 the Labour Government pledged to continue that process. In between times in 1985 I moved to establish the Law Commission:

(a) to "promote the systematic review, reform and development of the law for New Zealand" and

(b) to advise me on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.

More specifically to examine and review the language of legislation in New Zealand. This has been coupled with an overhaul of the Government Printing Office to make legislation more easily available to the public. All are moves to address the problem of accessibility.

Our Commission can take much from the admirable work of the Law Reform Commission of Victoria on Plain English and the Law. That body reported in 1987 and has published four excellent volumes on the topic – the report itself, a drafting manual for legislative drafters, a Plain English rewrite of the Victoria Takeovers Code, and a book of Standard forms such as Magistrates Act summons. These volumes are not large and they are attractively packaged. They are easy to read. They are the results of hundreds of hours of listening to submissions on the matter, of re-drafting and testing and checking existing statutes and forms. They are invaluable documents to advocates of plain and simple drafting. I am one such advocate.

There are arguments against, of course. It is said that legal language will lose its elegance and eloquence.

> "To be or not to be: that is the question;
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles,
> And by opposing end them?"

might become:

> "What's the guts?
> Is it better to put up with things?
> Or commit suicide in order to sort it all out?"

Each has its place.

Law is functional. Eloquence and elegance, while pleasant, are not always functional. They have only served in the past to give more status to the law. To make it more inaccessible. They must be cut down. Further, it is said that the law requires a special language of its own, because it deals with complex and technical topics. The concept of plain English recognises and preserves that view. Some statutes will be necessarily more technical than others. This is more acceptable where the Act is aimed at experts in the field. But it is only the subject matter which is technical. There is no need for the statute as a whole to be technical. Technical terms and concepts can still be put together in a simple way. The plain English approach aims for a wider audience, not everybody. It recognises that complex statutes cannot reach everybody. They are not aimed at everybody anyway. The Takeovers Code redrafted by the Law Reform Commission of Victoria is a good example. Legal experts have acknowledged there is no loss of precision and accuracy. And the code is much reduced in length.

It is also said that lack of detail would lead to substantial doubt continuing until resolved by the courts. If the Act is drafted properly in plain English there should be no doubt. Only lack of clear instructions or clear policy might defeat a statute otherwise written in plain English. So we have to improve those too. And in any event, drafting in detail leads to just as much litigation as to the meaning of the words used or those not specified. If parties can interpret a document easily to begin with, they will not get into disputes about their responses to it. It is feared plain English will destroy words and phrases which have come down through the ages with accepted legal meanings. Its funny that this has not stopped litigation already. If a word is ambiguous, or used in a vague way, it will lead to litigation, no matter how long it has been around. Use of plain English suggests we take the heroic step of cleansing the whole system of these obsolete practices and start again.

There is a fairly strong argument that the plain English approach will require a complete turn-around from the courts in interpreting legislation. The Victorian Commission has recognised and recommended that a purposive approach is absolutely necessary. I believe that is what we already have in New Zealand. Section 5(j) of the Acts Interpretation Act seems to me to be a clear direction to the courts to interpret with the purpose of the statute in mind. The relevant words are:

> "... interpretation as will best ensure the attainment of the object of the Act ... its true intent, meaning and spirit".

Interpretation used to centre on the notorious "literal" meaning of the words involved. But approaches to interpretation change with time. I believe, and others here will agree, that today's courts are adopting a more flexible and wide-ranging approach. They look for a natural meaning in the context of the Act as a whole. They are more ready to admit or take account of extrinsic material. The rules are by no means clear, but the trend is. I believe we have a judicial climate with regard to interpretation which is favourable to the introduction of plain English drafting. In fact, Plain English drafting serves to define the limits of the purposive approach. Legislation that is more tightly drafted allows less opportunity for the courts to impose their view of the world when they use the purposive approach.

Lack of time is another excuse for today's bad drafting. This again is only apathy. Time must be made – in the departments and bodies making policy which become Acts, and in the busy lawyer's office. Legislative draftsmen and women, I appreciate, have a very real problem here. Time is, quite simply, often denied them. They battle in the face of adversity. I must note, too, the detailed drafting work which has produced simpler forms for use under the Family Proceedings legislation. Also the redesigned Electoral Roll application forms which were posted to every adult member of voting age in every household. Ninety percent of these forms have been returned. This result bears out the virtues of the Plain English approach. I acknowledge they were time consuming efforts. But the time is only spent *once*. We are repaid two-fold later on. No litigation, and savings in cost. We can get on with other work. We do not have to deal with complaints and mistakes. Our image is also improved. Citizens cease to expect us to be inefficient. Apathy is reduced.

I am saying to you I support the plain English approach to legal drafting. But I am doing more than that. I am actively pursuing the Government's pledges in this area. In 1981 a consumer campaign to eradicate legalese met with a largely lukewarm response. Since then, the topic, like consumerism, has become somewhat fashionable. Let us not just pay lip-service to it. I urge legislative draftsmen and women, lawyers, and drafters of all other sorts of documents which affect people's rights and obligations, to make plain and simple communication their aim. I also urge you all to expect it from each other. This is the only way we will achieve true reform.

THE VICTORIAN EXPERIENCE OF PLAIN DRAFTING

Professor David Kelly, Chairperson,
Law Reform Commission of Victoria

Through a glass darkly:
legislative drafting in Australia

THE PROBLEM

At the launch of the Law Reform Commission of Victoria's lengthy report *Plain English and the Law* which was published late in 1987, a concerned layman by the name of Campbell McComas came forward to deliver a plain man's view of legal language in general and of legislative language in particular. His research for the occasion had led him to examples of legislative drafting far worse than anything the Commission had come up with. I quote Mr McComas' words:

> "The first example is s.36(1) of the U.K. Finance Act 1951 which quite seriously provides that –
>
> > a body corporate shall not be deemed for the purpose of this section to cease to be a resident in the United Kingdom by reason only that it ceases to exist.
>
> The second example is the U.K. National Insurance Bill 1959:
>
> > For the purpose of this part of the schedule a person over pensionable age not being an insured person shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person.
>
> Speaking for myself personally, I think I'd rather be a body corporate. At least I'd still be a resident somewhere even if I didn't exist.
>
> That exceptional English parliamentary draftsman's career ended, or it should have, in 1966 with his parting gift and bequest of sub-paragraph 1 of Part 2 of Schedule 1 of the Local Government Act:
>
> > For the purposes of this part of the Schedule [and praise Allah that it doesn't go any wider than that] the standard pennyrate product for an area for any year is the sum which bears to the product of a rate of one penny in the pound for that year for the whole of England and Wales the same proportion as the population of that area bears to the population of England and Wales but in ascertaining the standard pennyrate produce for a county or county borough the population of any county

> in the case of which the ratio of the population to the road mileage of the county is less than 70 shall be increased by one half of the additional population needed in order that the population divided by the road mileage should be 70.
>
> And by crikey if it's not 70 you're jolly well done for.
>
> To eliminate any remote jot or tittle of lingering uncertainty, paragraph 2 reads, and this is priceless –
>
> In this paragraph population means estimated population.
>
> Thank God for that. Thank somebody else for this master draftsman's apprentice who unfortunately survived long enough to produce this.
>
> In the nuts unground other than ground nuts order the expression nuts shall have reference to such nuts other than ground nuts as would but for this amending order not qualify as nuts unground other than ground nuts by reason of their being nuts unground.
>
> And he might have added, 'in this paragraph the expression nut means the person who drafted it'."

Exaggerated though these examples may be, convolution, repetition and plain obscurity are endemic in a good deal of Australian legislation. Legislation of that type is a failure – a failure in communication. It cannot be understood, either fully or at all, by those to whom it is directed – Members of Parliament, the public or the relevant section of it, the legal profession and the judges.

THE COSTS

Failure in communication imposes major costs on Government and on the community. The costs are of two main types: financial and social. The social costs lie in the detriment to Government policies and programs. The effectiveness of a program – say for rural subsidies or welfare benefits – depends on communication between Government, on the one hand, and recipients on the other.

Social Costs

If legislative communication (including communication via forms based on legislative requests) is ineffective, people may be deprived (either permanently or temporarily) of benefits intended for them. Worse still, people may be led into breaking the law simply because they cannot understand what it says. A well known example is found in the case of *Merkur Island Shipping Co.* v. *Laughton* [1983] 1 All ER 334. That case concerned the question whether the International Transport Workers Federation (ITF) had committed

the tort of inducement to commit a breach of contract. The answer depended on the effect of three interrelated Acts of Parliament, none of them expressed in clear language. The most recent of them adopted definitions which distorted their natural meanings. Sir John Donaldson MR observed that:

> "The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Second they must know what those rules are. Both are equally important, and it is the second aspect of the rule of law which has caused me concern in the present case, the ITF having disavowed any intention to break the law.
>
> In industrial relations, it is of vital importance that the worker on the shop floor, the shop steward, the local union official, the district officer and the equivalent levels in management should know what is and what is not 'offside'. And they must be able to find this out for themselves by reading plain and simple words of guidance. The judges of this court are skilled lawyers of very considerable experience, yet it has taken us hours to ascertain what is and what is not offside, even with the assistance of highly experienced counsel. This cannot be right."

The circumstances examined in the Merkur case are not isolated cases. That case portrays a pervasive problem with legal documents. The permanent head of a large Victorian government department has recently sought my aid in translating a number of awards into plain English. They are written in such an extraordinary and legalistic style that they cannot be understood by the workers and managers to whom they are directed. As a consequence they lead to false industrial disputes – not disputes about substance but disputes about words and meanings. Documents intended to settle rights and duties and to avoid industrial disputes have become the sole source of additional disputes. That is a highly unsatisfactory result from everyone's point of view.

Financial Costs

The financial costs of poorly drafted legislation and forms are equally important. As the Commission pointed out in its report:

> "Laws which are not written in plain English impose unnecessary costs on Government and on the community at large. A document that is not readily comprehensible takes longer to understand, is more likely to need a 'translator' and is more likely to be misunderstood. Poorly drafted Bills consume the time of Members of Parliament who must understand and debate them. They impede the conduct of business in Parliament and interfere with the Government's

> legislative program. Poorly drafted Acts and regulations consume the time of those who must administer or comply with them. They reduce the efficiency of administration and of business activity contrary to the Government's policies on public service efficiency and deregulation. They waste the time of lawyers and judges. The costs imposed by poorly drafted laws and related documents could be much reduced if they were written in plain English. The Government would save administrative costs. The community would benefit from a reduction in the costs of complying with the law." (Para. 100)

It is, of course, difficult to estimate the additional administrative and compliance costs which poor drafting imposes on the Australian community annually. But some indication is to be found in a 1984 report by Coopers & Lybrand of the extent of the administrative and compliance costs associated with poor drafting on the effectiveness of forms used by the United Kingdom Department of Health and Social Security. (Operational Research Series: *Forms Effectiveness Study*.) Coopers and Lybrand made a particular study of the costs resulting from errors in completing fourteen separate forms. One form alone, with an estimated annual use in excess of four million copies, accounted for errors costing more than £1m. to remedy. The cost of the remedial action for errors in all fourteen forms was almost £11m. The estimate of cost imposed on respondents by the errors on those forms was almost £2m. Further costs imposed on respondents' employers were more than £500,000. Most of these errors could be eradicated by better design and clearer language. The expenditure was simply wasted.

No such broad study has been performed in Victoria or, so far as I am aware, elsewhere in Australia. But it has been established that a revision of a small number of court and related forms in the Attorney-General's Department will produce savings estimated at between $400,000 and $600,000 per annum.

OPPOSITION TO PLAIN ENGLISH

If these savings can be made and the social costs of the existing drafting style can be avoided by adopting a plain English approach to legislation and Government forms, why has that not been done already? There are several reasons, including tradition and inertia, which only time will overcome. But there are also reasons of a different type which are open to argument and persuasion. These are variously expressed and have different emphases, but they ultimately come down to the assertion that, in one way or another, plain English will necessarily lead to a loss of precision and certainty. That assertion is, in my view, based on a misunderstanding of what is meant by 'plain English'. That term *might* be used to refer to Sir William Dale's proposal that legislation should be restricted to broad general principles, whose application to particular circumstances should be left to the courts (*Legislative Drafting: A New Approach* (1977)). Such an approach would

certainly lead to a loss of precision, at least in the sense of detail. But that is *not* the Commission's approach to plain English. By 'plain English' we mean clear and effective communication of ideas presented in an orderly fashion through straightforward and direct language. That approach does not involve any loss of precision or detail. If a particular method of communicating is to be effective, the full message must be conveyed, not a distorted one. It follows that words with a technical legal meaning may well have to be preserved. Plain English is not be understood as truncated English.

We attempted to demonstrate the difference between plain English in this sense and the drafting style which prevails in Australia by rewriting the Takeovers Code, one of our most complex pieces of legislation, in plain English. Our aim was not to make it intelligible to the average citizen. That would be impossible. The average citizen has insufficient grasp of the commercial context. Our aim was simply to make it as intelligible as possible to those who were familiar with the relevant context. Lawyers, regulators and others in the takeovers industry have responded enthusiastically to our redraft. It is less than 60% the length of the original and vastly more clear. In the course of our work, we identified a number of recurrent defects which contribute to the confusion of the original. It should help in appreciating the difference between the two styles if I give a few examples of these defects and show how we redrafted the relevant provisions. I put to one side the more obvious causes of obscurity, such as sentence length and overuse of the passive voice, though these abound in the Takeovers Code. I should emphasise that none of the defects I will discuss is peculiar to the Code. They are regularly found in other Commonwealth and Victorian legislation.

Language Problems

1. *Overwriting caused by a false search for precision.*

The Code contains numerous sections in which simple and straightforward propositions have been expanded into highly inflated forms which are far more difficult to understand than the original propositions. Take section 19 as an example. This gives the National Companies and Securities Commission power to extend the time for paying the consideration under an offer or a resulting contract. Subsection 19(2) states:

> "An offeror shall ensure that the consideration specified in the relevant takeover offer is paid or provided *not later than the time by which the consideration is required by the terms of that takeover offer to be paid or provided or, if a later time has been fixed under sub-section (1), not later than the time so fixed.*" [Emphasis added]

The qualification "or, if a later time ..." is quite unnecessary. Subsection 19(1) would have no effect at all if the offeror were still bound to provide the consideration by the time set out

in the offer or contract. The qualification is necessarily implicit; no one could question it. A similar false sense of precision is found in the lengthy phrase beginning "not later than ..." which precedes the qualification. Most of the information it contains is again quite unnecessary. The message of the subsection is a simple one, as the plain English version demonstrates:

> "An offeror must ensure that the consideration specified in an accepted offer is provided *on time*." [Emphasis added]

In the original, one's attention to this message is needlessly diverted by a string of words which dance around its edges, adding nothing to its meaning.

2. *The creation of concepts which perform no useful role.*

The Code operates on the basis of threshold entitlements to shares. In each case it sets the threshold percentage but allows in some cases for the possibility of subsequent variations by regulation. The reader's task in finding out what percentage has been set is made more difficult by the fact that the drafter does not speak of the set percentage in the relevant operative provisions, but speaks instead of the "prescribed percentage". This term is then defined in the following way:

> "A reference in sub-section [x] to the prescribed percentage is –
>
> (a) a reference to [y]%; or
> (b) where a lesser percentage is prescribed by regulations in force for the time being for the purposes of this section – a reference to that lesser percentage."

The creation of this concept obscures the message, requiring the reader to take two steps rather than one. But it also involves a serious distortion of ordinary language. Twenty per cent (as in s.11) is twenty per cent; it is not a "prescribed percentage". "Prescribed percentage", even in legal jargon, does not usually mean "prescribed by this Act" but "prescribed by regulations made under this Act". In the plain English version the definition is abandoned and the relevant material built into the operative provisions. Instead of referring mysteriously to "the prescribed percentage of shares", it refers in s.1, for example, to "20% (but, if a lesser % is prescribed, that %)" of shares. It is more informative than the original and avoids distortion of ordinary language.

3. *The failure to integrate provisions which are similar and interrelated.*

Section 20 of the Code deals with golden handshakes. It prohibits the making of an offer that requires an offeree's approval for a payment to certain officers of the target company or a related corporation, if the payment is in relation to retirement from office. Subsection (1) is as follows:

"An offeror shall not make a take-over offer that requires the offeree to approve or consent to –

(a) a payment or other benefit being made or given to a director, secretary or executive officer of the target company as compensation for loss of, or as consideration for or in connection with his retirement from, his office as director, secretary or executive officer or any other office in connection with the management of the target company or of a corporation that is related to the target company; or

(b) a payment or other benefit being made or given to a director, secretary or executive officer of a corporation that is related to the target company as compensation for the loss of, or as consideration for or in connection with his retirement from, office as director, secretary or executive officer or any other office in connection with the management of the target company or of a corporation that is related to the target company;

and any such requirement is void."

Paragraphs (1)(a) and (1)(b) are almost identical in language, but careful reading reveals that (a) deals with payments to officers of the target company while (b) deals with payments to officers of a related corporation. There is no justification for laying down two rules when the principle is identical. The two should be integrated, not only to improve comprehension but also for reasons of efficiency. The plain English version reads as follows:

"An offeror must not make an offer subject to a condition that requires the offeree to agree to a benefit being given to a director, secretary or executive officer of the target company or of a related corporation as compensation for the loss of, or as consideration in connection with retirement from, an office connected with the management of the target company or of a related corporation ..."

When defects of all three types are piled one upon another as they regularly are in the Code, incomprehensibility is pretty well inevitable. Try the following introduction to s.39(1) –

"39(1) For the purposes of the application of this section in relation to a listed company –

(a) each of the following periods is a relevant period:

(i) if a part A statement is served on the company –

(A) the period commencing when the statement is served and ending at the expiration of 28 days after the day on which the statement is served or, if take-over

offers are dispatched pursuant to the statement within those 28 days, at the expiration of the period during which the take–over offers remain open; and
(B) if take–over offers are dispatched, in accordance with an order under section 46, pursuant to the statement – the period during which the take–over offers remain open; and

(ii) if a take–over announcement is made in relation to shares in the company – the period commencing when the announcement is made and ending at the expiration of the period during which offers constituted by that announcement remain open; and

(b) a person is, at a relevant time, a prescribed person in relation to a period that is, by reason of the service of a Part A statement or the making of a take–over announcement, a relevant period in relation to the company if –

(i) he is the person who is, or one of the persons who constitute, the offeror under the take–over scheme to which the Part A statement relates or is the person or one of the persons who caused the take–over announcement to be made; or

(ii) he is, at that time, entitled to more than the prescribed percentage of the voting shares in the company and he is not, and is not associated with, a person referred to in sub–paragraph (i)."

And at the end of all this, we still have not reached the operative section. Surely that form of drafting cannot be necessary.

Structural Problems

If the language of Australian legislation is difficult, its structure is sublimely so. In the Appendix (p 69) I have set out s.44 of the Takeovers Code, in both the original and the plain English versions. Subsections (1) to (3) of s.44 deal with false or misleading statements in Part A statements, Part B and Part D statements, and Part C statements, respectively. Each creates an offence. None of them identifies the person who is guilty of the offence. The reader is merely told that "a person to whom this sub–section applies is guilty of the offence". There is no indication in any of the three subsections of where the concept "person to whom this sub–section applies" is elucidated. The reader looks in vain at subss. (4), (5) and (6). These also create offences (fortunately, they do identify the persons who are guilty of the offences which they create). Subsection (7) also offers no help with the mystery. It too creates an offence but reverts, in part, to the approach adopted in subss. (1) to (3). Subsections (8), (9) and (10) are entirely off the point. Subsection (8) contains definitions; subss. (9) and (10) create rights to civil compensation.

The reader's search for enlightenment ends at subss. (11) to (14). These explain who is "a person to whom this sub–section applies" in subss. (1) to (3) and (7) respectively but the reader's enlightenment is still only partial. They must read on to subss. (16) and (17) if they are to find out what defences are available in a prosecution for the offences created by subss. (1) to (7).

There can be no justification for a structure like that in s.44. It creates a significant barrier to understanding. The information relevant to the offence created by subs.(1) should have been placed immediately after it. The information relevant to defences to a prosecution should have come next. Better still, a chart could have been constructed setting out horizontally the circumstances of each offence, the persons guilty of it, and the defences available. A reader would then have been able to catch all relevant information at a single glance. The extent of the structural defects in s.44 can only be fully appreciated by reflecting on the fact that, in the plain English version, the original sub–sections had to be reordered in the following way:

(1) (11) (15) (16) (20) (2) (12) (16) (20)
(3) (13) (16) (20) (4) (16) (20) (5) (8) (17)
(20) (6) (8) (17) (20) (2) (7) (8) (14) (17)
(20) (9) (15) (21) (10) (21) (18) (19)

Structural arrangement of a section in this way is quite unforgiveable. It may make it easier for mathematically minded drafters. It makes it nearly impossible for the rest of us.

But structural arrangement within a whole Act is even more important. Once again there is little attention to the needs of those who use the legislation. When the Takeovers Code was reduced to a plain English form, not only in language but also in structure, the original sections (leaving to one side traditional introductory clauses) were reordered in the following way.

11, 12, 11, 15, 16, 20, 16, 24, 18, 22, 23,
25, 25A, 25B, 25C, 21, 27, 19, 28, 30, 31,
32A, 31A, 31B, 17, 32, 33, 34, 35, 39, 39A,
39B, 40, 36, 41, 37, 38, 42, 43, 52, 44, 46,
47, 48, 50, 57, 58, 57, 58, 59, 60, 60A, 61,
45, 49, 8A, 56, 2, 3, 4, 5, 10.

No wonder numerous lawyers have condemned the Takeovers Code as being little short of incomprehensible.

WHAT IS THE SOLUTION?

Language Problems

None of the language defects found in Australian legislation would have occurred if legislative drafters had paid heed to the

words of Thornton, Australia's leading writer in this field. He distinguishes between three groups to whom the communication of a law is relevant: (1) the members of the law-making authority, (2) the members of society who are concerned with or affected by the law, and (3) the members of the judiciary. He continues:

> "It is unrealistic to believe that laws should be drafted in language and in a style which is familiar and instantly intelligible to the man in the street. Nevertheless the draftsman must in each case endeavour to draft in such a way that the law is successfully communicated to the persons who make up the three groups. Legislation having a high technical content may not be fully understood by groups 1 and 3, at least without comprehensive technical explanation. This is inevitable. A law to regulate radio communication may justifiably contain phrases such as 'intermediate frequency gain' and 'sinusoidal tones' and other phrases equally meaningless to most people. What is vital is that the words be chosen and a style adopted which those whose interests are affected (i.e. group 2) should be able to comprehend without unnecessary difficulty. Technical purposes are likely to require technical words and technical law may still be good law, even if unintelligible to most people, so long as it achieves ready communication with those who matter so far as that law is concerned.
>
> On the other hand, because in its application to some specialist areas legislation must be virtually unintelligible to most people, that does not provide the slightest justification for widespread unintelligibility. The style of legislation should deviate from common language only when a specialist topic requires.
>
> Even in such cases, the style should deviate from common language no more than is made necessary by the technical content. This principle cannot be emphasised too strongly."

Although Thornton's text *Legislative Drafting*, 3rd ed. (1987) is highly regarded and his injunction has been read by every legislative drafter in Australia, it appears to have had little effect in practice. It is obviously vain to hope that broad generalised injunctions will result in the development of a clearer and simpler style. Perhaps the Commission's work in identifying some of the main sources of obscurity and its Takeovers Code demonstration of how to draft more plainly will have more success. Ultimately, however, it comes down to a matter of training. Training in Australia is left to the apprenticeship system. An inexperienced drafter watches an experienced one at work. The result is the perpetuation of existing practices. I have no doubt that on-the-job training is valuable - indeed, essential - for the development of a true craftsperson. Equally, I have no doubt that a more structured approach to the training of drafters would improve the product.

Australia experimented with such an approach some years ago. The Legislative Drafting Institute was established in 1974. Its functions were:

- to conduct courses of training and instruction in legislative drafting
- to assist other countries (especially developing countries) in the training of legislative drafters
- to undertake research into methods and techniques of legislative drafting with a view to the simplification of laws and procedures and the reduction of costs
- to foster interest in, and encourage suitably qualified persons to enter, the profession of legislative drafting.

It was hoped that the Institute would provide training for people wishing to become legislative drafters in Australia. The first course in 1975 was limited to people nominated by the Commonwealth, the states of Australia and Papua New Guinea. Only the Commonwealth, New South Wales, Tasmania and Papua New Guinea nominated participants. In 1976 invitations were sent to the Commonwealth, the states of Australia, Papua New Guinea and other British Commonwealth countries in the South Pacific area. Because only two nominations were received the Institute's programme was suspended until the following year. In 1977 it became clear that no nominations would be received from the Commonwealth or the Australian states. The course was eventually given to participants from a number of developing countries. In subsequent years invitations appear to have been extended only to developing countries. The Institute was abolished on 11 November 1981 as a result of recommendations made by a Ministerial Committee to review Commonwealth functions ("the Razor Gang"). The training of legislative drafters from developing countries was to be left to on-the-job training in Canberra.

Despite the lack of success of this forerunner, the Commission recommended the establishment of a Legal Drafting Institute at Monash University. It did so because of the success of a similar joint government-university initiative in Ottawa, and because it believed that the failure of the earlier Australian model was largely due to the lack of interest shown by State drafting offices. Things have now changed. Both the Victorian and South Australian Offices have indicated their strong interest in the establishment of such an Institute, as has the Law Institute of Victoria. A feasibility study has already been conducted by the Public Service Board. There is considerable support for the proposal around Australia. There is also a market in the Pacific and in South East Asia - a market now partly serviced by the Commonwealth Secretariat. I hope the Institute will be established in 1989. But that is of course a matter for the Victorian Government which will, on our proposal, have to contribute to the funding of the body.

Structure

Even if no formal training course eventuates, a great deal can be done by altering the structure of our Acts of Parliament. In almost every case they contravene the basic principle of communication. Instead of going directly to the central message, they commence with a range of material which is irrelevant, or only peripherally relevant, to 99% of readers. That may suit drafters. But it does not suit those who want to read their output.

Perhaps the most remarkable example of a delayed message is in a recent Bill prepared for the Victorian Parliament. The key provision appears as clause 86. Indeed, the whole of the substance of the bill (the classification and reclassification of Crown land as public (inalienable) land and government (alienable land) is left to Part 3 of the Bill. Earlier parts (leaving commencement and definitions to one side) deal with such matters as the functions of the Surveyor General! It is almost as if the drafter had set out to hide the essential message of the Bill rather than to deliver it. It is hardly surprising that the responsible Minister should have called for assistance in redrafting it.

Something could easily be done to correct the structure of Bills and Acts. The usual introductory material could be left to the end. Detail could be relegated to schedules. Administrative procedures could come after provisions establishing rights and duties. The result would be a vast improvement in the intelligibility of legislation. All this would have to be negotiated with the Government and the Parliament. But I can see no insuperable problems in that regard. Nor do I envisage any sustained resistance to improving the dull format of legislative documents, or to using footnotes, cross references and indexing to assist readers to find their way through the morass. If legislation is to communicate, it must be far more user–friendly than it is today.

CONCLUSION

In this paper I have been extremely critical of some aspects of legislative drafting in Australia. However my criticisms should not be taken to reflect on the professional abilities of drafters in other respects. Indeed, my own experience in drafting and in redrafting legislation has led me to admire the skills of legislative drafters enormously. The full profit of the Victoria Law Reform Commission's report on plain English will only be realised when drafters, rather than law reform commissioners, take up the challenge and redirect their outstanding skills towards improved communication with their audience.

I conclude on a hopeful note. More and more people are recognising that change must come, in this as in other areas of the law. If drafters do not themselves take the initiative they will find change forced upon them. Word processing and computer software

programs are being developed to assist better communication in drafting. Their capacities create expectations which will have to be met. Computerised retrieval of legal information and on–line services between Parliament, Government Printer and retrieval services are already with us. Software is being developed for the automatic updating of electronic legislative texts. There are enough problems in legislation with a simple and straightforward style. They would be well nigh impossible with the present one. Machine capability may, in this field, ultimately become the drafters greatest tool – to the very great benefit of the rest of us, at least.

Offences relating to misstatements

60. It is an offence in the circumstances specified the following table for a specified person to make* a statement that is false or misleading in a material particular, or to omit material matter, unless the person has a specified defence.

[Table reproduced on following pages.]

Liability for mis-statements

44. (1) Where—

(*a*) there is, in a statement that purports to be a Part A statement served under paragraph 16 (2) (*d*), in a take-over offer or in a notice given under sub-section 42 (2) or sub-section 43 (1) or (4), matter that is false in a material particular or materially misleading in the form or context in which it appears; or

(*b*) there is an omission of material matter from such a statement, offer or notice,

a person to whom this sub-section applies is, subject to this section, guilty of an offence.

(2) Where—

(*a*) there is, in a statement that purports to be a Part B statement given under sub-section 22 (1) or a Part D statement served under sub-section 32 (1), matter that is false in a material particular or materially misleading in the form or context in which it appears; or

(*b*) there is an omission of material matter from such a statement,

a person to whom this sub-section applies is, subject to this section, guilty of an offence.

(3) Where—

(*a*) there is, in a statement that purports to be a Part C statement served under paragraph 17 (10) (*a*), or in a notice given under sub-section 42 (3) or sub-section 43 (1) or (4), matter that is false in a material particular or materially misleading in the form or context in which it appears; or

(*b*) there is an omission of material matter from such a statement or notice,

a person to whom this sub-section applies is, subject to this section, guilty of an offence.

	SPECIFIED CIRCUMSTANCES	SPECIFIED PERSONS	SPECIFIED DEFENCE
1.	*a)* In a document* appearing to be a Part A statement*; *b)* in a takeover offer*; *c)* in a notice under subsections 53(1), 56(1) or 57(1).	*a)* The offeror*; *b)* in relation to a Part A statement, a director of an offeror corporation at the time the statement was served*, unless the director voted against the resolution authorising the signing of the statement or was absent from the relevant meeting; *c)* in relation to a report contained in a Part A statement, the person who made* the report, provided that notice of his or her consent to its inclusion was lodged with the Commission under paragraph 8 (2) (*b*); *d)* in relation to a takeover offer or a notice, a director of an offeror corporation at the time the offer was sent or the notice was given*.	That, at the time of giving or serving the statement, sending the offer, giving the notice—or making the report— *a)* the person believed on reasonable grounds that i) the false matter was true; or ii) the misleading matter was not misleading; or *b)* in the case of an omission, the person i) believed on reasonable grounds that no material matter had been omitted; or ii) did not know that the omitted matter was material, provided that if, before the date of the commencement of proceedings the person had ceased so to believe or had become aware of the omission, the person gave reasonable notice as soon as reasonably possible to correct the false or misleading matter or the omission.

44. (4) Where—

(*a*) there is—

(i) in a report that is set out in a Part B statement in accordance with paragraph 22 (3) (*a*) or accompanies a Part B statement in accordance with section 23;

(ii) in a report that is set out in a Part D statement in accordance with paragraph 32 (3) (*a*);

(iii) in a report that accompanies, or is included in, a statement issued with the consent of the Commission under section 37 or 38; or

(iv) in a report that accompanies a notice given under subsection 43 (4),

matter that is false in a material particular or materially misleading in the form or context in which it appears; or

(*b*) there is an omission of material matter from such a report,

the person who made the report and, if that person is a corporation, any officer of the corporation who is in default are, subject to this section, each guilty of an offence.

(5) Where—

(*a*) a person proposes, or 2 or more persons together propose, to dispatch a take-over offer or to cause a take-over offer to be dispatched, or to cause a take-over announcement to be made, in respect of shares in a company;

(*b*) the person, or either or any of the persons, referred to in paragraph (*a*), or a person associated with the person or with either or any of the persons, or, if the person or either or any of the persons or any person associated with the person or with either or any of the persons is a corporation, an officer of the corporation or a person associated with such an officer—

(i) makes or issues, or causes to be made or issued, an oral or written statement to the public, or publishes, or causes to be published, an advertisement, relating to a prescribed matter; or

(ii) dispatches, or causes to be dispatched, a document relating to a prescribed matter to any of the holders of shares in, or of renounceable options or convertible notes granted or issued by, the target company; and

(*c*) there is in the statement or advertisement, or in the document, matter that is false in a material particular or materially misleading in the form or context in which it appears,

the person who made or issued the statement, published the advertisement or dispatched the document, or caused the statement to be made or issued, the advertisement to be published or the document to be dispatched, and, if that person is a corporation, any officer of the corporation who is in default, are, subject to this section, each guilty of an offence.

	SPECIFIED CIRCUMSTANCES	SPECIFIED PERSONS	SPECIFIED DEFENCE
2.	*a)* In a document appearing to be a Part C statement*; *b)* in a notice under subsection 53(1), 56(1) or 57(1).	*a)* The offeror; or *b)* in relation to a document appearing to be a Part C statement, a director of the offeror corporation at the time the statement was served, unless the director voted against the resolution authorising the signing of the statement or was absent from the relevant meeting.	As above 1.
3.	In a document appearing to be in a Part B statement* or a Part D statement*.	*a)* The target company*; or *b)* a director of the target company at the time the Part B or Part D statement was given or served, unless the director voted against the resolution authorising the signing of the statement or was absent from the relevant meeting; or *c)* if the target company was in the course of being wound up or was under official management— the liquidator or official manager who signed the Part B or Part D statement.	As above 1.
4.	*a)* In a report set out in a Part B statement or a Part D statement or accompanying a Part B statement under subsection *b)* 12 (1); in a report accompanying or included in a statement issued under sections 51 or *c)* 52; in a report accompanying a notice under subsection 57 (1).	*a)* The person who made the report; or *b)* an officer of the corporation that made the report who was in any way knowingly concerned in the contravention.	As above 1.

44. (6) Where—

(*a*) the directors of a company have reason to believe that a person proposes, or 2 or more pers s together propose, to dispatch a take-over offer or to cause a take-over offer to be dispatched, or to cause a take-over announcement to be made, in respect of shares in the company;

(*b*) the target company or a corporation that is related to the target company or an officer of the target company or of such a corporation or a person associated with such an officer—

(i) makes or issues, or causes to be made or issued, an oral or written statement to the public, or publishes, or causes to be published, an advertisement, relating to a prescribed matter; or

(ii) dispatches, or causes to be dispatched, a document relating to a prescribed matter to any of the holders of shares in, or of renounceable options or convertible notes granted or issued by, the target company; and

(*c*) there is in the statement or advertisement, or in the document, matter that is false in a material particular or materially misleading in the form or context in which it appears,

the person who made or issued the statement, published the advertisement or dispatched the document, or caused the statement to be made or issued, the advertisement to be published or the document to be dispatched, and, if that person is a corporation, any officer of the corporation who is in default, are, subject to this section, each guilty of an offence.

(7) Where—

(*a*) a take-over offer is dispatched, or a take-over announcement is made, in respect of shares in a company;

(*b*) at any time during the period commencing when the take-over offer is dispatched or the take-over announcement is made and ending at the expiration of the period during which the take-over offer remains open or the offers constituted by the take-over announcement remain open, a person to whom this sub-section applies—

(i) makes or issues, or causes to be made or issued, an oral or written statement to the public, or publishes, or causes to be published, an advertisement, in connection with the offers under the relevant take-over scheme or in connection with the take-over announcement, relating to a prescribed matter; or

(ii) dispatches, or causes to be dispatched with or in connection with the offers under the relevant take-over scheme or with or in connection with the take-over announcement, a document relating to a prescribed matter to any of the holders of shares in, or of renounceable options or convertible notes granted or issued by, the target company (not being a document required by this Code to be so dispatched); and

	SPECIFIED CIRCUMSTANCES	SPECIFIED PERSONS	SPECIFIED DEFENCE
5	If a person proposes to make offers— *a*) in a statement relating to a defined matter* made to the public; *b*) in a document relating to a defined matter sent to a holder of shares* in or renounceable options* or convertible notes* issued by, the target company*, by the person or an associate* or, if the person or associate is a corporation, an officer or an associate of such an officer.	*a*) The person who made the statement or sent the document; or *b*) if that person is a corporation, an officer of the corporation who was in any way knowingly concerned in the contravention.	That, at the relevant time, the person believed on reasonable grounds that— *a*) the false matter was true; or *b*) the misleading matter was not misleading, provided that if, before the date of the commencement of proceedings, the person ceased so to believe, he or she gave reasonable notice as soon as reasonably possible to correct the false or misleading matter.
6.	If the directors of a company have reason to believe that a person proposes to send* or make offers in relation to shares in the company— *a*) in a statement relating to a defined matter made to the public;	*a*) The person who made the statement or sent the document; or *b*) if that person is a corporation who was in any way knowingly concerned in the contravention	As above 5.

44. (7) (*c*) there is in the statement or advertisement, or in the document, matter that is false in a material particular or materially misleading in the form or context in which it appears,

that person, and, if that person is a corporation, any officer of the corporation who is in default, are, subject to this section, each guilty of an offence.

(8) For the purposes of sub-sections (5), (6) and (7)—

(*a*) a reference to a document includes a reference to a disc, tape, cinematograph film or other article from which sounds or images can be reproduced; and

(*b*) a prescribed matter is a matter relating to affairs of, or to marketable securities issued or to be issued by—

(i) the target company or a corporation that is related to the target company;

(ii) the offeror or on-market offeror, as the case may be, or a corporation that is related to the offeror or on-market offeror; or

(iii) any other offeror or on-market offeror in relation to the target company, or any corporation that is related to such an offeror or on-market offeror.

(11) The persons to whom sub-section (1) applies are—

(*a*) the offeror;

(*b*) in a case where false or misleading matter appeared in, or material matter was omitted from, a statement—

(i) if the offeror is or includes a corporation—a person who was a director of that corporation at the time when the statement was served, not being—

(A) a director who was not present at the meeting at which the resolution authorizing the signing of the statement was agreed to; or

(B) a director who voted against that resolution; and

(ii) subject to sub-section (15), a person a notice of whose consent to the inclusion in the statement of a report made by him has been lodged with the Commission under paragraph 18 (2) (*b*); and

(*c*) in a case where—

(i) false or misleading matter appeared in, or material matter was omitted from, an offer or notice; and

(ii) the offeror is or includes a corporation,

a person who was a director of that corporation at the time when the offer was dispatched or the notice was given, as the case may be.

	SPECIFIED CIRCUMSTANCES	SPECIFIED PERSONS	SPECIFIED DEFENCE
6.	*b)* in a document relating to a defined matter sent to a holder of shares in, or of renounceable options or convertible notes issued by, the target company, by the target company, a related corporation, an officer of either or an associate of such an officer.		
7.	During the offer period— *a)* in a statement relating to a defined matter made to the public; or *b)* in a document relating to a defined matter (except a document that must be sent under this Code) sent in connection with the offers to a holder of shares in, or of renounceable options or convertible notes issued by, the target company,	*a)* The person who made the statement or sent the document*; or *b)* if the offeror or an associate is a corporation, an officer of that corporation, who was knowingly concerned in the contravention.	As above 5.

44. (12) The persons to whom sub-section (2) applies are—

(*a*) the target company;

(*b*) where the statement was signed as mentioned in paragraph 22 (2) (*a*) or 32 (2) (*a*)—a person who was a director of the target company at the time when the statement was given or served, not being—

(i) a director who was not present at the meeting at which the resolution authorizing the signing of the statement was agreed to; or

(ii) a director who voted against that resolution; and

(*c*) where the statement was signed as mentioned in paragraph 22 (2) (*b*) or 32 (2) (*b*)—the person who signed the statement.

(13) The persons to whom sub-section (3) applies are—

(*a*) the on-market offeror; and

(*b*) in a case where—

(i) false or misleading matter appeared in, or material matter was omitted from, a statement; and

(ii) the on-market offeror is or includes a corporation,

a person who was a director of that corporation at the time when the statement was served, not being—

(iii) a director who was not present at the meeting at which the resolution authorizing the signing of the statement was agreed to; or

(iv) a director who voted against that resolution.

(14) The persons to whom sub-section (7) applies are—

(*a*) the offeror or on-market offeror;

(*b*) a person associated with a person referred to in paragraph (*a*);

(*c*) the target company;

(*d*) an officer of the target company or a person associated with such an officer; or

(*e*) if a person referred to in paragraph (*a*) or (*b*) is a corporation—an officer of the corporation or a person associated with such an officer.

(15) A person referred to in sub-paragraph (11) (*b*) (ii) is guilty of an offence under sub-section (1), and liable to pay compensation under sub-section (9), only in respect of false or misleading matter in the report referred to in that sub-paragraph or an omission of material matter from that report.

	SPECIFIED CIRCUMSTANCES	SPECIFIED PERSONS	SPECIFIED DEFENCE
7.	made by the offeror or an associate, the target company, an officer of the target company or an associate of such an officer, or, if the offeror or the associate is a corporation or an associate of such an officer.		

Penalty: A fine not exceeding $5000 or imprisonment for a period not exceeding one year, or both.

Note: Original 44: Rendered virtually incomprehensible by poor structure and separation of interdependent material, as the following comparative table demonstrates:

Plain English	*Original*
60	*44*
Table 1	*(1) (11) (16) (20)*
Table 2	*(2) (12) (16) (20)*
Table 3	*(3) (13) (16) (20)*
Table 4	*(4) (16) (20)*
Table 5	*(5) (8) (17) (20)*
Table 6	*(6) (8) (17) (20)*
Table 7	*(7) (8) (14) (17) (20)*
61 (1)	*(9) (10) (15) (21)*
61 (2)	*(18) (19)*

44.(16) It is a defence to a prosecution of a person for an offence against sub-section (1), (2), (3) or (4) if the person proves—

(*a*) that, when the statement was served or given, the offer was dispatched, the notice was given or the report was made, he—

(i) believed on reasonable grounds that the false matter was true;

(ii) believed on reasonable grounds that the misleading matter was not misleading;

(iii) in the case of an omission, believed on reasonable grounds that no material matter had been omitted; or

(iv) in the case of an omission, did not know that the omitted matter was material; and

(*b*) that—

(i) on the date of the information, he so believed or did not so know; or

(ii) before that date, he ceased so to believe or came to know that the omitted matter was material, and forthwith gave reasonable notice containing such matters as were necessary to correct the false or misleading matter or the omission.

(17) It is a defence to a prosecution of a person for an offence against sub-section (5), (6) or (7) if the person proves—

(*a*) that, when the statement was made or issued, the advertisement was published or the document was dispatched, he—

(i) believed on reasonable grounds that the false matter was true; or

(ii) believed on reasonable grounds that the misleading matter was not misleading; and

(*b*) that—

(i) on the date of the information, he so believed; or

(ii) before that date, he ceased so to believe and forthwith gave reasonable notice containing such matters as were necessary to correct the false or misleading matter.

(20) The penalty for an offence arising under this section is a fine not exceeding $5,000 or imprisonment for a period not exceeding 1 year, or both.

(21) Nothing in this section affects any cause of action existing apart from this section.

61 Compensation for loss resulting from misstatements

1) Without prejudice to any other cause of action, a person who has failed to comply with section 60 is liable to pay compensation to another person who acts or fails to act on the basis of the relevant statement for any loss or damage suffered as a result*, even if the person has not been convicted of the offence.

2) It is a defence to an action for compensation if the defendent proves that, at the time the statement was made—

a) the defendant believed on reasonable grounds that the false matter was true or that the misleading matter was not misleading; or

b) in the case of an omission, the defendant believed on reasonable grounds that no material matter had been omitted, or did not know that omitted matter was material

and that, if the action is brought by a person who acted on the faith of the statement—

c) the defendant, at the time when the plaintiff so acted, believed or did not know as mentioned in paragraph (*a*) or (*b*); or

d) before the plaintiff so acted, the defendant ceased to believe or not to know as mentioned in paragraph (*a*) or (*b*) and as soon as reasonably possible gave reasonable notice to correct the error.

---

44. (9) A person to whom sub-section (1), (2) or (3) applies, or a person referred to in sub-section (4), is, in the circumstances referred to in that sub-section, whether or not he has been convicted of an offence under that sub-section, liable, subject to this section, to pay compensation to a person who acts, or refrains from acting, on the faith of the contents of the relevant statement, offer, notice or report for any loss or damage sustained by that person by reason of his reliance on the false or misleading matter or by reason of the omission of material matter.

(10) A person referred to in sub-section (5), (6) or (7) is, in the circumstances referred to in that sub-section, whether or not he has been convicted of an offence under that sub-section, liable, subject to this section, to pay compensation to a person who acts, or refrains from acting, on the faith of the contents of the relevant statement, advertisement or document for any loss or damage sustained by that person by reason of his reliance on the false or misleading matter.

(18) It is a defence to an action under sub-section (9) if the defendant proves—

(*a*) any matter referred to in paragraph (16) (*a*); and

(*b*) in a case where the action is brought by a person who acted on the faith of the contents of the relevant statement, offer, notice or report, that—

(i) when the plaintiff so acted, the defendant believed as mentioned in sub-paragraph (16) (*a*) (i), (ii) or (iii) or did not know that the omitted matter was material; or

(ii) before the plaintiff so acted, the defendant ceased so to believe or came to know that the omitted matter was material, and forthwith gave reasonable notice containing such matters as were necessary to correct the false or misleading matter or the omission.

(19) It is a defence to an action under sub-section (10) if the defendant proves—

(*a*) any matter referred to in paragraph (17) (*a*); and

(*b*) in a case where the action is brought by a person who acted on the faith of the contents of the relevant statement, advertisement or document, that—

(i) when the plaintiff so acted, the defendant believed as mentioned in sub-paragraph (17) (*a*) (*i*) or (ii); or

(ii) before the plaintiff so acted, the defendant ceased so to believe and forthwith gave reasonable notice containing such matters as were necessary to correct the false or misleading matter.

62 Presumption concerning a person's knowledge

Unless the contrary is proved, a person is presumed to have had, at a particular time, the same knowledge as a person had who was acting as his or her employee or agent in relation to matters which give rise to proceedings under this Code.

8(10) In any proceedings under or arising out of this Code, a person shall, in the absence of proof to the contrary, be presumed to have been aware at a particular time of a fact or occurrence of which an employee or agent of the person having duties or acting on behalf of his employer or principal in connection with the matter to which the proceedings relate was aware at the time.

COMMENT

PATRICK BRAZIL, Secretary, Commonwealth Attorney-General's Department, Canberra

Australia has recently addressed both issues which this seminar will be discussing - plain drafting and interpretation. Plain drafting is something that everyone supports in theory. At the Federal level, Cabinet has issued a directive that all legislation should be as simple as possible. Cabinet's concern for plain English has arisen from business deregulation, in particular the Takeovers Code and securities legislation. The Attorney-General's Department has recently redrafted the Takeovers Code taking into account comments made by the Law Reform Commission of Victoria, including its suggestions to restructure the Code. The next step will be to show the redraft to business people for comment.

The idea so dear to Sir William Dale was to draft provisions in very simple, short language and leave it to the courts and other users of the statute to apply in particular cases. Now we are all familiar with the trade-off that is involved in that particular case, namely it is the business of the lawmakers and the administrators ultimately trusting the courts to administer that very short general statement of law in a satisfactory way. I know plain English covers much more than that but I just dwell on that particular case for a moment. Our experience is that indeed that does sometimes work. The particular case I have in mind is s.52 of our Trade Practices Act which deals with deceptive or misleading conduct. It is a very short provision indeed but we found since that provision was enacted in 1974 it has been applied by the courts in a flexible but consistent way. A detailed but on the whole very satisfactory jurisprudence has been built up by the courts on the basis of that very simple and short provision.

I have already indicated by what I have said about the review of our Takeovers Code that an important part of improving the situation will be, wherever it is possible, to consult the users of the legislation at the time the legislation is being drawn up. I think that is a terribly important point. I realise it is not always possible but whenever it can be done I believe the opportunity ought to be taken. Indeed we are hoping to take that opportunity ourselves in relation to our review of the Takeovers Code.

What else do we do to improve the situation? Do we restructure Parliamentary Counsel? I think it is equally important that those instructing Parliamentary Counsel right up to the Prime Minister realise that simpler drafting, or plain English, is of value and should be recognised. It should be part of the context in which Parliamentary Counsel are asked to draft legislation. That approach ought to be possible even when the client comes along with a dreadfully complicated piece of legislation such as Australia's recent Fringe Benefits Tax legislation. There ought to be an

opportunity somewhere along the way for someone to say "Hey! You know you realise this is going to produce a monstrosity of an Act with 200 enormously complex provisions. Don't you think from the point of view of simpler drafting or plain English you ought to have a look at the concepts to see whether or not you can achieve what you have in mind by a simple conceptual approach that will lead to shorter, more accessible, more readily, understood legislation?" Perhaps I am being idealistic in that but I think it is so important that that sort of matter ought to be recognised in Cabinet and by instructing departments.

The final thing I want to mention is tax Acts. I have mentioned our Fringe Benefits Tax. In Australia we have got to the point where our tax Acts are just about unintelligible. Some sections go over about ten pages and make some of the Takeovers Code provisions, which David Kelly rightly criticised today, look like examples of relatively plain English. I just do not know how people understand those sections without referring to extrinsic aids. If you go to the explanatory memorandum issued by the Tax Office and you find out what they meant to do, then you have some hope of beginning to understand what the legislation may mean. Now that is a cry of despair in a sense. I do not see any solution for us in that particular area. A predecessor of mine said that our original Income Tax Act of 1916 was a thing of great simplicity, architectural symmetry and beauty. But the tax avoiders and evaders just drove a coach-and-six all through it and thus we have the monstrosity that it is today.

I think finally I should get into the competition of quotes in this particular area. It is a fruitful area for quotes and I want to direct you to the first Epistle of St Paul to the Corinthians where he tells us: "except ye utter the words easy to be understood, how shall it be known what is spoken".

COMMENT

WALTER ILES, Chief Parliamentary Counsel

Parliamentary Counsel have mixed feelings about plain English. On the one hand we welcome it and we think that the plain English advocates are people who are really coming along very late in the piece. Last century Lord Thring, who was looked upon as the father of the English style of legislative drafting, said in his text that the word best adapted to express a thought in ordinary composition will generally be found to be the best that can be used in an Act of Parliament. David Kelly would agree that that is a proposition very much in line with what the plain English advocates are putting forward at the moment.

Our view is that Parliamentary Counsel have actually led the way in style of the law. They have a structure and an approach to it which I think is far superior to the conveyancing styles that are used in the

rest of the legal profession. So we welcome the approach to plain English which means that people are now paying attention to the law, and I think attention needs to be paid to it both as to the form of the statute book and as to the form of ordinary legal documents. But on the other hand we find with the plain English campaign that Parliamentary Counsel seem to be the first on the receiving end of criticism and I do not really think that that is justified. There are grounds for criticizing the statutes but I do not really think there are grounds for criticizing what Parliamentary Counsel do. You may well ask what are the reasons for that. I think the first is the problem of pressure. I do not think anybody who has not participated actively in legislative drafting appreciates the pressure that can be involved to get a Bill out on time. This week, for example, I have had one session of 41 hours of meetings to get a Bill back into the House. Now when drafting in those circumstances it is difficult to do it on time. It is also difficult to have a look at your style and examine it and see whether you could be doing it better.

Parliamentary Counsel in New Zealand and most probably in Australia have not been renowned for the resources they have available to them. When I joined the New Zealand office in 1959 there were five Parliamentary Counsel and there are now nine. The number of Bills and Regulations we produce is very substantial. I think the standard is extremely high and is in accordance with the proud tradition of our office which was fathered by Sir John Salmond who controlled the office from 1909 to 1919.

Let me give another example of drafting under pressure – the Goods and Services Tax Act introduced by the last Government. This was most probably done in as short a time as was possible. I had no conversations with the Minister of Finance about that piece of legislation but I can imagine the response I would have received if I had said to him, "We can produce a conventional Goods and Services Tax Act in time for you to apply it in the next financial year; we could produce a better Act with more time but of course if we do you will forfeit $X million because it will not be ready to be applied in the next financial year ..."

A reforming government which wants change wants legislation with a great immediacy and I think that has to be appreciated. Another reason why we do not achieve a perfect result is complicated policies. This has been adverted to by others and it is certainly a major problem. It is hard to express a complicated policy in plain English and if it is possible to do it it is certainly going to take longer. Another reason why our result may not be perfect is possibly our traditional style. We do tend to have training on the job and people are inculcated into our method of doing it. I was interested that David Kelly said that in Australia the recruits to the Parliamentary Counsel Office are graduates fresh from university. It has never been our practice to do that. We have always recruited people with some experience in the practice of the law either in private law firms or in government service. There is always scope for good recruits and I should mention that there are still vacancies in our office.

I think you have to be wary of overseas criticism. It is easy to get examples which do not apply in New Zealand. I would be very reluctant to criticise what happens in the United Kingdom because I am not sufficiently familiar with it nor am I really familiar with practices in Australia. But there is a bit of a tendency to import criticism and say because this criticism is valid in England or Australia or somewhere else, it is valid in New Zealand.

Cost is another factor which affects how much time can be spent on a job. An example is the new electoral form. The forms expert who had been imported to rewrite the form said he did not want any legal gobbledegook in his form. My reply was that since the form must be in accord with the Electoral Act it should bear at least some resemblance to the provisions of that Act. From that unhappy beginning we actually developed a very good working relationship and speaking with some pride of authorship I think in the end it was a very good form. But the hours that went into it were tremendous and I am glad we did not have an accountant there with a cash register clocking up the hours. It may well have been worth it because, as the Minister of Justice said in his opening speech to this seminar, that form went out to every adult in New Zealand.

I was also involved in the forms that are attached to the Family Proceedings Rules that were largely done in consultation with officials of the Department of Justice . I am told that now most proceedings for dissolution of marriage in the Family Court are taken without the aid of solicitors and people rely solely on those forms. That may well be an example of what David Kelly says – that if you get the forms right you can make things very much easier for ordinary people.

There are two other exercises in New Zealand which I think should be mentioned. (I have had no participation in them.) The taxation form last year which was rewritten in plain English received an award from the New Zealand Plain English body. That is, I think, a very commendable New Zealand exercise that needs to be taken note of, as are the activities of the Public Trust Office with their plain English wills.

I am struck by what I have heard of Australia, that there seems to have been a degree of antagonism between Parliamentary Counsel and the plain English advocates. I think what we need in New Zealand is co–operation between those who advocate plain English and Parliamentary Counsel. Parliamentary Counsel are quite prepared to co–operate with those interested in achieving better legislation in New Zealand and I would not like to see an attitude of antagonism arise.

I think that one thing that perhaps distinguishes New Zealand is the co–operation that we have with government departments. I think that the best Bills result from full co–operation between departmental officials and Parliamentary Counsel and I think we have that. Overseas there does appear to have been an element of a priesthood with regard to Parliamentary Counsel. I know that is a

term that has been applied to New Zealand with regard to the Treasury. I make no comment on that. But the practice in some overseas jurisdictions both in Australia and the United Kingdom is to not accept a word of drafting from anybody else. In New Zealand we have been forced by our numbers to at least accept drafts from other people. Sometimes they are very good. Sometimes they are very bad. But the main thing I think is that there needs to be a proper degree of co-operation between Parliamentary Counsel and officials. I do not fancy the idea of Parliamentary Counsel sitting in an olympian way in his or her office and devising a Bill simply on the basis of written instructions. A lot of drafting takes place across the table and sometimes it would be hard to find any written record of how a Bill came to take a particular form.

We believe in a functional approach. The Minister of Justice in his address touched on the question of elegance. I do not think we make any claims to elegance but in doing a little reading in preparation for this seminar I came across a passage in the English magazine *The Conveyancer* which, while it is referring to conventional English conveyancing drafting, is I think a passage worthy of being read to this audience today. And I propose to conclude by doing that:

> "Given the years of usage which have produced a complex legal language and given that each and every lawyer has invested time and energy in polishing his or her mastery of it and given that there is no justification for innovating with clients' matters and given that others are free to do so if they wish, and given that it is not compulsory to change we think it likely and possible that some will not feel inclined to cease and desist and until they are shown good and sufficient reason therefor and unless and until they are required and enjoined to alter or amend their ways and binding and complete legislation is in full force and effect which will order and direct them so to do it is natural and fitting to be minded and inclined to hold maintain and adhere to the tried trusted and accepted method and system. It is, after all, so elegant."

DISCUSSION

Comment by participants

Maurice Gavin of the Department of Social Welfare, Wellington, said he believed that departmental solicitors were often overly cautious when giving instructions. Such caution was endemic to lawyers but sometimes this was not helped by Parliamentary Counsel. He gave an example where Parliamentary Counsel suggested the phrase "to the extent that it is practical" should be added to a list of guidelines.

Olive Smuts-Kennedy a barrister from Wellington said that it was important for legislation to foresee circumstances, otherwise they would be left to the Court to interpret and this could become expensive for the parties. This was not an appropriate application of the "user pays" philosophy.

Walter Iles gave the example of the Matrimonial Property Act which attempted to provide broad rules for the entitlement of married people. The Act had not stopped litigation but nevertheless was an example of detailed legislation which had been successful.

Jim Cameron, Law Commissioner, said there needed to be a balance between detail and generality. The Matrimonial Property Act 1963 had provided insufficient guidelines. Sometimes the lack of such guidelines could defeat the intention of legislation. It was not true, however, that more detail necessarily equalled less litigation.

Dave Smith of the Ministry of Transport gave the example of the blood alcohol legislation. Although in 1976 the Act was revised and streamlined, Parliament had to keep adding new bits because of interpretations by the High Court. He added that the actual time spent in drafting such legislation was very short, even though a Bill may be before the House for about nine months.

Geoff Fuller from National Mutual, Wellington noted that the old drafting technique was designed to ensure the document was safe from attack in the courts rather than for people to understand it. He believed that a client may be better served by having such a comprehensive document, even if it was incomprehensible to the client.

Richard Niven also from National Mutual, Wellington said he thought plain drafting required people of courage, knowledge and with adequate time. He did not believe it was a problem with the courts because the courts had not previously had the advantage of simple drafting to interpret.

David Kelly believed that plain drafting did not need courage so much as a willingness to get rid of old habits. He questioned whether it really took longer to write something in plain English. Walter Iles believed that it took time to change traditional drafting styles.

Jack Riddett a solicitor from Wanganui gave the example of the Local Government Official Information and Meetings Act 1982 with cross referencing to other sections and schedules. This led to ambiguity, and he believed it would be clearer if the exceptions were simply stated in the relevant section.

Bevan Greenslade of the NZ Employers' Federation suggested that more use could be made of flow charts or similar graphics. These were much more easily understood than a lot of sub-paragraphs, and were intuitive for non-lawyers to use. He also thought it was wrong to assume that the Legislature wants to make clear legislation, as sometimes it suited lawmakers to leave things obscure for the court to interpret.

Another participant asked what impact consolidation of statutes

had on clear and intelligible legislation, and whether it was desirable to have specific or general statutes. Walter Iles said that fashions had changed and that big Acts tended to create big problems. He believed that on the whole it was better to keep issues apart, although there was an advantage in bringing related matters together. He gave the example of the Labour Relations Act where there was a real effort to reorder the Act and to make it more intelligible than its predecessor. Bevan Greenslade agreed that the layout was better, but that subtle language had allowed various matters to sneak in unnoticed. Patrick Brazil said there were occasions when open textured legislation was the best approach, and one had to trust the wisdom of judges to recognise this.

II THE PARLIAMENTARY PROCESS

THE ROLE OF PARLIAMENT

Sir George Laking
Chairperson, Legislation Advisory Committee

The work of the Legislation Advisory Committee

In the interests of discussion, I propose to limit myself to a brief description of the composition and functions of the Legislation Advisory Committee, the way in which it operates and the contribution it tries to make to the legislative process in the areas which are of principal interest to this seminar. The fruits of the Committee's experience in the first year or so of its existence as to how the legislative process works in practice and how closely it conforms to the classic principles of good law-making can be illustrated by reference to a few examples of specific legislative proposals which have come under the Committee's scrutiny. They are culled from a list which includes such major measures as the State-Owned Enterprises Bill, the Immigration Bill, the Reserve Bank Amendment Bill, the Maori Language Bill, the Environmental Bill, the Town and Country Planning Amendment Bill and most recently the State Sector Bill.

When the Law Commission was established by the Law Commission Act 1985, the Law Reform Committees which up to that time were the main focus of law reform activity outside the Department of Justice were disbanded. One of them the Public and Administrative Law Reform Committee, was almost immediately revived in a modified form as the Legislation Advisory Committee. Its membership, in the words of the Minister of Justice, "comprises experts in the field drawn from the legal profession, the academic world and government". The work of the Committee is complementary to that of the Law Commission and the necessary co-ordination is achieved through the presence of Professor Keith on both bodies. In some aspects of its work the Committee also maintains a liaison with the Economic Development Commission.

The Committee's function is similar to that of its predecessor, i.e. to advise the Minister of Justice on matters in the field of public law referred to it by the Minister. It may also make submissions to Select Committees or other appropriate authorities on public law issues arising out of Bills introduced into Parliament. However, the scope of its activities was materially enlarged by the present Minister. It is now required to report to him or to the Cabinet Legislation Committee on public law aspects of "legislative proposals" which may be referred to it. This is a significant change. It means that from time to time the Committee is given the opportunity to study and comment on draft legislative proposals before they are introduced into the House or, in the case of statutory regulations, before they are finally approved.

Since the Committee began to operate in May 1986 it has dealt with a number of such referrals and in doing so has been able to come much closer to the process by which legislative proposals are developed than if it had been confined to looking at them after introduction. This is particularly important for members of the Committee who are not otherwise involved in the administrative machinery.

The Committee has invariably found that discussion with the officials concerned has produced a clearer understanding of the policy being implemented and has enabled the Committee to make a better judgment as to how well the draft will serve the purposes it is intended to serve. In some instances the end result of the Committee's consideration has been a recommendation that legislation was not necessary to achieve the objective sought; in others, that the draft proposal did not adequately or precisely reflect the policy to be implemented; in yet others that the draft, by failing to provide adequate rights of objection and appeal or in conferring excessive or unreasonable powers on enforcement authorities did not conform to basic legal principle; and again – all too often – that the draft needed to be made more comprehensible to those likely to be affected by the legislation.

The fact that the Committee has commented on a legislative proposal still under discussion does not inhibit it from presenting its views to the Select Committee following a Bill's introduction. It frequently does so.

It is not particularly useful, I feel, for the Committee to develop a scorecard mentality towards this aspect of its work. It naturally follows the progress of measures on which it has been consulted but does not seek to claim all or any of the credit for changes which may have been made to the proposal after the Committee has reported on it. One conclusion which the Committee did reach very rapidly was that while this type of "quality control" has a value, the problem needs to be attacked on a broader front and much earlier in the lawmaking process. The nature of it is such that the Committee's effectiveness is often limited by the pressures on the legislative programme. I have no doubt that Parliamentary Counsel could speak with much greater feeling on this point. By the time a proposal reaches the Cabinet Legislation Committee it is almost invariably being strongly pressed by the sponsoring Minister for a decision or early introduction into the House. In those cases what ought to be for the Committee a "solemn and deliberate process" becomes of necessity a rush job to be carried out at short notice by whatever members of the Committee are available in Wellington. Consultation with officials in these circumstances may be less than adequate. Suggested modifications of the proposal, however admirable, are less welcome to Ministers than they might have been at an earlier stage. In short, the later the controls are applied, the more difficult it is to check the momentum which has built up behind the proposal. That pressure tends to be reinforced by the time the measure reaches a Select Committee.

The Committee had an opportunity to do something about this when in July 1986 the Minister of Justice asked the Committee to comment on a paper prepared in the Department of Justice intended as guidance for departmental office solicitors in drafting legislation. In the light of its experience, the Committee suggested that a more detailed paper addressed to a wider audience, including Ministers, Members of Parliament, departmental officials, particularly those involved in policy formulation and the public would be of greater value. As a result a report entitled "Legislative Change – Guidelines and Content" was presented to the Minister and published by the Department of Justice in August 1987. Parts of that report are included in your seminar papers. I commend it to you as a useful tool. The Cabinet adopted the report in October 1987 and promulgated it within the Government. In doing so it imposed on Ministers and officials a requirement that all draft Bills submitted to the Cabinet Legislation Committee for approval should be accompanied by a statement from the sponsoring Minister that the guidelines were followed in its preparation; or, if not, the reasons for the departure.

On their face, the central questions posed by the guidelines seem obvious enough.

> What is the policy being implemented?
>
> To what extent is legislation necessary for that purpose?
>
> Does the legislative proposal in fact give effect to the policy?
>
> Is it as accessible and understandable as possible, particularly to those who are likely to be affected by it?

Let me give three illustrations from the Committee's experience which suggest that those questions are not always adequately addressed at the proper time.

The Dentists Bill now before the House is one with which the Committee became involved before it was given approval by the Cabinet Legislation Committee. For some years it has been accepted that the current Act needs revision. The present Government had committed itself to some amendments relating to the activities of dental mechanics and dental nurses and this finally provided the impetus for a general review of the existing statute. The Committee's initial involvement was with the updating of the complaint handling and disciplinary procedures within the profession. This in itself was an important feature of the Bill, the more so because it is seen by the Department of Health as a model for legislation regulating other health-related professions including presumably the medical profession. However, somewhere along the line the dental profession appears to have been swept up in an

examination of the Government's broad policy on occupational licensing. The Bill as introduced into the House carries an explanatory note that the policy now is "to remove all restrictions on the practice of dentistry by non dentists" except that they may not claim "to be dentists or to have expertise in dentistry".

In its submission to the Select Committee the Legislation Advisory Committee was obliged to point out that the Bill does not achieve this. Non-registered dentists will still be subject to restraints, imposed by, for example, the Medicines Act 1981, and the Misuse of Drugs Act 1975. Moreover, the change to a system of voluntary registration means that the revised disciplinary procedures in the Bill are no longer appropriate or enforceable.

In the result the Bill does not convey a clear statement of policy. The effort to graft a new concept onto an existing framework designed for a different kind of regime has not been conspicuously successful. If the policy is to move towards occupational delicensing, a shorter and simpler statute may be adequate. Much of what the present Bill seeks to achieve might equally well be given effect on a voluntary basis without the need for legislative backing and without any detriment to the public interest. Those, it seems to me, are issues which cannot be satisfactorily resolved until a set of broad principles governing occupational licensing has been developed and their applicability has been tested against the circumstances of individual occupations. The Bill, in its present form, is probably premature.

Trade and Industry Amendment (No. 2) Bill. A satisfyingly simple example of the need to consider whether legislation is necessary was the proposal to include in this Bill a clause giving the Department the power to charge fees for services provided by the trade advisory service. The clause was withdrawn when it was pointed out by the Committee that the power of the Crown to enter into contracts was adequate for this purpose. It can scarcely be claimed as a major triumph in reducing the legislative output for the year but, coming in the early days of the "user pays" development, one hopes that the point was a useful one to make.

Meat Industry Amendment Bill. At the other end of the scale of complexity one might instance, by way of light relief, a proposal to amend s.44A of the Meat Act 1981. The Committee was involved intermittently with this over several months following a reference from the Cabinet Legislation Committee. The purpose of the amendment, as stated in the explanatory note to the Bill, is to allow the Ministry to charge for the costs of establishing a meat inspection system at any licensed premises and of disestablishing any former inspection system at the same premises. Since payment of inspection charges is obligatory and is in practice a tax, there is no doubt that in this case (by contrast with the trade service) some legislative authority was necessary.

The first draft which was referred to the Committee by the Cabinet Legislation Committee must have been a drafting

nightmare. The Committee's first report acknowledged that any effort to reduce to simple language the elements of a regime which is a blend of consultation, agreement and separate contractual arrangements associated with the imposition of a tax which may also be subject to a discount or a surcharge for late payment presented a complex problem of drafting. The Committee suggested that the Ministry be asked to analyse the constituent elements of the proposed policy to distinguish more precisely between those which needed to be dealt with in the Act, those which were suitable for regulation and those which would be purely administrative.

Several months later the Committee received the second draft. I quote one of four sub-clauses of clause 43D about the calculation of discounts:

> "(b) In respect of any Saturday during the 5 days before which (excluding statutory holidays) the average daily period for which assigned employees were required to be available in the plant concerned was not less than 6 and a half hours and the agreement under section 43C of this Act specifies any normal operating hours for the plant, the amount described in section 43B(1)(c) of this Act shall be reduced by the prescribed proportion of the total amount (calculated as aforesaid) that would have been payable to the lower of ..."
>
> (i) The agreed employee level for the plant concerned on the day; and
> (ii) The number of assigned employees employed in or about the plant on the day -
>
> in respect of their employment in or about the plant during agreed operating hours if the ordinary time hourly rate of each were the appropriate notional rate."

The Committee, with commendable restraint, reported to the Cabinet Committee that -

> "When measured against the Guidelines for Legislative Change recently adopted by Cabinet, the new draft cannot be said to be a great advance on the old. There has to be a better way."

The lessons to be drawn from this experience relate not only to the need for the law to be comprehensible but also to the problems that are created when legislation is used to enshrine a series of administrative arrangements based on understandings between a government agency and an industry, the intricacies of which can be understood only by those immediately involved. Experience in other areas such as Education (as the reports of the Ombudsman testify) shows that the affected parties attach more importance to the understandings than to the law and arguments inevitably arise as to whether the law accurately reflects those understandings. That surely tends to bring the law into disrepute.

However, one element in the guidelines which ought to receive early attention and may be easier to bring about is the greater use of legal skills in the policy-making process. In the current deregulatory phase through which the economy is passing, the connection between law and economics calls for much greater recognition than has been customary. Sitting as I do between the Law Commission and the Economic Development Commission I see how great are the differences of approach between the two disciplines. The need to harmonise them is in fact a major argument supporting the Committee's contention that legal expertise should be brought into the development of a legislative proposal before the policy has been defined in detail. A closer interplay between the two disciplines can only be to the advantage of both and of the public welfare. It could make for clearer judgments as to which policies or parts of policies require legislation and which can equally well or better be implemented by other means. The Dentists Bill is a case in point. I was interested to hear the Minister of Justice refer to this issue recently in launching an EDC publication on occupational licensing. It seems to me to be assuming a special importance.

My final point concerns the need for the widest possible consultation both within the Government and with the wider community. As the guidelines say, "the broad acceptability of a legislative measure can be influenced significantly by the consultation that is undertaken. This relates particularly to consultation with sections of the community most likely to be affected". From the point of view of the Legislation Advisory Committee that principle applies with equal force to consultation within Government. Until the initiating agency has thoroughly explored the elements and implications of a legislative proposal, it has no sound basis for consultation with other departments and even less for any discussion of the proposal outside the Government. Regrettably the urge to consult, either within a department or between departments is, in our experience, not always evident. The endorsement of the Committee's "Legislative Guidelines" by the Cabinet should do much to reinforce it. The continuing activity of the Committee in reporting on legislative proposals can and should act as a spur.

When one takes account of the innumerable ways in which a legislative proposal can be generated, it would be idle to suppose that the mere promulgation of a set of guidelines even with Cabinet endorsement, will quickly bring about substantial change in the legislative process. The educative process will be slow. The current climate is not particularly conducive to it. I doubt whether those responsible for giving instructions to Parliamentary Counsel on the State Sector Bill consulted the guidelines in any detail. Or indeed did the Traffic Officer who appeared on television answering questions about a device said to outwit the Ministry's new speed detectors. He announced that the Transport Regulations would be amended to prohibit importation of such devices. For him the question was a simple one and the answer self-evident.

I have been associated with the legislative process in one guise or another for a long time. During the whole of that time the pressures on Parliament and its members have increased year by year. To some degree their wounds are self-inflicted. Radical change in the legislative process is not easy to bring about. To me it looks and acts much as it always did. On the other hand the process of policy formulation has, particularly in recent years, undergone massive change. More and more policy issues are being developed through the agency of outside consultants rather than through government departments. They may be taken to the point where draft legislation to put a policy into effect is included. This obviously presents problems for Parliamentary Counsel – whether to titivate or to redraft, adding considerably to the heavy pressures under which they always work. Other controls in the legislative process instituted by Cabinet (including the Legislation Advisory Committee) do not operate in those circumstances as early as they should. The impact of such changes is not necessarily negative but the mechanics of incorporating them into the existing governmental machine need analysing. If my comments have any point, it is to suggest that the primary attention ought to be directed to this area. It requires a different mind set.

THE INFLUENCE OF INTEREST GROUPS ON THE LEGISLATIVE PROCESS: CASE STUDIES

NATIONAL COUNCIL OF WOMEN – Janet Hesketh and Stella Casey

This paper is in two parts. The first gives a background to the National Council of Women (NCW) and indicates the part it has played in the legislative process by affecting the climate of opinion of society in the past ninety-two years, and the second gives some recent experiences of presenting submissions to Select Committees which highlight different aspects of the Committee system.

The NCW is a council of organisations – 45 national organisations affiliate directly and members of their local sections, along with some 100 other local groups, are affiliated to the 37 NCW Branches throughout New Zealand. There are about 1,500 women attending Branch meetings, the representatives of 200,000 women, all of whom are deemed to be members of the National Council of Women and able to take part in its decisions. Our most important function is providing women with information on which they can base their own decisions, add to the level of knowledge in their own communities, and influence the course of government both directly through NCW and indirectly as members of society. Our chief mode of communication is a monthly circular which not only provides members with information on a very wide range of subjects but is also the means of seeking their opinions. These opinions are expressed, formally, in resolutions passed at annual meetings and, on immediate issues, through replies to the questions printed in the circular.

The Council was formed in 1896 and has been telling successive governments the opinion/decisions of its members ever since. Although NCW began making submissions to Select Committees only after 1968 we had been both writing letters to and visiting Ministers for the seventy or so preceding years, and as we still do. Our ninety-year history now makes it difficult to find specific examples of how we have affected legislation. We have been part of the formation of the political climate of the country – equal pay, electoral reform, a review of the liquor laws, women on juries, the treatment of criminals, were among the Council's concerns at its first meeting. We began to press for women Justices of the Peace the following year, and for women police in 1919. Other concerns have been for the environment, for disarmament, especially nuclear, for good affordable housing, for access to good quality health and education services. Our views are frequently different from those given prominence in the media – the attitude our members have towards violent crime and the treatment of violent offenders is far less vindictive than the general public is reputed to hold, and we believe we have had some influence in preventing revenge style punishment. We promote education,

treatment and rehabilitation of prisoners, not extension of prison terms. Much of our most effective input has been in the pre-legislative stages - in the comments we make on discussion papers - the formation of the Accident Compensation Commission, the revision of the rape legislation, development of consumer protection, and we hope, next year, on the revision of the resource management statutes.

We see results over a long term - comments made, and ignored, in our submission when the Official Information Act was introduced, were included in the recent series of amendments. It is more usual for the Council to comment on the ideas that lie behind the proposals, or to concentrate on issues that are *not* included. The most recent of these is our continuing request for the legislation on State-owned enterprises to include monitoring for social responsibility - unsuccessfully so far, but we persist. It is because we express the reasonable and reasoned views of a considerable section of the community that our submissions are listened to, and our views quoted, but we have also helped to form the communal ideas that make much of our legislation possible. Our special influence is that we are consumers - of whatever legislation is under consideration. We do not see our roles as necessarily commenting on specific clauses of Bills; that is more appropriate for those working with the law, although such questions as "Why is the Prime Minister's Department not listed in the Schedule which defines the State Sector?" can produce some confusion.

Last year alone NCW made over 50 submissions; in the past five years approximately 200. I have selected five recent examples to highlight different aspects of the Select Committee process.

1. In our submission on the Personal and Property Rights Bill we pointed out that it was unreasonable to exclude from the duties of the welfare guardian the power to consent to the administering of psychotropic drugs because they are standard medical treatment for some mental conditions; as unreasonable, we said, as excluding their right to consent to administering insulin for diabetes. The provision in question was withdrawn before the legislation was enacted. However, in our very next paragraph we asked that the powers of a welfare guardian should not include giving consent to any surgical procedure which prejudicially affected reproductive capacity. Our submission was ignored - failure. This is fairly typically. We get some the of things we think important; some have to wait for another day, another year.

2. We approach our submissions from the simple angle of how does this affect us as consumers? And this seems at times to give a perspective different from that of the legislators. In the recent Dentists Bill we felt that in seeking to do two things - to implement government policy on de-regulation and to meet the profession's desire to ensure high standards - the legislators had contradicted themselves. The removal of any restriction on practising dentistry makes nonsense of all the provisions regulating the conduct of registered members of the profession. The Select Committee considering the Dentists Bill was surprised at our contention, which

was confirmed by the officials present, that a disqualified dentist could continue to practise. The only requirement was that she or he remove the word "dentist" from her/his nameplate and notepaper. We will watch with interest to see if the Select Committee can reconcile the two objectives into sensible legislation.

3. We are becoming increasingly aware of the need to emphasise in our submissions those matters of which we approve, not merely to criticise those we find unsatisfactory. The recent example of the Children and Young Persons Bill has seriously upset us. We, and no doubt many others, pointed out in our submission that we would like to see attention paid to such matters as education for parenthood. The departmental committee which has made a review of the Bill, on behalf of the Select Committee, recommended that the present child protection teams be changed into units to identify the factors underlying abuse, and to develop solutions to the problems within families. Meantime, children are left to suffer. In our submission we made *no* reference to mandatory reporting of child abuse because it seemed to us elementary commonsense. Now we find the Committee recommending that that provision also be removed. It is going to mean much longer submissions in future if we have to fight for what is already in the Bills as well as what we want added.

4. The Select Committee process can at times be quite useless. Late last year, at very short notice, we made a submission to the Finance and Expenditure Committee on the clauses in the Finance Bill which repealed the National Housing Commission Act and the Building Performance Guarantee Corporation Act. NCW is very concerned about the present apparent withdrawal of government from housing. Opposing these provisions in this Bill, which abolished these two facets of government involvement, was our only opportunity to express our members' anxiety. The Select Committee told us repeatedly and firmly that they were concerned with finance and expenditure, *not* housing, and could do nothing about housing. The only good effect of this experience is that we are now even more careful to study Bills and their Schedules, even when they have no apparent relevance to our interest.

5. Finally, a matter which is of particular concern to this seminar – accessibility. The recent Mental Health Bill is concerned with the compulsory treatment of mental disorders. Our members see the need for this law from the point of view of families who have reached breaking point, when the care and treatment are needed urgently and immediately. The new legislation proceeds in a leisurely and very detailed fashion for 86 clauses before any provision is made for the situations which, in our experience, are the norm. Even then it is not clear what may be done. We have yet to appear before the Select Committee on this one. We hope they heed our worries. If not, we can only hope that those who are required to cope in these situations have the law satisfactorily interpreted for them before they are required to implement it!

These, then, are five examples from many. We hope you find them useful.

NEW ZEALAND LAW SOCIETY - J G Fogarty

The Society considers it has a special responsibility to assist in the legislative process. It monitors all, and considers many, of the Bills and White and Green Papers introduced into the House. In this short paper I consider only the influence the Society attempts to have on the content of Bills after they are introduced to the House.

The Society does not usually take a stance on the policy of the Bill. But it may do so if the Bill affects the interest of its members, or if the Bill is intended to effect a reform of an area of law in which lawyers see themselves as having a special interest. Where the Society does not have a direct interest in the policy of the Bill its submissions tend to be limited to ensuring that the Bill contains fair procedures and, where possible, will in fact achieve its object. In this regard the Law Society adopts a watchdog role similar to that of the Legislation Advisory Committee and checks the Parliamentary Counsel and Departmental Officers' work. In the latter respect, however, there is no attempt to significantly rewrite any Bill. We tend to accept the particular style adopted by the Parliamentary Counsel and just check for any internal inconsistencies which may have slipped through the screening process. We try to avoid quibbling. This approach means that the Society does not make submissions on every Bill, and usually only on parts of a Bill. Attached is a schedule (Appendix, p.) summarising the activity of the Legislation Committee in 1986.

We have a deliberate style of presentation of submissions. This is a three-step method of making a point. First, the subject clause is identified and where necessary, summarised. Secondly, there is a comment on the quality of the clause. Thirdly, we recommend how the clause should be altered. We try to keep submissions short and readable. They are addressed primarily to the members of the Select Committee although we are aware that lawyers from the Department and Parliamentary Counsel are likely to read them. Often they occupy no more than two or three pages. Usually we appear in support of the submissions before the Select Committee. Almost invariably we are received courteously and there seems to be a measure of respect for our detachment and the expertise that is brought to bear.

The success rate is significant, but patchy. It has never been analysed. On many occasions our presenters have come away believing that a point has been accepted as made but this is not reflected in the bill when reported back. I suspect this is due to a variety of factors, not all of which may be present at any time. Some bills have such a high priority that they are simply rushed. There is no time to take on board recommendations which call for significant redrafting. Political or budgetary constraints may rule out what we consider to be appropriate procedures. Our opinion, although respected as a valid opinion, may simply be rejected in favour of the opinion of the parliamentary drafter. Or, unbeknown to us, the Legislation Advisory Committee may already have considered the point and given a different opinion.

We have to accept that by the time a Bill comes before a Select Committee it is well down the track. It will stay in its current form unless there are manifestly good reasons for change. The challenge for any interest group is to demonstrate this. If we had access to draft Bills when they first emerge from the Departments and/or Parliamentary Counsel Office we would have more time, and I think probably more success infiltrating our views. We might be able to suggest a different approach to the problem. As already noted, at the Select Committee stage it is usually too late to attempt to have a Bill rewritten. Town Planning is an example. We can call on considerable expertise in this area. The Act was amended in 1987. We did not think the amendments went far enough and did not altogether approve of some of the approaches. But we knew a general review was not far away so we gave sympathetic submissions to the Bill, achieving some drafting amendments. Then we made more root-and-branch submissions to Mr A Hearn QC when he was appointed later to review the legislation.

I am sure the Society would welcome being invited to assist with drafts of bills before they are introduced in to the House. If this happened we could offer our views on matters of method and style.

I would now like to conclude by illustrating the Society's approach with a recent submission it made to the Select Committee considering the Rating Powers Bill. This Bill has not yet been reported back to the House. I will leave it to you to consider whether or not the Society has made out a good reason for amending the Bill. I also invite you to consider whether the issues have been overly condensed.

> "Recovery of Rates from Persons other than the Occupier
> Clause 138(1) empowers the local authority to recover rates from any person owning any interest in land (if any occupier has made default).
>
> Comment: Previously, the equivalent provision contained a phrase after the word interest 'including an interest as first mortgagee'.
> The absence of that phrase causes two problems of construction, one of which may lead to injustice. They depend on a narrow or wide interpretation of interest in land. If interest in land includes mortgagees, then rates can be recovered against any mortgagee however postponed behind the first mortgagee. If interest in land does not include mortgagees then rates can no longer be recovered against the first mortgagee. There is obvious merit in being able to recover rates against the first mortgagee. Rates in any event are a charge on land ahead of the first mortgage. But if a mortgagee subsequent to the first mortgage has to pay, the persons having the benefit of mortgages ahead of the payer obtain a meritless advantage.
>
> Submission: We recommend that the phrase 'including an interest as first mortgagee' be reinstated so that there is no change in the law."

138. Recovery of rates from persons other than the occupier—(1) If any occupier makes default in the payment of any rate, or of any part of any rate, due by him or her, the principal administrative officer of the local authority, or any other person authorised by the local authority to collect rates, may recover the rate or part thereof as a debt from the owner, or from any person owning any interest in the land in respect of which the rate is payable or from any person actually in occupation of the land.

(2) No rate shall be recoverable from any tenant of rateable property, not being an occupier within the meaning of this Act, to a greater extent than the rent payable or to be payable by him or her for the property at the time the assessment is delivered to him or her, and any such rate so paid by him or her shall be deducted from his or her rent.

(3) Where the land in respect of which the rate is payable is let under 2 or more tenancies, then, subject to **subsection (2)** of this section, each tenant shall be liable under that subsection for only so much of the rate as bears to the total amount of the rate the same proportion that the yearly rent payable under his or her tenancy bears to the total amount of the yearly rents payable under all the tenancies.

(4) Every person who, pursuant to **subsection (1)** of this section, pays any rate due by an occupier shall, unless that person has agreed with the occupier to pay the rate, be entitled to recover the amount so paid from the occupier as a debt or to retain or deduct that amount out of or from any money which is or becomes payable by him or her to that occupier.

(5) Every person other than the owner who, pursuant to **subsection (1)** of this section, pays any rate due by an occupier shall, unless that person has agreed with the owner to pay the rate, or has already recovered the rate from the occupier, be entitled to recover the amount so paid from the owner as a debt or to retain or deduct that amount out of or from any money which is or becomes payable by that person to that owner, and any such payment so made by the owner shall be deemed to be payment by the owner under **subsection (4)** of this section.

APPENDIX II

During 1986 the Legislation Committee considered all Bills (a total of 85) and made, or assisted with, submissions on the following :

Airport Authorities Amendment
Constitution
Customs Amendment
Fencing of Swimming Pools
Environment
Homosexual
Housing Corporation Amendment
Immigration
Income Tax Amendment (No 7)
Law Reform (Miscellaneous Provisions)
(including legislation for Masters in the High Court contained in a Supplementary Order Paper)
Local Authorities (Elections, Polls, and Voting Rights)
Discussion Paper "Review of Mining Legislation"
Official Information Amendment
Protection of Undercover Police Officers
Recreation and Sport
Reserve Bank of New Zealand Amendment
Shipping and Seamen Amendment
State-Owned Enterprises
Status of Children Amendment
Taxation Reform
Te Pire Mo Te Reo Maori
Tokelau Amendment
Town & Country Plannning Amendment
Transport (Vehicle and Driver Registration and (Licensing)
Union representatives Education Leave
Victims' Rights
Video Recordings
Violent Offences
Weights and Measures

COMMENT

KATHERINE O'REGAN, MP for Waipa

I appreciated Professor Kelly's comments this morning about plain English and I am very grateful to see that much of the legislation coming through to the Select Committees has improved considerably in my short term in Parliament. I thank the Parliamentary Counsel, who have a hellish job at times. I know how hard they work and I appreciate the support that they give the Members of Parliament in explanatory notes and explanations to those of us who do not always understand the legalese.

When I first came into Parliament my delight turned to plain fear on being informed of my membership of the Justice and Law Reform Select Committee, knowing that I had no legal background. But later one witness told me that those opinions from the grass roots are probably just as important if not more important than the experts' opinions. I agree with him entirely.

I would like to paraphrase the Minister of Justice who said that it was very important that the executive power of Parliament, which of course is the Cabinet, should be kept in check. That is no less important now than it was three or four years ago, and certainly no less important than when he wrote his book "Unbridled Power", where he said that the purpose of the Select Committee was to provide an opportunity for well informed and detailed scrutiny of government bills and policy by both Parliament and public. He went on to say that in recent years the reference of Bills to Select Committees had increased markedly. This is excellent, but it is also important to consider what the Select Committee does when legislation gets there.

I would like to talk about the State Sector Bill because I am rather concerned at the manner in which it was dealt and I think it requires much closer scrutiny. The time honoured conventions of Select Committee procedures have been severely bruised in this instance and may call into question the role of Parliament itself. In this instance the Government turned the Select Committee into a negotiating table. We are not there to debate awards, terms and conditions in an actual Bill. Then a premature unilateral decision was made immediately after the hearings were concluded but before the deliberation on the Bill, when the Minister and two Government members made public their intention to change the Bill. This was done without participation of the other members of that Select Committee. If the committee had gone into deliberation a breach of privilege would have occurred. What happened was very very close to a breach of privilege.

I have always been of the belief and I think the public also believe that Select Committees are bipartisan. I believe also that the fact that the Government advertised their version of the Bill could also be questioned. I think this breach of the convention has compromised Select Committees for the future and placed the validity of consultation with the public in jeopardy. Why should anybody bother in future to make submissions to a so-called bipartisan committee of Parliament when announcements are going to be made prior to deliberation which may scuttle anything that you have suggested in the meantime?

I would like to discuss briefly the changes that have been made to the Select Committees. There were excellent reforms implemented by the Minister of Justice, one being that Select Committees could undertake investigations on their own. However very few have done so because of a major and very heavy legislative workload. I agree with Sir George Laking when he says we should really be questioning whether we need legislation at all in a certain area. We now have five members on Select Committees. With the small numbers and only two of us on the Opposition side, it has made it very difficult for us to spend as much time on committees as we would like, particularly during the debating times. In the past there were seven members and that I think has been certainly the greater value, and I would hope that in the future Standing Orders may be changed again to include an increase in the numbers.

RICHARD J NORTHEY, MP for Eden

The Select Committee process is one in which laypeople are involved as members of Parliament. The majority of us have not had legal training. So the Law Society and the National Council of Women are quite correct in saying that submissions need to be made in the language of the layperson.

Parliament has now issued guidelines for making submissions to Select Committees as a result of which we are getting submissions that are more useful in that they zero in on particular clauses to say what is wrong with them and specifically what they want changed and preferably also suggested specific improved wordings they would like instead.

We spend a considerable amount of time hearing submissions in person from organisations and individuals who have not read the Bill. The submissions based entirely on newspaper reports or the little advertisement that appears saying that Parliament is dealing with such and such a matter are a waste of their time and ours. Those who have a genuine concern and have read the Bill carefully and who make a general submission attacking aspects of a Bill without proffering alternatives even in a general sense, are not particularly helpful either. I think it is also important to state those things which are agreed to or supported. If a majority of submissions disagree with a particular clause, that is likely to sway the committee if those who agree with the clause do not make a submission in its favour.

The Select Committee process has improved very considerably. When I first came into Parliament in 1984 I was quite appalled to find that most of the members of the Select Committee in fact spent most of their time there answering their correspondence. Some of them still do! One of the realities of the other pressures acting on Members of Parliament is that if they are on the Select Committee at the same time as one of their constituents is about to be deported or have a mortgagee sale, or they have to give a major speech in an hour, their attention span is reduced. So it is quite important to be very direct and even colourful in getting the point across through that maze of other pressures on Members of Parliament.

Without the relevant Minister at the Select Committee, Members of Parliament can not look to him or her for guidance on particular issues and so members have to take more direct responsibility to ensure that the Bill is meeting the objectives it seeks to achieve. There is of course a process of discussion within the Caucus committees and with the Minister over any major disputes of policy and with the Opposition members of the Committee on policy and on the more technical matters.

I think that one of the problems that sometimes occurs is that the period, between hearing the submissions and the time when the departmental advisers and the Parliamentary Counsel come back in response to submissions, can result in a loss of attention span to the particular points that were made in submissions. The fact that most of us are on more than one committee is also a problem. One of the answers to that is to have more MPs. The present small number of MPs is the major reason why the committees consist of only five members and why quite frequently the second Opposition member and the third Government member are away on another committee on which there may be more time pressure.

When we come to deliberate on submissions there is often a battle between the members of the Select Committee who seek to add into the Bill some points made by submissions and the Parliamentary Counsel who say they had put it very beautifully and elegantly and right the first time and not to tamper with it. There is also a feeling that we want the legislation quite specific so that we are making the decisions and not some judge and lawyers later on.

There is often the question of whether something should be dealt with in legislation. There are matters which are so dealt with because we want them to have the added aura of being legislation, such as the Nuclear Free Bill. If it is decided that a matter is an appropriate area for Government and public intervention, I tend to feel it is better to have it specified in the legislation rather than left for Cabinet or for departmental interpretation.

Most of the reforms to Parliament which were envisaged in the Labour Party's 1984 Election Manifesto have been implemented, except one which I am still keen on which is that all legislation apart from urgent financial legislation should take at least six months between introduction and passage. The reality is that there are time gaps when nothing is happening on legislation, especially after a Bill

has been reported back to the House. There are Speaker's rulings now requiring that legislation be reported back to the House immediately after the decision of the committee, but often there are matters that sit before the House for some time, often after the date at which they were supposed to come into effect.

The role of the debate in Parliament itself in legislative content is very small. The Opposition have their effect through the pressure groups that they might be associated with and through their input into the Select Committee, and the Government members through the Caucus committee structure. It is almost unknown for Parliament itself to change things. An exception was a proposal in the Residential Tenancies Bill for the tribunal to be able not to abide by the law if it so chose. The matter drew absolutely no submissions but was raised by an Opposition member in the House and the Government agreed to amend it.

Another interesting case was the Criminal Justice Amendment Bill which raised the monetary value of a theft for which imprisonment would be applied from $30 to $300. One of the effects was that for a minor theft there would be no right to a jury trial. This issue was fought out in Caucus but no subsequent public Select Committee submissions touched on it at all. Then when the Bill came before the House, suddenly the Opposition members raised that point *ab initio*. In that case we did not respond because we believed that it was not a matter of general public concern or it would have been raised in the Select Committee process. It was not just a technical failure to notice that point.

DISCUSSION

Comment by participants

Bevan Greenslade noted the anger and frustration he had felt giving submissions to a Select Committee when it was clear that some members of the Committee had not read the submission or even the Bill beforehand, and where much of the time was spent in political sparring.

Stella Casey responded that she was generally impressed with the performance of Select Committees, and that they were much better than Parliament as a whole. Richard Northey said there was a problem with MPs' conflict of obligations towards committees and their own constituents.

Michael Stace of the Economic Development Commission asked what scrutiny was given to Regulations. Richard Northey said that the Regulation Review Committee gave *ex post facto* scrutiny, although in principle it would be better to have prior scrutiny. Janet Hesketh said that the National Council of Women had long asked for there to be public scrutiny of Regulations. She said that they had had an opportunity to make submissions on the new driving licence Regulations which had been well discussed prior to implementation. Sir George Laking noted that the Economic Development Commission had proposed a regime for public scrutiny

of Regulations. Professor Keith commented that some of the more substantial regulatory powers have been eliminated and that a large number of statutes do require the giving of notice with an opportunity to comment. Pat Northey said that in Canada, draft Regulations were released as a matter of course, giving people an opportunity to make submissions. Professor Keith said that there was a danger that too much public scrutiny would make it harder to enact Regulations than Acts, and that there needed to be an appropriate balance.

Grant Liddell of the Law Faculty, University of Otago asked to what extent those making submissions could question departmental officials at Select Committee hearings. Katherine O'Regan said that it was now becoming more common for the Chair to ask officials to comment directly to a witness.

III ACCESS TO THE STATUTE LAW – THE CONSOLIDATION AND REVISION OF LEGISLATION

THE PRESENT

Beth Bowden (Manager, Legislation and Marketing, Government Printing Office) began by explaining the statutory framework for the Government Printing Office. She noted that although the students' association in the case of *Victoria University of Wellington Students Association* v. *Shearer* (1973) 2 NZLR 21 had attempted to force the Government Printer to make available copies of the Code of Civil Procedure, the legislation did not impose an absolute obligation upon the Government Printer to make all legislation available. Nevertheless it was obviously important that all legislation should be as accessible as possible.

The Government Printing Office held regular consultations with government departments and Parliamentary Counsel but there was a need for better liaison, particularly with departmental publicity officers.

In order to make legislation more readily available the Office was developing new methods of distribution – for example the freephone system, the use of facsimile material, and the development of a database which would eventually encompass all public Acts, Bills and Hansard.

THE FUTURE

Moira Collyns (of the National Library) explained the development of Kiwinet, a computer database which was commenced by the National Library in February 1988. Subscribers to this service could gain access to the Government Printing Office database, and in addition lists of holdings in all New Zealand libraries and an index of New Zealand periodicals. As the number of subscribers increased, there were plans to increase the service to cover more areas, for instance unreported judgments, and information on the Companies Register.

COMPARATIVE EXPERIENCE

David Elliott
Law Drafting Officer, Law Commission[1]

This paper describes how other jurisdictions, notably England and Canada, have attempted to keep their statute law "accessible". The word "accessible", as it is used in this paper, includes both "up to date" and readily found. The paper comments in particular on English and Canadian experience with consolidations of and revisions to the statute law.

The first part summarises the process of consolidating and revising legislation in England and Canada and provides some comment on the process. The second part of the paper discusses how overseas experience may assist in making decisions about the proposed computerisation of New Zealand statutes.

ENGLISH EXPERIENCE

In England consolidation of statutes is common. There are three kinds of consolidation:[2]

(a) The "pure" consolidation
This is virtually a verbatim re-enactment, in one Act of Parliament, of law scattered in several Acts. In its usual form no material change in the law is made. The organisation is improved and the law is presented in a more coherent manner. In the course of a consolidation sections may be combined and provisions relating to past transactions are generally omitted.

(b) Consolidation with corrections
Consolidations falling in this category are authorised by the Consolidation of Enactments (Procedure) Act 1949. The corrections that are permitted under this procedure include: resolving ambiguities, removing doubt, removing unnecessary provisions.

(c) Consolidation with amendments
These are consolidations prepared by the English Law Commission which include changes to the law to give effect to Law Commission recommendations.

---

1 This paper expresses the personal views of the writer.
2 For a fuller description of the work of consolidation and revision in England see *Legislation* by David Miers and Alan Page.

All consolidation Bills go through the same process. After Second Reading they are referred to a Joint Committee of both Houses of Parliament. If the Bills are approved by the Committee the rest of the parliamentary stages are usually a formality.

The demand for consolidation Bills is greater than the supply: even so, the output is considerable. Of the 21,000 pages of Acts passed by the Parliament of the United Kingdom in the past ten years, over 7,000 have been contained in consolidation Acts.[3] The work of consolidation is carried on both by the Office of the Parliamentary Counsel and by the English Law Commission. Consolidation in the Law Commission is undertaken by Parliamentary Counsel seconded from Parliamentary Counsel Office.

In England there are "reprints" of Acts. This is the publication of the original Act with amendments incorporated in it. It is similar to the New Zealand "reprint" system. The reprint system works relatively well when the original Act is amended by the "textual amendment" method (e.g. s.2 is struck out and the following section substituted ...). When the textual amendment system is not used consolidation Acts become virtually essential.

Access to the statute law in England has improved in the last decade and continues to improve. But much remains to be done. There are few, if any, lessons for New Zealand in the English experience except perhaps to guard against statute law becoming as inaccessible as it has become in England.

Publication of Statute Law

The systematic publication of statutes as "Statutes Revised" in England started in 1870. There have been three editions. A new publication called "Statutes in Force", based on a classification of statutes by subject matter, was completed in 1981. The publication and editing of Statutes in Force is under the direction of a committee chaired by the Lord Chancellor.

While there have been calls for a computerisation of English statute law no specific plans to do so have been announced.

CANADIAN EXPERIENCE

It is dangerous to generalise with a country having ten provincial legislatures, one Federal parliament and two territorial legislative councils, each having lawmaking capacity.

---

3 British and French Statutory Drafting – Proceedings of the Franco-British Conference, 7–8 April 1986. Institute of Advanced Legal Studies (University of London), Comments by Mr Christopher Jenkins, Parliamentary Counsel, pp. 72–78.

Each of those jurisdictions has their own way of making the statute law "accessible", but there are common threads. During most of this century there have been attempts by most of the provinces to prepare what in Canada are called "revisions" of the statute law every ten to fifteen years or so. The Federal government's revisions have been produced less frequently.

Simply put, legislation authorises a person or group of persons to prepare a revision of all the Acts in force in the jurisdiction authorising the revision. Once complete, the revised Acts replace the "originals" and all the amendments made to them. The revised statutes become the statute law of the jurisdiction. Canadian revisions take different forms, but they will invariably involve:

- correcting references to outdated offices, departments and Ministers;
- correcting cross references to sections and the names of Acts;
- incorporating improvements to the presentation of the statute book which may involve a new style of print, line length, marginal or head notes to sections.

Revisions will usually go much further than cosmetic changes. They can also include:

- modernising outdated or antiquated language;
- splitting up large blocks of type into two or more sections and dividing sections into subsections and paragraphs to make them easier to read and understand;
- resolving conflicts between Acts;
- changing sex biased language to sex neutral language;
- omitting provisions the effect of which is spent;
- generally making such amendments as are necessary to bring out more clearly what is considered to be the intention of the Legislature.

Sometimes sections from one Act which can be more conveniently located in another are moved to the other Act. On occasion, two or more Acts are combined into one or the provisions of an Act that do not conveniently fit together may be split into two or more Acts.

The revision process

The process of revising statutes, simply stated, is as follows:

- a revising officer or officers will be appointed – in most cases this is a Legislative Counsel (equivalent to a New Zealand Parliamentary Counsel);

- the policy of the revision is settled – this involves a determination of the nature and extent of the revision, what is to be revised and how it is to be done; a manual of standard provisions will usually be prepared;

- the original Act and every amendment made to it are provided to the revising officer;

- the revising officer will create a consolidation of the original, "cutting and pasting" the amendments into it;

- the revising officer will then mark up the changes to the consolidated text that are necessary;

- the revised text is typed up and proof read;

- the typed up revised text, together with the consolidated version with the changes made by the revising officer, are sent to the department responsible for administering the Act;

- the department checks the consolidation and revisions and returns it to the revising officer with appropriate comments;

- the text is checked again (usually by a second revising officer); further revisions are made as required and rechecked by the department if necessary.

This process continues until all the Acts are in a revised form. Ultimately a "Revised Statutes Act" is prepared. It is usually prepared after the revision is virtually complete so that any changes the revising officers have made can be authorised by legislation.

The revised statutes are printed in alphabetical order in a set of volumes and enacted as the law, usually coming into force on Proclamation. The revised statutes replace the existing statute law.

Comments on the Canadian system

Most jurisdictions in Canada either have their statutes on computer or are in the process of establishing a computer database. The result of computerisation of statutes in Canada is that, in most jurisdictions, the statute law is now available in three forms:

- the form in which it is passed on the date the revised statutes are proclaimed (normally a set of volumes printed in alphabetical order) plus the annual volumes of Acts passed, which are published each year;

- a looseleaf system which enables the reader to see the current state of the statute law;

- the statute law on computer.

While most jurisdictions now have their statute law as a computer database, it is not yet readily available outside Legislative Counsel Offices although some commercial statute law databases are available. Computerisation has allowed comprehensive indices to be prepared of the statute law. These are proving a valuable tool in providing access to the statute law.

In the past ten years access to the statute law has also been helped by the establishment of looseleaf systems of the statute book. Looseleaf systems are now available in a number of Canadian jurisdictions. After the end of each session of a Legislature, looseleaf pages are issued replacing those that have been changed by amending Acts. It is a simple task for the amended pages of the statute book to be removed and the new pages inserted. Subscribers to the looseleaf version then have access to up-to-date versions of the statute law within weeks of the end of a Legislative session. Annual volumes of the statutes are still published. When the annual volumes are used with the revised statutes the reader is able to determine the state of the statute law as at any given time. The combination of computerisation of the statute book and looseleaf systems probably means that the day of the ten-year revision in Canada is over. That is the view of the leading reviser in Western Canada, W. E. Wood QC. In his view once the statute law is on a computer having sufficient search capacity, cross references, names, and other phrases that need to be changed as a result of new legislation will be found easily, and those changes will be made completely when an amending Act or new Act is passed. Consequently it will no longer be necessary to periodically check all the statutes to ensure they are up to date. A computer facility, coupled with the speed with which Acts are repealed and replaced, means that wholesale revisions to the statute book may be a thing of the past.

Only if there were large scale changes proposed for the statute book as a whole would another revision be required. Perhaps the State of Victoria will lead the way in this regard. The Law Reform Commission of Victoria has proposed an undertaking to revise the statutes by rewriting them in plain English. Although not called "a revision" but rather a "consolidation", all the elements of a "Canadian revision" are there.

Personal observations

If periodic revisions are a thing of the past it would be a pity. A periodic objective review of the statute law is healthy and constructive. The state of the Canadian statute book is a credit to those who have undertaken revisions in the past. If there has been anything lacking in the past it has been the reluctance of revisers to

look to the expertise of others in assisting them in a revision. An Act is a communication from the legislator to the persons affected by it. Communication can be aided by the means by which the Act is presented in written form. Obviously the style of language is a major component in communicating the law, but there are other components. These include the type style, headings and marginal notes, line length and margin lines for subsections and paragraphs. Revisors have not taken sufficient account of these aids to communication. It is time that all the available expertise is pooled to provide the best possible communication of an Act to the reader.

While the Canadian system is relatively simple, comparatively cheap, and it works, improvements could still be made to it.

APPLICATION OF OVERSEAS EXPERIENCE TO THE NEW ZEALAND STATUTE BOOK

New Zealand is poised to computerise its statute law. It is an appropriate time to consider change – change both in the cosmetic "look" of the statute book and in the style of drafting. In this part of the paper questions arising from the proposed computerisation of New Zealand statute law are considered.

COMPUTERISATION OF NEW ZEALAND ACTS

Major objective

The major objective of putting all Acts on a database is to be able to pick up the published version of the database (whether in electronic or written form) and be sure that it is an authoritative and up to date statement of the statute law. "Up to date" means that the original Act would have incorporated in it all amendments, in their appropriate place, as part of the text.

How can the objective be achieved?

There are two principal ways of achieving the major objective:

The first is to type onto the database everything that is now in the Reprint Series started in 1979 (the "brown volumes"), plus everything that has yet to be added as part of the "brown volumes" including the annual statutes for 1986–88. This in effect would give the user a "reprint" in electronic form which would duplicate what is now available in written form. There would be no change to the law. The original print of the Act would remain in effect and could be referred to as necessary. This process would not meet the major objective.

To meet the objective of having an up to date version of the law available, further work would be still required. This work would involve incorporating all the amendments into the Acts they amend. Once that had been achieved (and assuming all future amendments were incorporated into the Acts they amend) the electronic database would provide an up to date version of the Acts of New Zealand as amended. The major objective would then be achieved.

(Another method would be to go back to the original Acts themselves and type them in to the database, type in the amending Acts and subsequently insert amendments into the original text. This approach seems counter-productive and does not make use of the work already complete through the reprints in the "brown volumes". In saying this it is assumed that the office of the Compiler of Statutes has already taken the original Act and inserted amendments that have been made to it in preparing reprints.)

The second way to achieve the major objective would be to manually take the reprint Act (plus any that are not yet "reprints") and cut and paste into them all amendments (essentially doing an annotators' job). The result of that "cut and paste" job would then be typed to form the database. This would meet the major objective.

Which is the better route to follow?

The essential work of inserting amendments into the original Act to obtain an up to date text is much the same whether the amendments are incorporated before being typed onto the database or after they are on the database.

Should the project be considered "a reprint" or could it be a more significant "revision" of the Acts of New Zealand?

If the project is a reprint –

- Should changes to the text be considered in the same way that changes have been considered in the past when a reprint has been undertaken (e.g. modernisation of spelling, obvious errors corrected; inserting amendments; citations of new Acts; plus other changes described earlier)?

- Should more be done with the text to take into account research into presentation of text e.g. differently presented headings, margins and other "layout" matters? If more is to be done it would be best if those changes could be agreed upon now and incorporated into the project at this stage.

- The result of the work should be authorised by statute, replacing the existing statute law.

If the project is a revision –

At this stage it is clear that the project is not a revision. The question is really, should it be?

The question of "reprint" v. "revision" was mentioned in the 1931 reprint. At that time a consolidation (i.e. revision) was considered but rejected in favour of a reprint of the statutes of New Zealand. The Foreword to the 1931 reprint said (pp.vii–viii):

> "... the preparation of a consolidation could not satisfactorily be undertaken except by a body of men familiar with the law and, at the same time, skilled in the art of draftmanship. Moreover, no matter how careful and competent such a body of men may be, a general consolidation and re–enactment must always be attended by the grave danger of the law being unintentionally altered, for a consolidation can never be effected by a mere repetition of the terms in which the law to be consolidated is expressed. A reprint of statutes, as distinguished from a consolidation, does not present these difficulties. An exact repetition of the law is the aim of such a reprint, and this can be secured by the exercise of a high standard of care, and difficulties of draftmanship are in no way involved. If, notwithstanding the exercise of such a standard of care, an error were to find its way into the work, the law would not thereby be affected. Such an error might cause inconvenience but could not alter any rights or obligations; these, notwithstanding such error would continue to be determined by the law as enacted by the Legislature. For these reasons alone, a reprint such as is contained in the present series of volumes has obvious advantages over the more ambitious scheme that would be involved in a consolidation and re–enactment of the statute law."

Subsequent reprints have not indicated whether any consideration was given to preparing a revision (or consolidation) as distinct from a reprint. (But perhaps the Compiler of Statutes has considered this matter in connection with past reprints.)

Now would be an appropriate time to consider a modest revision. The 1895 Reprint of Statutes Act is included with this paper (Appendix, pp. 116–117). That Act authorised the appointed Commissioners, amongst other things, to "revise, correct, arrange, and consolidate" Acts and omit enactments of a temporary character or Acts that "have expired, become obsolete, been repealed, or had their effect"; in Canadian terms, a revision. Also included with this paper (Appendix, pp. 118–120) is an extract from the subsequent 1908 Consolidation of Statutes Act. That Act enacted the results of the consolidation, and repealed former Acts. A recent example of a Canadian Act authorising a revision is also included (Appendix, pp 121–123).

The "revision" experience of other jurisdictions could be helpful in determining what form of changes should be considered for New Zealand.

Accessibility after the Project

It hardly needs to be said that establishing a database is only sensible if the end result is something that can be used by a wide variety of people. The following needs are apparent:

- the system should be capable of providing an up to date statement of the law (i.e. the original text with amendments incorporated in it);
- there should be a means of keeping track of amendments to and repeals of Acts;
- there must be a wide capability of searching the Acts;
- there should be an index to the Acts as a whole, and to most individual Acts;
- the system should be capable of producing a printed version of what is seen on the screen;
- the basic text must be absolutely secure – no one can be permitted to tamper with the database except in accordance with proper authority;
- there needs to be a facility whereby copies of all or part of the database can be provided to users in electronic form so that those users can manipulate the text of the copy provided or annotate the database copy for the subsequent use of clients;
- arrangements should be made to provide (i) annual volumes of the statutes (which when combined with earlier Acts allow the law to be found as at any given past date); (ii) a looseleaf service; (iii) the computer service.

Whatever decisions are made about "reprints" or "revisions", the existing Acts should be put on the database in a form which will enable these basic needs to be met.

It is to be hoped that in the preparation of this undertaking advantage will be taken of research into how a writer communicates with his or her audience. Research has shown that the lay–out on the printed page can improve communication. The results of that research should be incorporated into the presentation of the statute book.

CONCLUSION

Creating the statutes of New Zealand as a database is a major undertaking. The way in which it is done will affect statute law for decades to come. There are two major options that should be considered. The first is to continue to tread the same reprint route

that New Zealand has followed since 1931. The second is to use the database undertaking as a revision of New Zealand statutes culminating in re–enactment of the statute law following the revision.

There are three reasons why it is suggested that a modest revision would be the better route:

(a) *Cost* – The cost of a set of annotated New Zealand statutes is about $4000. The cost of a set of Canadian Federal and Provincial statutes combined would be about half that amount.

(b) *Size* – The size of the statute book. The bulk of the statute book would be reduced to about a third of its present size.

(c) *Accessibility* – a revision of the statute book could improve the readability considerably. Not only could revisors take advantage of the latest research into the kinds of lay out that assist in communicating the message on the page, but other improvements described earlier could be incorporated.

If advantage is not taken of the opportunity presented by the computerisation of statutes another opportunity may not occur for decades. Access to the statute law of New Zealand can be improved and now is the time to do it.

With the experience of the office of the Compiler of Statutes in the preparation of reprints, and with the commitment to computerisation of the statute book, there is every reason to look forward to an improved statute book in the future. The improvement will also facilitate improvements in the drafting and updating of legislation, improvements which in turn help make the law easier to use. The result of this undertaking will unquestionably be greater access to the statute law of New Zealand.

New Zealand

ANALYSIS.

1895, No. 24.

AN ACT for compiling an Edition of the Enactments in Force in New Zealand of a Public and General Nature. Title.

[*20th September, 1895.*

WHEREAS it is expedient that an edition of the Public General Statutes in force in this colony should be prepared in the manner hereinafter set forth: Preamble.

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. The Short Title of this Act is "The Reprint of Statutes Act, 1895." Short Title.

2. The Governor may issue a Commission under the Seal of the Colony to not more than three persons, appointing such persons Commissioners for the purposes of this Act. Governor to appoint Commissioners.

The Governor may also appoint some fit person to be Secretary to the said Commissioners; and the Commissioners may employ such clerical assistance as they, from time to time, may find necessary. Secretary and clerical assistance.

3. The Commissioners so appointed shall have the following powers, duties, and functions:— Powers and duties of Commissioners in preparing and arranging laws for publication.

(1.) They shall prepare and arrange for publication an edition of all the Public General Acts:

(2.) They shall revise, correct, arrange, and consolidate such Acts, omitting all such enactments and parts thereof as are of a temporary character or of a local or personal nature, or have expired, become obsolete, been repealed, or had their effect:

(3.) They shall omit mere formal and introductory words, and all enactments repealing any matter, and shall make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the existing Acts:

(4.) They shall also report upon such contradictions, omissions, and imperfections as may appear in the existing Acts, with the mode in which they have reconciled, supplied, and amended the same:

(5.) They may indicate such Acts or parts of Acts as in their judgment ought to be repealed, with their reasons for such repeal, and may recommend the passing of such new enactments as may, in their judgment, be necessary:

(6.) They may indicate in any report such enactments or proposed measures of the Imperial Parliament as, from their general interest and importance, the Commissioners may think it desirable should be adopted and made applicable to the colony:

(7.) They shall from time to time report to the Governor their progress and proceedings, and in every such report shall show any proposed new matter in different type from that which shows the existing law; and, when they shall have completed the revision and consolidation of the Acts relating to any separate branch of the law, they shall cause a copy of the same to be submitted to the Governor.

Governor to transmit reports of Commissioners to Legislature.

4. The Governor shall from time to time transmit to the Legislature the said reports, together with the Acts so revised and consolidated as aforesaid, in order that the said Acts may be enacted by the Legislature and the force of law given thereto, if the Legislature shall think fit.

Expenses of carrying Act into operation.

5. The Governor may appoint such honorarium to be made to the Commissioners, and such sum to be paid to the Secretary to be employed by the said Commissioners, as he may deem a reasonable remuneration for their respective services; which sums, together with all other necessary charges and expenses incurred in carrying out the provisions of this Act, or which have been incurred or become chargeable under the Act hereby repealed, shall be paid by the Colonial Treasurer out of any moneys appropriated by the General Assembly for that purpose.

Repeal.

6. "The Revision of Statutes Act, 1879," is hereby repealed.

WELLINGTON: Printed under authority of the New Zealand Government, by SAMUEL COSTALL, Government Printer.—1895.

New Zealand.

ANALYSIS.

1908, No. 4.

AN ACT to enact certain Public General Statutes prepared by the Commissioners appointed under "The Reprint of Statutes Act, 1895." [*4th August, 1908.* Title.

WHEREAS pursuant to "The Reprint of Statutes Act, 1895," Commissioners were appointed by His Excellency the Governor to prepare and arrange for publication an edition of the Public General Statutes of New Zealand: And whereas the said Commissioners have prepared and submitted to His Excellency a revised and consolidated edition of two hundred and eight Acts, the Short Titles of which are set forth in Appendix A hereto, and the full text of which is set forth in Appendix D hereto: And whereas for reasons stated in the report of the said Commissioners the edition so prepared does not include certain Acts the Short Titles of which are set forth in Appendix C hereto: And whereas the enactments specified in Appendices B and C together comprise all the Public General Acts of New Zealand printed as such in the statute-books up to and including the close of the last session of Parliament and then not specifically repealed: And whereas, in further pursuance of the above-recited Act, the report of the Commissioners, together with the aforesaid revised and consolidated edition, has been transmitted to the Legislature by His Excellency in order that the said edition may be enacted by the Legislature and the force of law be given thereto, if the Legislature thinks fit: And whereas it is expedient that the Acts so revised and consolidated as aforesaid should be enacted in manner hereinafter appearing: Preamble.

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Short Title.

1. The Short Title of this Act is "The Consolidated Statutes Enactment Act, 1908."

Enactment of consolidated Acts.

2. The Acts numbered one to two hundred and eight, the Short Titles of which are set forth in Appendix A hereto, and the full text of which is set forth in Appendix D hereto, are hereby enacted as public general statutes of New Zealand.

Provisions respecting such Acts.

3. With respect to each of the said Acts the following provisions shall apply:—

(*a.*) The Act shall operate and be construed as a separate Act with the Short Title named therein.

(*b.*) The Act shall be deemed to be a consolidation of the enactments mentioned in the Schedule thereto, or if there are more Schedules than one, then in the First Schedule thereto.

(*c.*) In the construction of the Act the enactments of which it is expressed to be a consolidation shall be deemed to be repealed by it, and, except where the Act otherwise provides, it shall be deemed to come into operation simultaneously with this Act.

(*d.*) The saving provisions (specific and general) contained in the Act shall be construed in aid of one another, and shall receive large and liberal interpretation, to the intent that the Act may, without gap or omission of any kind, extend and apply to the offices, appointments, things, and circumstances arising or existing under the enactments thereby consolidated as if the same had originated under the Act itself; and in particular, but without limiting its generality, the term "acts of authority" shall be construed to cover everything the validity of which depends on any of the said enactments.

Acts Interpretation Act to apply.

4. Without limiting the generality of the application of "The Acts Interpretation Act, 1908" (being Act No. 1 in Appendix D hereto), it shall apply to all the Acts in that appendix.

Repeal of Acts consolidated.

5. The enactments specified in Appendix B hereto (all of which are consolidated in the Acts set forth in Appendix D hereto) are hereby repealed:

Provided that in the case of "The Shipping and Seamen Act, 1908," which is reserved for the signification of His Majesty's pleasure thereon, the repeal of the enactments thereby consolidated shall not take effect until that Act comes into operation:

Provided further that in the case of section forty-two of "The Immigration Restriction Act, 1908," the repeal of the Act mentioned in subsection three thereof shall not take effect until as provided by that subsection.

Temporary provision pending circulation of Acts.

6. In order to facilitate the conduct of business and meet the convenience of the public pending the circulation of the consolidated Acts and the preparation of the rules and forms thereunder for general use, it is hereby declared that for the period of three months after the coming into operation of this Act, or such extended period as the Governor by Order in Council gazetted directs, references to any of the enactments hereby consolidated shall, in all proceedings and instruments, be construed and have effect as references to the corresponding Consolidated Act.

APPENDICES.

APPENDIX A.

SHORT TITLES OF CONSOLIDATED ACTS.

1. Acts Interpretation Act, 1908.
2. Accident Insurance Companies Act, 1908.
3. Administration Act, 1908.
4. Agricultural and Pastoral Societies Act, 1908.
5. Aliens Act, 1908.
6. Animals Protection Act, 1908.
7. Apiaries Act, 1908.
8. Arbitration Act, 1908.
9. Arms Act, 1908.
10. Auctioneers Act, 1908.
11. Banking Act, 1908.
12. Bankruptcy Act, 1908.
13. Beer Duty Act, 1908.
14. Beet-root Sugar Act, 1908.
15. Bills of Exchange Act, 1908.
16. Births and Deaths Registration Act, 1908.
17. British Investors' Rights Act, 1908.
18. Building Societies Act, 1908.
19. Cemeteries Act, 1908.
20. Charitable Gifts Duties Exemption Act, 1908.
21. Chattels Transfer Act, 1908.
22. Civil List Act, 1908.
23. Civil Service Act, 1908.
24. Coal-mines Act, 1908.
25. Commissions of Inquiry Act, 1908.
26. Companies Act, 1908.
27. Contagious Diseases Act, 1908.
28. Cook Islands Government Act, 1908.
29. Copyright Act, 1908.
30. Coroners Act, 1908.
31. Counties Act, 1908.
32. Crimes Act, 1908.
33. Crown Grants Act, 1908.
34. Crown Suits Act, 1908.
35. Customs Duties Act, 1908.
36. Customs Law Act, 1908.
37. Dairy Industry Act, 1908.
38. Death Duties Act, 1908.
39. Deaths by Accidents Compensation Act, 1908.
40. Deeds Registration Act, 1908.
41. Defence Act, 1908
42. Demise of the Crown Act, 1908.
43. Dentists Act, 1908.
44. Designation of Districts Act, 1908.
45. Destitute Persons Act, 1908.
46. Distillation Act, 1908.
47. Distress and Replevin Act, 1908.
48. District Courts Act, 1908.
49. District Railways Act, 1908.
50. Divorce and Matrimonial Causes Act, 1908.
51. Dogs Registration Act, 1908.
52. Education Act, 1908.
53. Education Reserves Act, 1908.
54. Employers' Liability Act, 1908.
55. English Laws Act, 1908.
56. Evidence Act, 1908.
57. Explosive and Dangerous Goods Act, 1908.
58. Extradition Act, 1908.
59. Factories Act, 1908.
60. Family Protection Act, 1908.
61. Fencing Act, 1908.
62. Fertilisers Act, 1908.
63. Fire Brigades Act, 1908.
64. First Offenders' Probation Act, 1908.
65. Fisheries Act, 1908.
66. Foreign Insurance Companies' Deposits Act, 1908.
67. Friendly Societies Act, 1908.
68. Gaming Act, 1908.
69. Gas-supply Act, 1908.
70. Gold Duty Act, 1908.
71. Government Accident Insurance Act, 1908.
72. Government Advances to Settlers Act, 1908.
73. Government Life Insurance Act, 1908.
74. Government Railways Act, 1908.
75. Harbours Act, 1908.
76. High Commissioner Act, 1908.
77. Hospitals and Charitable Institutions Act, 1908.
78. Immigration Restriction Act, 1908.
79. Impounding Act, 1908.
80. Imprisonment for Debt Limitation Act, 1908.
81. Industrial and Provident Societies Act, 1908.
82. Industrial Conciliation and Arbitration Act, 1908.
83. Industrial Schools Act, 1908.
84. Industrial Societies Act, 1908.
85. Inebriates Institutions Act, 1908.
86. Infants Act, 1908.
87. Injurious Birds Act, 1908.
88. Inspection of Machinery Act, 1908.
89. Judicature Act, 1908.
90. Juries Act, 1908.
91. Justices of the Peace Act, 1908.
92. Kauri-gum Industry Act, 1908.
93. Labour Department and Labour Day Act, 1908.
94. Land Act, 1908.
95. Land and Income Assessment Act, 1908.
96. Land Drainage Act, 1908.
97. Land for Settlements Act, 1908.
98. Land Titles Protection Act, 1908.
99. Land Transfer Act, 1908.
100. Law Practitioners Act, 1908.
101. Legislature Act, 1908.

CHAPTER 109 OF THE 1979 STATUTES

An Act to provide for the Consolidation and Revision of the Statutes

Assented to December 20th, 1979

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Commissioners, appointment

1.—(1) Arthur Norman Stone, one of Her Majesty's Counsel, Senior Legislative Counsel, and Jack Allen Fader, Legislative Counsel, and such other person or persons as the Lieutenant Governor in Council may appoint, are hereby appointed commissioners under the direction of the Attorney General to consolidate and revise the public general statutes of Ontario in accordance with this Act.

Remuneration

(2) The commissioners and such persons as may assist them shall be paid such remuneration for their services under this Act, out of the moneys voted by the Legislature for the purposes of this Act, as the Lieutenant Governor in Council may fix.

Duties

2. The commissioners shall examine the public general statutes of Ontario enacted before the 1st day of January, 1981 and shall arrange, consolidate and revise such statutes in accordance with this Act.

Powers

3. In the performance of their duties under this Act, the commissioners may omit any enactment that is not of general application or that is obsolete, may alter the numbering and arrangement of any enactment, may make such alterations in language and punctuation as are requisite to obtain a uniform mode of expression, and may make such amendments as are necessary to bring out more clearly what is deemed to be the intention of the Legislature or to reconcile seemingly inconsistent enactments or to correct clerical, grammatical or typographical errors.

Supplementary revision of statutes passed between Jan. 1, 1980 and time when R.S.O. 1980 is proclaimed

4. Where, in an Act that is passed after the 31st day of December, 1980, and before the Revised Statutes of Ontario, 1980 come into force, a reference is made to an Act or provision that is to be included in the Revised Statutes of Ontario, 1980, the

reference shall be deemed to be a reference to the corresponding Act or provision in the Revised Statutes of Ontario, 1980 and the commissioners shall, accordingly, cause appropriate changes to be made in the publication of Acts passed during that period.

Printed roll

5. As soon as the commissioners report the completion of the consolidation and revision authorized by this Act, the Lieutenant Governor may cause a printed roll thereof, signed by the Lieutenant Governor and countersigned by the Attorney General, to be deposited in the office of the Clerk of the Assembly.

Appendices

6. There shall be appended to the roll,

(*a*) an appendix marked "Appendix A", similar in form to Appendix A appended to the Revised Statutes of Ontario, 1970, containing certain Imperial Acts and parts of Acts relating to property and civil rights that were consolidated in the Revised Statutes of Ontario, 1897, Volume III, pursuant to chapter 13 of the Statutes of Ontario, 1902, that are not repealed by the Revised Statutes of Ontario, 1980 and are in force in Ontario subject thereto; and

(*b*) an appendix marked "Appendix B", similar in form to Appendix B appended to the Revised Statutes of Ontario, 1970, containing certain Imperial statutes and statutes of Canada relating to the constitution and boundaries of Ontario.

Schedules

7.—(1) There shall be appended to the roll,

(*a*) a schedule marked "Schedule A", similar in form to Schedule A appended to the Revised Statutes of Ontario, 1970, showing the Acts contained in the Revised Statutes of Ontario, 1970 and the other Acts that are repealed in whole or in part from the day upon which the Revised Statutes of Ontario, 1980 take effect and the extent of such repeal;

(*b*) a schedule marked "Schedule B", similar in form to Schedule B appended to the Revised Statutes of Ontario, 1970, showing the Acts and parts of Acts that are repealed, superseded and consolidated in the Revised Statutes of Ontario, 1980 and showing also the portions of the Revised Statutes of Ontario, 1970 and Acts passed thereafter that are not consolidated; and

(*c*) a schedule marked "Schedule C" containing references to all the provisions passed by the Ontario Legislature

after the 1st day of July, 1867 that are unconsolidated and still have effect.

Effect of inclusion or omission of an Act in schedules

(2) The inclusion or omission of an Act or a part thereof in a schedule shall not be construed as a declaration that the Act or part was or was not in force immediately before the coming into force of the Revised Statutes of Ontario, 1980.

Proclamation

8.—(1) After the deposit of the roll under section 5, the Lieutenant Governor may by proclamation declare the day upon which the roll will come into force and have effect as law by the designation "Revised Statutes of Ontario, 1980".

Effect of proclamation

(2) On and after the day so proclaimed, the roll shall be in force and effect by the said designation to all intents as though the same were expressly embodied in and enacted by this Act to come into force and have effect on and after that day, and on and after that day all the enactments in the several Acts and parts of Acts in Schedule A thereto shall be repealed to the extent mentioned in the third column of the schedule.

References to repealed Acts in former Acts

9. Any reference in an unrepealed and unconsolidated Act or in an instrument or document to an Act or enactment repealed and consolidated shall, after the Revised Statutes of Ontario, 1980 come into force, be held, as regards any subsequent transaction, matter or thing, to be a reference to the Act or enactment in the Revised Statutes of Ontario, 1980 having the same effect as such repealed and consolidated Act or enactment.

Publication by Queen's Printer to be evidence

10. The publication of the Revised Statutes of Ontario, 1980 by the Queen's Printer shall be received as evidence of the Revised Statutes of Ontario, 1980 in all courts and places whatsoever.

Distribution of copies

11. The Revised Statutes of Ontario, 1980 shall be distributed as the Lieutenant Governor in Council directs and the Lieutenant Governor in Council may fix the price at which copies may be sold by the Queen's Printer.

This Act to be printed with R.S.O. 1980

12. This Act shall be printed with the Revised Statutes of Ontario, 1980 and is subject to the same rules of construction as the Revised Statutes of Ontario, 1980.

How Acts may be cited

13. A chapter of the Revised Statutes of Ontario, 1980 may be cited and referred to in any Act, proceeding, instrument or document whatever either by the title with which the chapter is headed or by using the expression "Revised Statutes of Ontario, 1980, chapter ", or the abbreviation "R.S.O. 1980, c. ", adding in each case the number of the particular chapter.

Short title

14. The short title of this Act is *The Statutes Revision Act, 1979*.

DISCUSSION
Comment by participants

Several participants noted that access to local body material was abysmal, and that even local body solicitors had difficulty compiling their own bylaws.

Moira Collyns said that the National Library had not previously had a request for bylaws to be put onto Kiwinet, although it was likely that the Standards Association bylaws would be available. Beth Bowden said that with such matters it would be a question of who would pay for the work to be computerised, as there was only a tiny market involved.

Donna Buckingham, Faculty of Law, University of Otago, asked whether printouts from Kiwinet would be likely to be admissible as evidence under the present law. Beth Bowden noted that a laser printout could look original although in fact it was simply a sophisticated photocopy. Professor Keith noted that copies of CCH and Halsbury's statutes were sometimes used in evidence, and that there was a gap between the law and reality.

Chris Eales of the Government Printing Office said that they expected the Public Acts (all 31,000 pages) to be on computer within about a year. Local Acts would not be on the database unless specifically requested and paid for.

IV INTERPRETATION ISSUES

THE NEW ZEALAND APPROACH TO INTERPRETATION

Professor John Burrows
University of Canterbury

Approaches to statutory interpretation

THE PAST

Statutory interpretation in the British system of Justice has been much criticised for its adherence to the letter. Writing in 1907,[1] Roscoe Pound noted that of several approaches which could have been adopted to interpretation, the orthodox common law attitude toward legislative innovations was –

> "... not only [to] refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly."

Sometimes, indeed, this literal approach could thwart the parliamentary intent. There is no better example than *Ex Parte Hill*,[2] an English decision of 1827. A statute for the prevention of cruelty to animals provided that it was an offence to wantonly and cruelly ill-treat "any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle". It was held that since a bull was not specifically listed, it was not within the section. There are numerous other examples, in New Zealand[3] as well as England.[4] No doubt it is a considerable overstatement to say that statutory interpretation in earlier times always took this narrow approach, but there is likewise no doubt that it was predominant. Indeed as late as 1963, Mr Denzil Ward, the New Zealand Draftsman, wrote an article[5] complaining of New Zealand decisions which he felt emphasised the letter at the expense of the spirit of Acts of Parliament.

Two things presumably lay behind such an approach. The first was a simple failure to acknowledge that there is more to the meaning of a document than a collocation of the dictionary meanings of each of its words. This attitude spread beyond public documents like statutes to private documents. The second lay in the realms of policy and was peculiar to statute law. For a remarkably long time lawyers and judges regarded common law as the "real law", and saw statutory additions to it and, more particularly, statutory encroachments upon it as nuisances to be given no more effect than their letter demanded.[6] Justice Harlan Stone's depiction of judges treating statutes as "alien intruders in the house of the common law"

is justly famous.[7] Sometimes this attitude went further: if the statute was seen as affecting a basic principle of the common law it was to be given as *narrow* a meaning as possible. Indeed some of the so called examples of "literal interpretation" do not really exemplify literal interpretation at all: rather they are examples of a *restriction* of the letter to something even narrower than its literal meaning.[8] There were a number of corollaries of this attitude:

(i) There was sometimes a tendency to pronounce upon a section or even a single subsection, of an Act by itself, without reading it in the context of the Act as a whole. If the section (or subsection) seemed clear enough on its own, that was the end of the matter. In *Vacher & Sons* v. *London Society of Compositors*[9] Lord Shaw said:

"Were [the words of the section in question] ambiguous, other sections or subsections might have to be involved to clear up their meaning; but being unambiguous, such a reference might distort the meaning and so produce error."

(ii) There was considerable reluctance also to go beyond the four corners of the statute and look at surrounding contextual material. It was permissible to look at the state of things before the Act was passed to discern the mischief it was meant to remedy, but there were statements that this was to be done only in the event of ambiguity, or lack of clarity, in the Act itself.[10] Reports of Law Reform Committees and the like which had recommended the legislation could be studied, but only for the limited purpose of discovering the mischief.[11] Reports of parliamentary debates, and the history of the passage of the Bill through Parliament, were not admissible at all.[12]

The legal context of the Act was also paid scant attention. In particular there was a somewhat parochial attitude as far as the international legal context was concerned: if an apparently clear meaning emerged from the domestic act as it stood, it was simply irrelevant whether or not that interpretation accorded with the country's international treaty obligations.[13]

(iii) There was also a plethora of specific rules of interpretation: the rule that a proviso simply creates an exception to the general rule in the main part of the section: the *ejusdem generis* rule; *expressio unius exclusio est alterius.*

Some of these rules were based on common sense and sound grammar but they could become dangerous masters. Some of the old judgments based decisions on them as if they were immutable principles of logic, without regard being paid to the merits of the case at all.[14]

All of this leads to the impression that all that once mattered to judges and lawyers was what the words of the instrument itself

meant. Context, purpose, and the intent of the framers were considerations which became relevant only if the words themselves yielded no answer. This attitude was particularly prevalent last century and in the early years of this century; as Mr Ward's 1963 article shows it had not disappeared by the middle of this century. Paradoxically, it might be said to have given the judges more control. If they were not obliged to inquire into what Parliament really intended there was more scope for them to attribute to the words of the Act the meanings that they, the judges, believed they should have. Something of this attitude is apparent in the judgment of Lord Wilberforce in *Black-Clawson International Ltd* v. *Papierworke Waldhof-Aschaffenburg A.G.* in 1975:[15]

> "This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved upon the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law – as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."

It must be said that, however much it becomes accepted that the courts' task in interpretation is to give effect to the will of Parliament, one would expect, and indeed hope, that this idea of judicial control will never entirely disappear.

FACTORS INFLUENCING THE STYLE OF INTERPRETATION

In the 1980's the old over-literal approach has receded. Statutes are customarily given a more purposive, effective interpretation than they used to be. It must be recognised, however, that it is quite impossible in a field like this to deal in universal truths. A number of things influence the style of interpretation applied to a particular statute, and it would be quite wrong to say that today the purposive approach applies without exception. Some of the factors which dictate the style of interpretation are as follows.

1. *The judge*

It has always been true, and it would be remarkable if it were otherwise, that different judges may have slightly different ways of approaching the interpretation task. In Britain the divergence of opinion and approach between Lord Denning and Lord Simonds is well-known.[16] One can point to similar personal differences, albeit less extreme, in this country.[17] This is an important point, for just as one is able to say that a style of interpretation has become established in a particular court, say the Court of Appeal, a change of personnel could make a difference.

2. *The type of interpretation problem*

There is a variety of interpretative problems; they are as different as chalk from cheese.[18] Some involve pure ambiguity, where the question is simply which of two possible meanings should be attributed to a word or phrase. Some involve questions of what Hart has called penumbral meaning: for example if a person in the passenger seat of a car has his hands on the steering wheel, can he be said to be "driving" the car?[19] Others involve the reconciliation of apparently conflicting provisions within the same statute or in different statutes. Yet others arise because the most obvious meaning of the words produces a result which is undesirable in practice, perhaps even absurd. And yet others involve a question arising out of the operation of a statute which requires an answer, but the statute is completely silent on the point: for example, under the Water and Soil Conservation Act which of national or local government fund Regional Water Boards?[20] So different are these *kinds* of questions that one cannot reasonably expect that the answers to them will always involve the same reasoning process.

3. *The kind of issue before the court*

Courts have traditionally wished to be seen as impartial adjudicators, not taking sides in matters of political or social controversy. In modern society courts, as Sir Robin Cooke has recently shown,[21] have become increasingly used to handling "hot" issues, and the argument for a Bill of Rights assumes that they will continue to do so. But the basic proposition is still true, and in matters of statutory interpretation manifests itself in a tendency, when dealing with a controversial matter in which there is heated public interest, to resolve the matter by attention to the literal meaning of the statute concerned.[22] A more liberal approach could lead to criticisms that the court was going beyond the statute and taking sides. Thus in high-profile industrial disputes[23] and in moral issues like abortion, the courts have tended to rely, or rather to *say* they are relying, on the dictionary meaning of the words of the Act. In *Royal College of Nursing* v. *Department of Health and Social Services*[24], where the issue was whether a new method of inducing abortion was within the statute concerned, Lord Wilberforce said:[25]

> "In my opinion this Act should be construed with caution. It is dealing with a controversial subject involving moral and social judgments on which opinions strongly differ. It is, if ever an Act was, one for interpreting in the spirit that only that which Parliament has authorised on a fair reading of the relevant sections should be held to be within it ... the Act is *not* for a 'purposive' or 'liberal' construction."

(It may be remarked that since the House of Lords divided 3:2 on what the words of the Act meant the "clear meaning" of those words was at best a tenuous guide to decision.)

4. *The drafting style*

The styles of drafting of statutes differ. There is a great

difference between the detailed and somewhat tortuous provisions of most fiscal legislation and the Credit Contracts Act 1981, and the more sparse style of the Domestic Protection Act 1982 and the Contractual Remedies Act 1979. There is probably some truth in the belief that there is a chicken-and-egg relationship between drafting and interpretation. The ultra-literal interpretation of earlier courts no doubt led drafters to be more detailed in an herculean effort to leave nothing out and leave no room for evasion. In turn the increased particularity of the drafting could only induce an increased attention to the *litera legis* by the interpreters. This is not to say that short and simple drafting leads to less litigation than detailed drafting: only that the *types* of interpretative problems and the interpretative approaches adopted by the courts may be somewhat different.

5. *The subject matter of the legislation*

In 1948 Freidmann wrote an article in the Canadian Bar Review[26] suggesting that one could divide statutes into several basic types, and asserting that a different style of interpretation was appropriate to each type. Penal statutes demanded a different approach from social policy statutes, and so on. Freidmann's thesis runs into the difficulty that statutes do not dissect neatly into the categories he sets out, but his argument contains more than a grain of truth: certain types of statutes, particularly fiscal statutes and statutes infringing on human freedoms, have historically received a more restrictive interpretation than others. Many of the so-called "presumptions" of interpretation are simply reflections of this. While, as will be shown later, the modern tendency has been to minimise and even to attempt to remove completely these differences in approach between statutes, it still remains true that in the (hopefully) rare case when a statutory provision appears inimical to a fundamental human freedom, it will be given the narrowest interpretation of which it is capable. Privative clauses in legislation establishing tribunals are a good example.[27] As has been said earlier, judicial control of as opposed to judicial acquiescence in the legislative policy is to be expected in such cases. Indeed, as an extreme version of this, Sir Robin Cooke has recently said judicially that there may be some principles which go so deep that legislation *cannot* affect them.[28] A Bill of Rights, if enacted, will of course adopt that notion into legislation. Any theory that all interpretation should be "purposive" finds itself at odds with this proposition.

6. *The desirable result*

Legislation should work sensibly and effectively. The desire to achieve the best working result must at times influence the style of interpretation adopted. At times the desire to arrive at a particular end has led to liberality of construction: the interpretation of "hardship", for instance, in a recent case on the appeal rights of a student refused a tertiary bursary,[29] or the judicial distortion of s.26 of the Misuse of Drugs Amendment Act 1978.[30] At other times that desire has led to restricting the natural meaning of words: as in an Australian case where the words "any animals" were held not to include tame animals.[31] While this

approach often equates with the purposive approach, they do not always coincide. The desire for workability is another factor which can distort any logically consistent theory of interpretation.

The attempt which follows to chart the modern trends in interpretation must therefore be read as an attempt to state the *general* position. All the trends indicated are subject to occasional exceptions and rogue decisions which spoil the universality of what is being said. Nevertheless, speaking in general terms the trends are clear enough. Just as, 50 or even less years ago, one could say the approach to interpretation was more literal than purposive, one can now say the reverse.

THE PRESENT

The following things can be said to be features of modern statutory interpretation in New Zealand. Most of them are not confined to New Zealand, but appear also in other Commonwealth jurisdictions; occasionally, therefore, appropriate overseas illustrations will be given.

1. *Purposive approach*

It is quite clear that there is an overwhelming tendency today for courts to attempt to effectuate the parliamentary intent in interpreting statutes. In Britain, Lord Diplock was able to say in 1975:[32]

> "If one looks back to the actual decisions of this House on questions of statutory construction over the past 30 years, one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions."

In New Zealand the same trend is clearly observable. It is difficult nowadays to find examples of cases where one can say that the legislative purpose has been frustrated by a too literal interpretation. Arguably this trend should have been established much earlier, for what is now s.5(j) of the Acts Interpretation Act 1924 was first enacted in 1888. It reads:

> "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit."

Section 5(j) has had an interesting history. It was cited in the courts from the earliest times, but has had its most far-reaching effects more recently. Early on, although cited, it was often circumvented by one means or another. Several devices were used. One was to say – in apparent contradiction to the wording of the Acts Interpretation Act itself – that s.5(j) did not apply to certain types of legislation, and that a strict interpretation remained more appropriate to them. Thus, for instance, it was said that the method of s.5(j) was "hardly applicable" to tax Acts.[33] Another was to say that s.5(j) had to be read subject to the common law presumptions, even though it was the Legislature's fairly clear intention to override those presumptions. "Although, by the Acts Interpretation Act 1924 no distinction is to be made in the rule to be applied in the construction of penal and other statutes, we think the observation made by Pollock C B in *Attorney-General* v. *Sillern* is still applicable ..." (namely that penal statutes are to be strictly construed.).[34] Another device was to distort the meaning of the expressions "object" and "true intent meaning and spirit" as they appear in s.5(j). In *Taylor* v. *N.Z. Newspapers Ltd*[35] Fair J. said that s.5(j) was "hardly applicable" to a highly penal section. "The law has always held that in construing penal sections their true intent meaning and spirit is that they shall extend no further than is clearly stated therein."

Yet another argument was to say that while s.5(j) requires the object of the legislation to be given effect to, in some statutes that object cannot be found independently of the words of the statute, or if it can is so general as to be unhelpful. In such a case one falls back on the ordinary meaning of words themselves, and finds one has come full circle.[36] This argument, more than any of the others, sometimes does have genuine validity: the difficulty of finding purpose can be a real limitation on the effectiveness of s.5(j). But one has the impression that sometimes it was used as an excuse to fall back on the comfort of the literal rule rather than as a necessity.

In other situations, s.5(j) was evaded very simply by not even being mentioned. In a large number of cases dealing with governmental powers and private property, for instance, common law presumptions were cited, but s.5(j) was never referred to either expressly or by implication.[37]

However this has changed. If s.5(j) is not constantly referred to in the courts these days this is only because it is so well known that it is unnecessary to refer to it. The great majority of modern cases of statutory interpretation in New Zealand are consistent with its premise. While it would be quite wrong to say that the old presumption about penal statutes no longer has any force, one can find many examples of penal statutes being liberally construed in accordance with s.5(j) – examples involve the man in the passenger seat being held to be guilty of "driving" a car while disqualified,[38] and a conviction being entered against a shipping company for "discharging" oil into navigable water when in fact the oil was seeping from a cracked pipe.[39] There are even indications that s.5(j)) and the purposive approach are sometimes not entirely out of

place in the context of a revenue Act.[40] There is little of the attention to the minutiae of the letter which marked some of the older cases. Statements like these are often found in judgments:

> "In the complex task of wresting the true construction of an Act it cannot be compartmentalised and scrutinised molecularly."[41]

> "In a long and much amended Act complete consistency is too much to expect. In my judgment it can be dangerous to approach legislation of this kind ... with primary regard to literal meanings and strict analysis."[42]

Whether s.5(j) has been solely responsible for this development may be doubted. Very much the same trends are observable in Britain, where of course there is no equivalent to s.5(j). The true position probably is that these developments would have happened anyway, simply because a thinking and socially-conscious modern society would have demanded them. But the modern approach is entirely in conformity with s.5(j) which can be, and frequently is, used to support the decisions. However, it has been rightly said that s.5(j), with its purposive approach, is no panacea.[43] There are two major limitations on its effectiveness. The first is simply that however liberal, or purposive, statutory interpretation is, it must remain interpretation and not reach the stage where the court is effectively rewriting the statute. The words must be capable of bearing the meaning placed on them.[44] This is a question of degree, and different minds will doubtless differ on when the boundary between interpretation and judicial law-making is reached. The more compelling the purpose, the more desired the result, the further the courts may be prepared to venture from the primary meaning of the words in question.

The second limitation has already been adverted to. Section 5(j) enjoins the court to give such interpretation as will ensure the attainment of the ***object*** of the provision. If that object is itself not clear, s.5(j) must be of limited utility.[45] Quite apart from the consideration that the very notion of "object" or "purpose" has varying shades of meaning (it can range from *what* parliament intended to accomplish to the ***reasons*** it so intended), the materials to which the court is permitted to have regard are often unhelpful. That was particularly so when Hansard and other types of parliamentary history were forbidden territory - the increasing resort to such materials has no doubt reduced some of the problems in this respect. However, it is sometimes clear enough, without the need to resort to any extrinsic materials at all, that the facts of the case are so analogous to the things Parliament had in mind that s.5(j) may justify a liberal interpretation of the words. Thus, betting in a doorway was held to be "betting in the street";[46] injury to an animal was held to be "damage to property" for the purpose of the accident provisions of the Transport Regulations;[47] and a man who married a woman with a pre-nuptial child was held to be the child's "step-father" for the purpose of maintenance legislation.[48] The line between reaching a decision because it effectuates Parliament's object and because it leads to a desirable or sensible result is a fine one in some such cases.

2. *Context*

The realisation that a section must be read in its full context is one of the most important features of modern statutory interpretation. It contrasts with the myopic vision exemplified by the dictum of Lord Shaw in the *Vacher* case cited earlier.

(a) Internal context – the scheme of the Act

The New Zealand courts, particularly the Court of Appeal, currently place great emphasis on the "scheme of the Act".[49] The whole statute must be studied before one can proclaim fully to understand one section of it. It is increasingly common for a court concerned with the interpretation of a single section to set out in its judgment not just that section but a number of surrounding sections of close relevance. In this way recurring and underlying themes may emerge; contrasts between sections may illuminate the meaning of one of them; indications in other parts of the Act may confirm or negate the initial impression made by one section; and a general intent may emerge from a reading of several sections together even though some of them taken alone are far from clear.[50] In applying the purposive approach enjoined by s.5(j) the scheme may be one of the ways of finding the purpose, although a study of the scheme helps in more ways than that.

(b) External context

(i) *International treaties* – The willingness of courts to place New Zealand domestic statutes in their wider international context is in contrast to the older approach of cases like *Ellerman Lines* v. *Murray*.[51] Treaties have been referred to to determine which of two statues should prevail in the particular case,[52] to assist in the interpretation of ambiguous expressions,[53] and as a reason for giving wide operation to the words of a domestic statute.[54] The Universal Declaration of Human Rights and certain resolutions of the United Nations have been referred to.[55] This tendency to set New Zealand statute law in its international context, coupled with an expressed desire to ensure uniform interpretation of uniform statutes,[56] is one of the most significant developments of recent years.

(ii) *Other statutes* – There is also a greater willingness than previously to look at the statute under consideration in the light of other statutes on the same general topic: comparisons can yield statutory trends or significant differences.[57]

(iii) *Surrounding circumstances* – It is permissible for courts to have regard to the factual circumstances pertaining at the time the Act was passed so that they can view the Act in its social setting and determine what social mischief, if any, it was passed to remedy. There would appear to be every reason, also, why regard should be had to any changing circumstances in which an old Act must operate in modern times: the current workability of a statute is surely at

least as important as its original purpose.[58] It is extremely difficult to assess how much resort is made to this contextual aid. In the case of most Acts the social circumstances surrounding them are a matter of obvious common knowledge, and express reference to them is not necessary in the course of a judgment. Acts of Parliament do not exist in a vacuum, and every reader relates the words of the Act to his or her knowledge of the circumstances with which it deals. It is seldom that a court requires to be informed by counsel, either by written documentation or oral evidence, of the social and economic context of the Act,[59] although a member of the Court of Appeal has extra judicially called on counsel to do so where it is helpful.[60] In cases where that does happen, the most common source of the information is the report of the committee which recommended the passing of the Act.[61] The most typical application of the "mischief" approach, however, involves reference not to factual circumstances but to common law decisions which it was the purpose of Parliament to reverse.

(iv) *Committee reports* – The received learning on this topic was that reference could be made to committee reports to determine the mischief the Act was passed to remedy, but for no other purpose.[62] That limitation has been repeated in New Zealand in relatively recent years.[63] Nevertheless there have long existed instances in this country of references to particular committee reports which have seemed to go beyond this limited purpose. The Report of the Commissioners who recommended the 1908 consolidation has been referred to several times to determine whether certain provisions of the consolidated statutes were intended to amend the earlier law.[64] Likewise it is not uncommon for courts interpreting the Crimes Act to refer to the report of the Royal Commission of 1879 as a direct guide to the intention of the drafters.[65] In the past decade reference to Committee and Commission reports has been increasing, and in several of the cases it appears that reference has been made for a purpose going beyond the mere discovery of the mischief. Indeed in *N.Z. Educational Institute* v. *Director-General of Education*[66] McMullin J. noted the difficulty in practice of separating the functions of identifying the mischief and interpreting the Act. Thus in *Worsdale* v. *Polglase* the Chief Justice, in interpreting a provision of the Contractual Remedies Act 1979, said:[67]

> "That report [of the Contracts and Commercial Law Reform Committee] makes it plain that the interpretation contended for by Mr Boon was at least the one intended by the Reform Committee in its recommendations to Parliament."

There are other examples.

(v) *Hansard* – It used to be thought that the New Zealand rule was the same as that prevailing in England: that the parliamentary debates on a Bill may not be resorted to assist in statutory interpretation.[68] There was no extended judicial discussion or justification of the rule in this country, and there were occasional departures from it in the cases: but no one seriously

doubted that the rule existed here. Yet in all countries which have adhered to the rule there has, in recent years, been serious questioning of its rationale. In Australia, Commonwealth and some State legislation abolished it in 1984;[69] in England members of the judiciary have occasionally intimated that they would rather it did not exist.[70] In New Zealand, the courts have themselves begun to make inroads into the old rules, and have begun to refer to Hansard.[71] Sometimes this has been simply to explain the background to the Act in question, sometimes to see whether the parliamentary debates assist with interpretation in a more direct way. The two most signficiant cases are *Marac Life Assurance Ltd* v. *CIR*[72] and *N.Z. Maori Council* v. *Attorney-General.*[73] In the former, the Court of Appeal held that the difference between the premium paid and the amount received by the holder of life bonds is not "interest" within the meaning of that word in the Income Tax Amendment Act 1983. To support this conclusion all five members of the Court of Appeal cited from the Budget speech in the House at the time the Bill was introduced. Cooke J. stated:

> "... in my view it would be unduly technical to ignore such an aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief arrived at or to clarify some ambiguity in the Act".

In *N.Z. Maori Council* v. *Attorney-General*, the famous State Owned Enterprises/Treaty of Waitangi case, Cooke P. looked at Hansard, saying that "not to do so in a case of the present national importance would seem pedantic and even irresponsible". His Honour located and cited three passages in the parliamentary debates which were of some relevance to the problem before the court, but in the end concluded that none of them provided significant help. His impression was that members who took part in the final debate thought that the Act would have the effect contended for by the Crown, but the lack of discussion made that understanding inconclusive and of no great help.

To date, reference to Hansard in the New Zealand courts cannot be said to have provided much significant assistance, although in a case before the Licensing Control Commission a passage was found in the debates which was virtually conclusive of the issue.[74] The recent Australian cases also contain a few examples where real assistance was obtained. But overall the results of the various perusals of the debates have not been dramatic. This has led the Court of Appeal in a later case to say that the new development is "certainly not intended to encourage constant references to Hansard and indirect arguments therefrom. Only material of obvious and direct importance is at all likely to be considered."[75]

> While it appears from Cooke J's dicta in *Marac* that Hansard may be referred to to support a provisional interpretation of apparently clear words, it must clearly not be allowed to alter the meaning of clear words in the Act. That has already been emphasised.[76]

- Can Hansard be used to limit the meaning of words in the Act which appear perfectly general? In *Maori Council* Cooke P. left that question open.

- If Hansard suggests that those responsible for the legislation intended an interpretation which does not comply with that which the courts have traditionally accorded that type of legislation, will the interpretation favoured by the courts, or that favoured by legislators, prevail? Australian authority suggests the former.[77] If that is so, the courts will not allow the new-found power to resort to Hansard to weaken the judicial control which has always been a feature of statutory interpretation.

- Where does one stop? If Hansard, why not departmental instructions to the drafter (if obtainable), or such records as are kept of the meetings of select committees?

It cannot be said that this development is as yet entirely free from controversy.

(vi) *Other materials* – The widening of the interpretative context does not stop at Hansard. Of little less significance is the reference by members of the Court in *Marac* to the Department of Inland Revenue's Post-Act Public Information Bulletin on the Act in question. That is also a new development. The 7th edition of *Grimes on Statute Law* in 1971 states categorically that this type of material is inadmissible. Recent cases also show courts referring to Amendments to a Bill;[78] to an explanatory memorandum by a government department;[79] to an explanatory note to a regulation;[80] and to the explanatory note to a Bill.[81]

(c) *An opposing trend*

There has clearly been a widening of the judicial focus in recent years, and a much greater tendency to place the statute in context. Much more material is being admitted than in the past. Per contra, however, certain other types of material are being viewed with more suspicion than they once were. There is less willingness than there was for instance, to rely on earlier judicial dicta on the statute in question, or dicta or other analogous statutes; what matters is the words of the statute itself and the parliamentary intent in enacting it, not some earlier judicial paraphrase.[82] Likewise the New Zealand Court of Appeal has indicated that it accepts the House of Lords view that when interpreting consolidation statutes consideration of the earlier repealed statutes should be kept to a minimum.[83] There are however exceptions to that despite these cautions, and there is in reality not much noticeable diminution in the volume of legislative history currently being referred to by our superior courts.

3. *Natural meaning*

There are to be found in the modern cases, just as there were

in the older ones, numerous dicta to the effect that the primary rule of interpretation is that the words of the Act must bear their natural meaning.[84] However "natural meaning" is not the same thing as the old literal meaning.[85] Rather it is the meaning arrived at after a consideration of the words *in context*: the meaning which would be derived by a sensible reader having regard to the scheme of the Act, and making allowance for drafting slips, the occasional tautology, and some complexity of expression.[86]

However it would be wrong to assume that the concept of "natural meaning" is a sure guide to interpretation, or even that the term is always used consistently. Two points should be made about it.

First, the statement that the "natural meaning" rule is the primary rule of interpretation may seem to ring a little hollow when one sees how often words are in fact given meanings which are wider, or narrower, than their dictionary meanings. This, however, is to confuse "dictionary" and "natural" meaning; there is not inconsistency in saying that, when read in light of the scheme of the Act and surrounding context, the most natural meaning of the words may be something other than their dictionary meaning. However in more extreme cases this explanation falters. Sometimes one simply has to admit that the attainment of the object of the Act (pace. s.5(j)) or the desire to achieve a workable result has led to an interpretation which is not the most natural one. At times, indeed, words in statutes have been given extraordinary meanings.[87] In this sense the "natural meaning" of the words can sometimes be displaced by strong countervailing pressures.

Secondly, sometimes judicial reliance on "natural and ordinary meaning" as the ground of a decision is less than satisfying to a reader. Sometimes the reader may not feel that the meaning attributed to the words really was the natural one; at other times judges in the same case may disagree on what the natural meaning of the words was. This may indicate no more than that different people may differ on the connotation of words (an unremarkable conclusion); or that unexpressed factors contribute to the decision in some cases. Statutory interpretation is a complex of many influences, and sometimes reliance on "natural and ordinary meaning" is too simple an explanation.[88]

4. *Presumptions and rules*

(a) Presumptions

As has been mentioned earlier, books on statutory interpretation list many "presumptions" of interpretation, the most common being those which dictate that particular types of legislation are to be interpreted narrowly in favour of the individual. Examples are tax Acts, penal statutes, and statutes taking away vested rights such as rights of property. However, as already indicated, these presumptions have lost the extreme force they used to have. If the purpose of the Act is clear the words will within the reasonable boundaries of meaning, be interpreted so as to advance

that purpose, even though the result may not favour the individual litigant. There are signs that there may be room for a purposive interpretation even in some tax cases. In other words, the edict of s.5(j) is being applied.

It would however, be an oversimplification to leave matters there. First of all, cases of real doubt may arise where the legislative intent and purpose are unclear. In these cases, the presumptions still have force in that the benefit of the doubt must go to the individual. In other words the presumptions are a means of resolving an impasse. Secondly, as discussed above, there are a few sensitive cases where such important principles of freedom are at stake that the courts are still strongly disposed to scrutinise legislation very carefully, and to insist on very clear language before they are prepared to hold that inroads have been made into these principles. Sometimes, in fact, restrictive interpretation still occurs. Privative clauses, attempting to deprive citizens of access to the courts, are perhaps the clearest example.[89] These are instances of judicial control of statute: they are cases where judicial and legislative policy may not be in harmony with each other, and where the courts will concede no ground to the Legislature. They pose a problem for any coherent universal theory of purposive interpretation based on s.5(j); yet one would not wish to have it otherwise.

(b) Rules

The modern judgments make much less use of rules such as *ejusdem generis*. Much more attention is now paid to the particular statutory provision, its purpose and its context. Every provision is different, and rigid notes can obscure rather than illuminate parliamentary intent. In the Court of Appeal in 1966 McCarthy J. said of the *ejusdem generis* rule:[90]

> "The rule is ... a rule to be applied with caution and the tendency of the modern authorities is to alternate its application. Statutes, like other documents, should be construed so as to carry out the object sought to be accomplished, and if that object is plainly discernible, then there is little room for such rules."

One can find similar dicta in respect of other rules – such for example as the rule that the true function of a proviso is to create a qualification to a rule.[91]

5. *Analogy*

Pound[92] and Landis[93] complained in the first half of the twentieth century that the courts, by their narrow and literal approach to interpretation, were not allowing statute law to play a proper part in the legal system. By not allowing statutes to operate further than their letter demanded they were not allowing the principles and policies of statute law to enrich the common law and the legal system as a whole. For the greater part of the twentieth

century that criticism has been justified. Examples of judges developing the common law by analogy with statute law have been few and far between. Recently, however, there have been signs, in line with the more purposive modern approach to interpretation, that courts are beginning to reason by analogy with statutes. There were two landmark decisions of the House of Lords in the late 1970's developing uncertain areas of the common law in accordance with the policy visible in certain modern statutes.[94] The New Zealand courts have followed suit. A good example is *R* v. *Uljee*[95] where it was held that solicitor–client privilege pertained even where a conversation between solicitor and client was overheard by a constable. Although this was not a drug case, the Court of Appeal used the analogy of s.27 of the Misuse of Drugs Amendment Act 1978 which specifically exempted solicitor–client communications from the provisions rendering intercepted evidence admissible. Cooke J. said:[96]

> "That section is part of contemporary New Zealand legislation ... Cases outside the scope of the legislation need to be considered in its light. It would be out of harmony with the approach and sense of values revealed by the section if the Court were to hold that a person charged with a crime could not assert privilege..."

Whereas once legislation had to bend to the common law, we may now be nearing a stage where the common law can be moulded to achieve consistency with legislation. This harmonisation of the various parts of the system is to be welcomed.

CONCLUSIONS

The process of statutory interpretation invokes a complex interaction between several things, of which the most important are the natural meaning of the words used, the purpose of the Act in question, and the most workable and desirable result. When these all point in the same direction, as they very often do,[97] there is little difficulty. Cases where they do not sometimes pose difficulties for any consistent or uniform approach to interpretation. So do the factors outlined in the second section above. One can, however, draw the following general conclusions.

1. The New Zealand courts now normally adopt a purposive approach to construction in line with s.5(j) of the Acts Interpretation Act 1924. It is seldom these days that legislative intent is frustrated by an over–literal interpretation.

2. The courts are also adopting a wide view of context. Not only is the scheme of the Act as a whole carefully regarded, but so are some extrinsic materials. There is very recent evidence that the courts may be prepared even to look at Hansard in appropriate cases.

3. Occasionally, however, the courts may be prepared to exercise judicial control over parliamentary intent: they will do this when they perceive that fundamental human freedoms are at stake, as for instance the right of access to the courts. This tendency cuts across the purposive approach.

The question arises of what reform, if any, is necessary or even possible.

1. Since the approach of the New Zealand courts is fundamentally in line with s.5(j) of the Acts Interpretation Act 1924, it is doubtful whether there is any need to re-inforce that provision. The most that might be hoped for is a redrafting in more modern and less tautologous language.

2. It would be a mistake, and practically impossible in any event, to legislate against any departure whatever from the dictates of s.5(j). As long as the judiciary are seen as the protectors of freedom, one would not expect nor wish them to be deprived of the power they occasionally exercise to construe provisions narrowly. Were a Bill of Rights to be enacted, this power would become more visible than it now is.

3. One may wish to consider whether it would be desirable to statutorily legitimise reference to materials such as Hansard. Since the courts seem to be prepared to move in this direction themselves, legislation may be thought unnecessary. Its only advantage would be that it could define, as s.15AB of the Australian Acts Interpretation Act does, the conditions on which resort may be had to Hansard, and guidelines for its use. No doubt if left to themselves the courts will work out such criteria on a case by case basis, but it will take time.

FOOTNOTES

1 (1907) 21 Harv L R 383, 385
2 (1827) 3 & P 225
3 See Ward [1963] NZLJ 293
4 Another well-known English example is *Whiteley* v. *Chappell* (1868) LR 4 QB 157 where it was held, in construing an Act which made it an offence to "impersonate a person entitled to vote", that it was no offence to vote in the name of a dead person
5 Note 3 above
6 See Pound, n 1 above
7 Stone (1936) 50 Harv LR 4
8 *Ex p Hill* is an example: the words "or other cattle" surely encompass a bull?
9 [1913] AC 107, 126

10 See for instance *Johnstone* v. *Police* [1962] NZLR 673, 674 per Turner P. Statements to this effect can in fact be found much more recently, e.g. *Hunt* v. *BP (Libya) Ltd* [1980] 1 NZLR 104, 112 per Barker J

11 Statements to this effect can be found in relatively recent years: for instance *Harding* v. *Coburn* [1976] 2 NZLR 577, 581 per Cooke J

12 The New Zealand authority for this proposition is slight enough (*Hamilton Gas Co.* v. *Mayor of Hamilton* (1908) 27 NZLR 1020, esp. 1030–1031 per Williams J; *Otago Land Board* v. *Higgins* (1884) NZLR 3 CA 66, 80 per Johnston J. arguendo) but it has always been assumed that the English rules hold good here

13 The best known authority is English: *Ellerman Lines Ltd* v. *Murray* [1931] AC 126

14 See for example *Re Puhi Mahi* v. *Hutchinson* [1919] NZLR 82 and *Waimairi County Council* v. *James* [1929] NZLR 449, 458 (judgment of MacGregor J.)

15 [1975] AC 591, 629

16 See for instance the famous dictum of Lord Simonds in *Magor and St Mellons RDC* v. *Newport Corporation* [1952] AC 189, 190–191

17 Compare the judgments of the judge at first instance and the Court of Appeal in *Leveridge* v. *Kennedy* [1960] NZLR 1

18 See Bennion, *Statute Law* (2nd ed) and Ross, *On Law and Justice*, chapter 4

19 e.g. *R* v. *Clayton* [1973] 2 NZLR 211

20 The question which arose in *Rotorua District Council* v. *Bay of Plenty Catchment Commission* [1979] 2 NZLR 97. See especially Richardson J. at 102

21 (1983) 5 Otago LR 357

22 See Atiyah (1980) 15 Israel LR 346, 358

23 For example *Duport Steels Ltd* v. *Sirs* [1980] 1 WLR 142

24 [1981] AC 800

25 At 822

26 (1948) 26 Can.BR 1277

27 e.g. *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129

28 Most notably in *N.Z. Drivers' Association* v. *N.Z. Road Carriers* [1982] 1 NZLR 374, 390 and *Taylor* v. *N.Z. Poultry Board* [1984] 1 NZLR 394, 398. See Caldwell [1984] NZLJ 357

29 *Director-General of Education* v. *Morrison* [1985] 2 NZLR 430

30 *R* v. *Wall* [1983] NZLR 238

31 *Ex p Goddard* (1940) 40 NSWSR 450

32 *Carter* v. *Bradbeer* [1975] 1 WLR 1204, 1206

33 *McKinnon* v. *Glen Afton Colliers Ltd* [1935] NZLR 988, 1013 per Fair J

34 *R* v. *McKechie* [1926] NZLR 1, 13 per Reed J.

35 *Taylor* v. *N.Z. Newspapers Ltd (No. 3)* [1938] NZLR 212, 214 per Fair J.

36 e.g. *Pitches* v. *Kinney* (1903) 22 NZLR 818, 819 per Williams J.; *Calvert* v. *McKenzie* [1937] NZLR 966, 976 per Myers CJ

37 See the examples in Paterson, *Administrative Law in New Zealand*, 18–19. For a view of the Canadian equivalents of s.5(j) see Tucker (1985) 35 Univ of Toronto LJ 113

38 *R* v. *Clayton* [1973] 2 NZLR 211

39 *Union Steamship Co of N.Z. Ltd* v. *Northland Harbour Board* [1980] 1 NZLR 273

40 For instance *Duff* v. *Commissioner of Inland Revenue* [1982] 2 NZLR 710, 716 noted (1982) 1 Cant LR 415

41 *Arataki Honey Ltd* v. *Minister of Agriculture and Fisheries* [1979] 2 NZLR 311, 316 per Jeffries J

42 *Hotel Association of New Zealand* v. *Crowley* [1976] 1 NZLR 110, 119 per Cooke J. See also *Waitamata City Council* v. *Auckland Regional Authority* [1982] 2 NZLR 137, 139 per Cooke and Ongley JJ See the survey of s.5(j) by Glover [1987] NZLJ 278

43 The phrase is that of Haslam J in *Nunns* v. *Licensing Control Commission* [1967] NZLR 76, 78

44 "Judges have been compelled to search for an interpretation which would make the section both workable and just. In doing so they inevitably approach the line where interpretation ceases and legislation begins – a line which they may not cross." *Mangin* v. *Commissioner of Inland Revenue* [1971] NZLR 591, 597 PC per Lord Donovan. It has been said that this is the purport of the word "fair" in s.5(j): the words must *fairly* be able to bear the meaning put on them: *Union Motors Ltd* v. *Motor Spirits Licensing Authority* [1964] NZLR 146, 150 per Wilson J. For a recent example see *R* v. *Gray* [1984] 2 NZLR 410 holding that running an escort agency is not "keeping a brothel"

45 "I am in general disposed to regard s5(j) ... as of limited assistance in the interpretation of statutes in which the true intent cannot be clearly ascertained from the text and historical and circumstantial context": *Gifford* v. *Police* [1965] NZLR 484, 500 per Turner J. See also *Nunns* v. *Licensing Control Commission* n.43 above; *Calvert* v. *McKenzie* [1937] NZLR 966, 976 per Myers CJ and *Commissioner of Inland Revenue* v. *International Importing Ltd* [1972] NZLR 1095, 1096 per Turner J.

46 *Hutton* v. *Hutton* [1910] 13 GLR 201

47 *Aburn* v. *Police* [1964] NZLR 435

48 *Lineham* v. *Lineham* [1974] 1 NZLR 686, 688

49 For recent examples see the judgments of Richardson J. in *New Zealand Baking Trades Ltd* v. *General Foods Ltd* [1985] 2 NZLR 110 and *Brown* v. *Minister of Education* [1985] 2 NZLR 356

50 "One of the features of [the] 1967 Act is prolixity and some lack of precision in language; but ... I think the general intent of the statute comes through reasonably clearly.": *Rotorua District Council* v. *Bay of Plenty Catchment Commission* [1979] 2 NZLR 97 at 100 per Cooke J

51 Note 13 above

52 *Police* v. *Hicks* [1974] 1 NZLR 763

53 *King-Ansell* v. *Police* [1979] 2 NZLR 531

54 *Department of Labour* v. *Latailakepa* [1982] 1 NZLR 632

55 *Van Gorkom* v. *Attorney-General* [1977] 1 NZLR 535, [1978] 2 NZLR 381; *Levave* v. *Immigration Dept* [1979] 2 NZLR 74; *Lesa* v. *Attorney-General* [1982] 1 NZLR 165

56 See *King-Ansell* v. *Police* [1979] 2 NZLR 531, 540 per Richardson J.

57 See for example *Taylor* v. *N.Z. Poultry Board* [1984] 1 NZLR 394 and *Commodore Property Ltd* v. *Perpetual Trustees* [1984] 1 NZLR 324

58 On the whole question of economic and social factors, see Sir Ivor Richardson (1986) 12 Mon LR 35

59 See for instance *Re Porirua Rugby Football Club* [1979] 2 NZLR 673, 680 per Davison CJ. His Honour says that one should put oneself in the shoes of the makers of the statute and "take into account relevant facts known to them when the document is made".

60 Mr Justice Richardson in an address to the N.Z. Society of Legal Philosophy on 6 June 1984 said: "And – unfortunately in my view – many counsel still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history; to canvass law reform committee materials ..." *Judges as Policy Makers* (1985) 15 VUWLR 46, 50. See also n.58 above

61 As in *Re Porirua Rugby Football Club* [1979] 2 NZLR 673

62 See the discussion in *Black-Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] AC 591

63 e.g. *Harding* v. *Coburn* [1976] 2 NZLR 577, 581 per Cooke J.

64 e.g. *Hughes* v. *Hanna* (1909) 29 NZLR 16, 22 per Edwards J.; *R* v. *Wilson* (1912) 31 NZLR 850, 854 per Denniston J.

65 e.g. *Downey* v. *R* [1971] NZLR 97 at 100 per North P.; *R* v. *Bennett* [1981] 1 NZLR 519 at 521 per Somers J.

66 [1982] 1 NZLR 397 at 414

67 [1981] 1 NZLR 722,726 per Davison CJ. See also *Phonographic Performances (N.Z.) Ltd* v. *Lion Breweries Ltd* [1979] 2 NZLR 252; *Thomas* v. *Thomas* [1984] 1 NZLR 686; *Wellington Newspapers Ltd* v. *Dealers Guide Ltd* [1984] 2 NZLR 66; *Young* v. *Hunt* [1984] 2 NZLR 80; *Coopers & Lybrand* v. *Minister of Justice* [1985] 2 NZLR 437

68 See n.12 above

69 Section 15AB of the Acts Interpretation Act (Cwlth)

70 e.g. Lord Scarman in *Tuck* v. *National Freight Corporation* [1979] 1 WLR 37, 55: "But, if Parliament chooses to use language that is general to the point of ambiguity, ought not judges to be allowed the aid of, for example, official reports or the record of proceedings at the committee stage of the Bill to determine the intention of Parliament?"

71 e.g. *Proprietors of Atihau-Wanganui* v. *Malpas* [1985] 2 NZLR 468; *Director-General of Education* v. *Morrison* [1985] 2 NZLR 430; *N.Z. Food Processing IUW* v. *N.Z. Meat Processors IUW* (1986) N.Z. Employment Law Cases 78-059 (CA); *Harley* v. *Lawrence Publishing Co. Ltd* CA.77/84, 1 May 1986

72 [1986] 1 NZLR 694

73 (1987) 6 NZAR 353

74 Licensing Control Commission, 6 Nov. 1987, Decision 343/87; [1987] Butterworths Current Law 1644

75 *Attorney-General* v. *Whangarei City Council* CA.56/87, 22 Oct. 1987

76 See for example, Cooke P in *Real Estate House (Broadtop) Ltd* v. *Real Estate Agents Licensing Board* [1987] 2 NZLR 593: "An explanatory note or a speech in the House could not be allowed to alter the meaning of an enacted provision which in its own terms is clear beyond any doubt." See also, in relation to a committee report *R* v. *Howard and Masters* [1987] 1 NZLR 347

77 *R* v. *Bolton* (1986) 70 ALR 225

78 *Park* v. *Park* [1980] 2 NZLR 278 at 281

79 *Proprietors of Atihau-Wanganui* v. *Malpas* [1985] 2 NZLR 468 at 477 (to demonstrate department practice). In the *Marac* case the Court of Appeal had regard to a departmental information bulletin

80 *Tasman Pulp and Paper Ltd* v. *Newspaper Publishers Association* [1983] NZLR 600 at 605

81 *Real Estate House (Broadtop) Ltd* v. *Real Estate Agents Licensing Board* supra n.76

82 "The words of the statute are paramount and the Court should not lose sight of that": *Auckland City Council* v. *Tubman* [1973] 2 NZLR 133, 135. See also *Accident Compensation Commission* v. *Nelson* [1979] 2 NZLR 464, 467 per Richmond P and Cooke J

83 *Rossiter* v. *Commissioner of Inland Revenue* [1977] 1 NZLR 195, 207 per Cooke J; *Fuller v. MacLeod* [1981] 1 NZLR 390, 395 per Richardson J

84 e.g. *Accident Compensation Commission* v. *Kivi* [1980] 2 NZLR 385, 389 per Richmond P; *Reid* v. *Reid* [1979] 1 NZLR 572, 594 per Cooke J; *McBreen* v. *Ministry of Transport* [1985] 2 NZLR 495, 495 and 498 per Cooke J.

85 "The words ought to be read in their ordinary and natural sense, which in this case appears to me to be different from the literal sense": *Jackson* v. *Hall* [1980] 1 All ER 177, 185 per Lord Fraser

86 See the authorities referred to in notes 41 and 42 above and *Local Government Commission* v. *Souch* [1982] 1 NZLR 415, 423 per Somers J

87 "The word 'plant' has frequently been used in fiscal and other legislation ... It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or ordinary meaning. This is certainly true of 'plant'. No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant – yet each of them has been held to be so." *I.R.C.* v. *Scottish & Newcastle Breweries Ltd* [1982] 1 WLR 332, 324 per Lord Wilberforce

88 See, as an example, *Police* v. *Carter* [1978] 2 NZLR 29 on the meaning of the word "found"

89 See also *Rosenberg* v. *Jaine* [1983] NZLR 1. Likewise the courts are unwilling to find that a statute has curtailed the inherent jurisdiction of the court: *Broadcasting Corporation of N.Z.* v. *Attorney-General* [1982] 1 NZLR 120

90 *R* v. *Coneybear* [1966] NZLR 52, 55-56 per McCarthy J

91 e.g. *Leveridge* v. *Kennedy* [1960] NZLR 1, 6 CA per Henry J

92 (1907) 21 Harv LR 383

93 *Harvard Legal Essays* (1934) 213, reprinted in (1965) 2 Harvard Journal of Legislation 7

94 *R* v. *Lemon* [1979] AC 617, 665 per Lord Scarman; *Warnink Besloten Venootschap* v. *J. Townend & Sons (Hull) Ltd* [1979] AC 731, 743 per Lord Diplock. See also *Bowen* v. *Paramount Builders Ltd* [1977] 1 NZLR 394

95 [1982] 1 NZLR 561

96 At 569 per Cooke J. See also *Fletcher Timber Co. Ltd* v. *Attorney-General* [1984] 1 NZLR 290, 296 per Woodhouse P. and 302 per Richardson J; *Gartside* v. *Sheffield Young & Ellis* [1983] NZLR 37, 42 per Cooke J. and *Day v. Mead* [1987] 2 NZLR 443

97 See for instance *McBreen* v. *Ministry of Transport* [1985] 2 NZLR 495; and *Commodore Pty Ltd* v. *Perpetual Trustees* [1984] 1 NZLR 324, 334 per Cooke J.

COMMENT – A Judge's view

THE HON MR JUSTICE GALLEN

Professor Burrows analyses the process of statutory interpretation as it presently appears from the more recent decisions of the Courts. His general conclusions all emphasise what he describes as the purposive approach, with the exception of his third conclusion where he contemplates the possibility that in certain circumstances, judicial control may run counter to Parliamentary intent. Professor Burrows in his conclusion is looking at purpose in terms of Parliamentary intention. This is in line with Bennion's approach. Bennion describes the purpose of statutory interpretation as being "to arrive at the legal meaning of the statutory material which for one reason or another requires consideration". He then defines the legal meaning in terms of legislative intention.

There is another point of view. Those subject to the operation of the statutory material, will generally speaking be less concerned with the intention of the Legislature than the effect on them and their activities of the statutory material being considered. While it may be said that a Judge has an obligation to consider questions of interpretation from the point of view of the intention of the Legislature, a Judge also has obligations to those who are subject to it. When this is appreciated, some of those traditional approaches in the past which have been subject to criticism, become more understandable. They are designed not as might sometimes have been thought, to frustrate the intentions of Parliament, but to ensure that as far as possible some framework exists which will allow those subject to the statute to gather for themselves what it means with some degree of certainty.

The existence of a framework may sometimes mean that when statutory material is forced into it, its shape may be affected, but Members of Parliament and statutory drafters are like everybody else deemed to know the law and there is much to be said for the view that they had it in mind when preparing the statutory material.

Those comments of course refer to the various presumptions and so–called rules. As Professor Burrows points out, most of those are no more than guides – commonsense approaches to the determination of what the legal meaning is. More important and more entitled to the designation rule, is the approach that the words of the Act must bear their natural meaning. This is in accord with the concept to which I have already referred – that is, that those people who are affected by the Act should be able to read it and to determine its meaning and this they are much more likely to be able to do, at least according to theory, if it is plainly expressed and the plain meaning of the words is that which the Courts are likely to adopt. As Professor Burrows pointed out however, the rule may not often be

the guide that it is piously thought to be. The fact that a matter comes before a Judge for resolution at all is generally of itself an indication that the words have been read as having a different effect by the two competing interests. Words may not always have a clear and undisputed meaning. The same words may be understood in different ways by different people. That problem is compounded when words are used in conjunction with other words and may sometimes be even more difficult when considered in the context of an Act as a whole. Words change their meaning with the passage of time. They have different meanings in American use and English use and a New Zealand use, but even these differences must be considered in the context of the levelling effect of world-wide media. There are differences from one generation to the next. A recent survey of the use of drugs by secondary school children, came up with some alarming conclusions. Subsequently newspaper reports suggested that the vocabulary used in the survey was in itself in some cases, a barrier to communication. Those formulating the survey, had prepared the questionnaire using vernacular terms forgetting that the vernacular of their own youth differed from that of the young people to whom the survey was directed.

The general impression that one gets is that people in our society now read very much less than was the case one or two generations ago and literary vocabulary is much less common than the vernacular vocabulary derived from the television set. There is something to be said therefore for the view that in order to obtain such degree of clarity and certainty as is possible to enable persons to order their affairs, drafters should use words which will have a recognised meaning in the Courts and draft in a manner which reflects those generally recognised approaches to interpretation which they and the Courts recognise.

What I am endeavouring to convey is that although the Courts may have moved away from the comparative rigidity of former times, where the form may have been more important than the substance, it would be unwise to assume that there is no place for the old approaches, either in drafting or in interpretation. Where the natural meaning is not clear and even in some cases where it is, because of the existence of a dispute, it may be necessary to endeavour to ascertain what the intention of Parliament was in passing the legislation.

Professor Burrows considers this in depth in dealing with what he describes as the purposive approach. He deals also with the material to which Courts may have recourse in endeavouring to ascertain what that intention was, pointing out that it has recently become much more common to look more widely than was once the case. He refers to the context, both internally and externally and Parliamentary as well as other material.

It was once thought that the use of extrinsic material and in particular reference to debates recorded in Hansard, created more difficulty than it resolved. One objection which would appear to have logical significance, was the difficulty in knowing whose

recorded speech might be regarded as reliably definitive. Since the vote of every Member should be regarded as having an equal significance, there is some logic in saying that the comments of all those who voted in favour, should be taken into account – an approach which would be impossible in practice. In fact however on analysis, the particular objection is more apparent than real. The reference to Hansard or to any other material is designed to obtain helpful information as to what was intended. If there appears to have been a consensus as to the meaning of the word or words under debate, then it does not seem to me that there is very much problem in accepting that as material useful in assisting to define the meaning of the words used. If the material recorded in Hansard does not present a clear picture, then it will be neither helpful nor definitive and the Court will have to seek assistance from such other approaches as may be considered acceptable and available. In so far as material prior to the debate is considered, it must be considered of course with the caveat that Parliament may not have accepted it unchanged. It is not unimportant to point out that the use of extrinsic material of this nature allows factors to be taken into account, which precipitated the legislation and to fail to refer to such precipitating information might be illogical and unjust.

It is worth however, bearing in mind that the extent of the enquiry available to a Judge is limited and a Court is very dependent upon the abilities and research of counsel. Since these will vary, there must be at least some tendency towards preferring a result which is not dependent upon unpredictable industry.

At the outset of these comments, I referred to the significant consideration that a Judge to some extent stands between Parliament on the one hand and the subject on the other, with obligations to both. In considering the intention of Parliament, it must be remembered that that intention was general rather than particular. The Judge is obliged to consider a particular situation and one which may not have been in mind when Parliament evidenced such intention as may be ascertainable. A Judge works not in a hypothetical situation where intellectual considerations may be of great significance, but in the context of an actual dispute between individual persons who will be affected perhaps in a major way, by the interpretative decision he or she is called upon to make. To a greater or lesser extent, the conclusion may be affected by the factual circumstances.

The old saying that hard cases make bad law, is no doubt a warning, but it also recognises the existence of a human desire to avoid a perceived injustice.

In addition to a concern with the individual case, a Judge is obliged to bear in mind the importance of the doctrine of precedent. An interpretation in one case may affect a large number of other situations. Such a consideration provides a test of the approach in the particular case and the contemplated conclusion. It also is a consideration which may affect the outcome. The point I wish to make is that a Judge in considering the legal effect of a provision,

may be justified in placing a lesser emphasis on the intention of Parliament, partly because that intention may not have been directed towards the particular case and partly because the Judge has a constitutional obligation to consider the effect on those subject to the Act.

This leads me into a very brief comment on the judicial activism to which Professor Burrows also refers. There would I think be general disapproval of Judges interpreting statutes in such ways as to give effect to their own views rather than those which might have been considered to have been those of Parliament, but it is not unimportant to observe that Judges like the other arms of constitutional authority, are in the last resort, representatives of the community within which they function and while it is important that they should not be mere instruments for the imposition of majority views which are not infrequently fickle and ill-informed and quite transient, they will hopefully be motivated by that overall reflective considered conscience of the community which well-informed, unemotive, unprejudiced people may from time to time consider as best representing natural justice. It may be considered that it is in this context that the 17th century lawyers considered there might be a residual judicial control, even of legislation. They spoke in terms of natural justice. Professor Burrows used the more modern terminology which related to human rights.

In conclusion therefore it seems likely that, making allowance for individual idiosyncracies, Judges will be pragmatic in the interpretation of statutes. The old adherence to rigid rules and literal interpretation would not today find many adherents, but it would be unwise to assume that in a particular situation such rules might not be regarded as of assistance and perhaps even at times decisive. Judges are likely to look to ascertaining and giving effect to the intention of Parliament, but this is tempered by the need to bear in mind the particular situation within which they are called upon to act and their equal obligations to those subject to statutory material.

A Judge will generally seek a solution which is logically and intellectually satisfying and which conforms to a perceived overall pattern, taking into account the legislation as a whole and its context.

In his conclusion, Professor Burrows referred to three matters - first, that the New Zealand Courts now normally adopted the purposive approach. There is ample authority for that proposition, but I think it is important to bear in mind that "purposive" should not be limited to the purposes of the Legislature, but should also take into account the effect on those who are subject to its activities. Secondly, he pointed to the fact that the Courts were adopting a wide view of context. I agree also with that, provided it is accepted that the context includes the other side of the equation that is those affected. Thirdly, he referred to the Courts being prepared to exercise some degree of judicial control over Parliamentary intent. I do not think that this cuts across the purposive approach. It simply

takes into account the obligations which the Judges have, to both governors and governed.

Because it seems to me that the pragmatic approach to which I have referred generally speaking leads to results acceptable within the community as a whole and for the reasons which I have endeavoured to express above, I think it would be quite unfortunate if any attempt was made to restrict the present latitude which allows within the limits imposed by the need for certainty and precedent, a Judge to take into account both sets of obligations.

THE AUSTRALIAN APPROACH

Patrick Brazil, Secretary of
Attorney-General's Department, Canberra*

Reform of statutory interpretation – the Australian experience on use of extrinsic materials: with a postscript on simpler drafting

This paper deals firstly and mainly with recent Australian reforms at the Federal level on use of extrinsic materials in statutory interpretation. The conclusion submitted is that the reforms have proved successful and satisfactory.

Effectively the reforms may be dated from the introduction in 1981 of s.15AA of the Acts Interpretation Act 1901 approving a purposive approach to interpretation under which a construction that would promote the purpose or object underlying legislation was to be preferred to an interpretation that would not promote that purpose or object. This legislative initiative coincided with a clear move at the highest judicial level in the same direction. One matter not dealt with by s.15AA was the provision of guidance as to the extent to which extrinsic material could be used for the purpose of ascertaining object or purpose, or for otherwise interpreting legislation. Thus some Judges were using Hansard, others ruled it out. This matter was addressed subsequently by s.15AB, which was inserted in the Acts Interpretation Act in 1984. The full text of ss.15AA and 15AB is set forth in the Appendix (p.241).

THE STRUCTURE OF SECTION 15AB

Threshold and other constraints on the use of extrinsic materials

The first point to be noted about the way s.15AB does its work is that it states only three grounds on which extrinsic material may be considered. The first is where extrinsic material is used:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act.

The other two situations are:

(b) to determine the meaning of the provision when –

---

* I acknowledge the able assistance given to me by Guy Aitkin of the General Counsel Division of my Department. The responsibility for the views expressed, of course, is mine.

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text ... leads to a result that is manifestly absurd or is unreasonable.

An important consequence is that it is only in the situations referred to in (b) that s.15AB is available to overturn the ordinary meaning of the text of a provision. The threshold grounds referred to in (b) have been readily understood and generally accepted. However, an explanation is required concerning the threshold ground referred to in para.(a) of considering extrinsic material to confirm the ordinary meaning of a provision. It can set the mind, and argument, to rest. The inclusion of the ground also recognised the reality that Judges and lawyers in the past had referred, whether openly or not, to extrinsic materials for assurance as to the meaning of the text. An incidental aspect is that in particular cases ground (a) may enable the Court to foreclose criticism that its decision does not reflect the real intention of Parliament.

The presence of ground (a), particularly when joined with the lawyer's ability to discern ambiguities under ground (b), means that the use of extrinsic material is potentially very wide. This is where the constraints spelt out in subs.(3) of s.15AB come into play. Sub-section (3) provides that the matters to which regard shall be had in exercising the discretion to refer to extrinsic material include:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

List of extrinsic aids

While s.15AB does not place limits other than relevance on the kind of materials which may be thus considered to assist interpreting legislation, subs.(2) sets out to identify the main categories of relevant extrinsic material. As well as matters that appear in the document containing the text of the Act as printed by the Government Printer (such as headings and marginal notes), the following categories are listed:

. any relevant reports laid before or made to Parliament before the time when the provision was enacted

. any treaty or other international agreement that is referred to in the Act

. the explanatory memorandum relating to the Bill circulated to members of Parliament before the time when the provision was enacted

- the second reading speech of the Minister

- any document that is expressly declared by the Act in question to be relevant document for the purposes of s.15AB

- finally, any relevant material in the Journal of the Senate or the Votes and Proceedings in the House of Representatives, or in Hansard

It should be noted that while Hansard is listed, separate listing is made of the Minister's second reading speech. This may properly be regarded as an indication that, generally speaking, it was regarded by Parliament as having greater relevance and weight than other speeches. This accords with common understanding and has been generally recognized by the Courts.

Role of the judiciary

There is an important difference between s.15AA and s.15AB. The former contains a command that a construction which promotes the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. The interesting feature of s.15AB is that it contains no command at all, except the command in subs.(3) to consider the constraints referred to in the sub-section about, among other things, the need to avoid unduly prolonging legal proceedings. Judges and other users of statutes are not ***required*** by s.15AB to refer to any extrinsic materials. For that matter, they are not ***prohibited*** either for referring to any materials.

We may use the extrinsic material constituted by the observations of the then Attorney-General, Senator Gareth Evans QC, during the passage of s.15AB to confirm that the aim was to produce a satisfactory outcome in relation to the use of the extrinsic materials by relying on the good sense of Judges to apply the guidelines and the discretions laid down by Parliament so as to produce a situation in which the range of extrinsic materials and the way in which they are used are reasonably defined and confined.

I myself noted, about the time s.15AB became law, that an appeal should not succeed against a Court's decision on interpretation simply on the ground that certain extrinsic materials were, or were not, looked at. Section 15AB clearly gives extrinsic materials the status of an ***aid*** to interpretation, but does not involve any rule of law. I believe that the subsequent experience in the Courts bears this out.

SECTION 15AB AS APPLIED BY THE COURTS

Some illustrative cases are referred to.

The Plain Meaning Rule

In *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, counsel sought to rely on the second reading speech of the Minister. The High Court held that s.15AB does not permit recourse to that speech for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure, or its ordinary meaning leads to a result that is manifestly absurd or unreasonable (at 420). A similar approach was taken in the earlier case of *Ball* v. *Commissioner of Taxation* (1984) 56 ALR 242. The High Court, without referring to s.15AB, held that reference to the explanatory memorandum or the second reading speech could not alter the meaning of a plainly expressed provision (at 244).

Only an aid and not determinative

An unusually difficult question of interpretation came before the High Court in *R* v. *Bolton; Ex parte Beane* (1987) 70 ALR 225. Very briefly, the question that arose was whether the Defence (Visiting Forces) Act 1963, which provided for the arrest and detention of deserters from forces of another country, applied to a deserter from the armed forces of the United States where the desertion occurred in Vietnam and the person had subsequently come to Australia. The main judgment was given by Mason CJ, and Wilson and Dawson JJ. They said (at 227–8):

> "There are powerful arguments ... in support of the respondent's contention that on its proper construction Section 19 of the Act authorises the arrest in Australia of a deserter or absentee without leave from the forces of a country to which the Section applies, notwithstanding that the desertion of absenting occurred outside Australia ... Furthermore, given that Section 19 is ambiguous, consideration may be given in ascertaining the meaning of the provision to the second reading speech of the Minister when introducing the Bill for the Act into the House of Representatives in 1963: Acts Interpretation Act 1901 as amended, Section 15AB. That speech quite unambiguously assets that Part III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

See also Deane J. at 238, to similar effect. In contrast, another Judge in the case, Toohey J., dissented and held that the second reading speech put the proper construction of the legislation beyond doubt (at 242 and 245).

The differences in approach may be explicable by a different perception of the values in question. Toohey J. gave effect to the value represented by respect for the Parliament's intent. The majority gave weight to the value represented by the freedom of the subject, as being something that required clear language in the *Act* if it was to be derogated from. The difference neatly illustrates that s.15AB involves a discretionary element.

Taxing Acts

In his 1987 Fullagar Memorial Lecture, Mason CJ. noted that recent taxation cases have been seen as emphasising purposive construction at the expense of literal construction. He went on to say that in this area the High Court had traditionally given emphasis not so much to literal construction as to the long established rule of interpretation that a taxing Act to be strictly construed in favour of the taxpayer. That has now changed. More weight is being given to the Parliamentary intent. (See (1987) 13 Mon L Rev 149, 161.) This seems to bring it more into line with the New Zealand approach which, while falling short of being that of a "fiscal evangelist", gives emphasis to discerning the scheme and purpose of tax avoidance provisions – see e.g. Richardson J. in a paper on "Appellate Court Responsibilities and Tax Avoidance", *Australian Tax Forum* Vol.2, Part (1), p.3 (1985).

A case which demonstrates the changing attitudes to taxing Acts is *Commissioner of Taxation* v. *Gulland* (1985) 160 CLR 55. There the application of the general tax avoidance provision in s.260 of the Income Tax Assessment Act 1936 was considered. Gibbs CJ. noted (at 67) that the established view that s.260, in protecting the general provisions of the Act, cannot negative the Act's specific and particular provisions, was based on the application of the maxim *generalia specialibus non derogant*. Brennan J. pointed out that s.260 had traditionally been interpreted in light of the "choice principle" which allows taxpayers to choose to organise their affairs in a way which takes advantage of tax benefits provided by the specific provisions of the Act (at 78). However, the judgment of Dawson J. qualifies this principle. He suggested that the fact that the arrangements entered into by the taxpayer are contrived may indicate that as a matter of construction the arrangements is one for the avoidance of tax to which s.260 is intended to apply. He then said that this may indicate that the choice or choices made by the taxpayer are not available by reason of the presence of s.260, however much they may have been available in the absence of that section (at 110).

Deane J. said that the effect of past decisions of the Court (e.g. *Mullens* v. *Commissioner of Taxation* (1976) 135 CLR 290) was to deprive s.260 of much of its intended operation. He felt that the

emphasis which those cases place upon legal forms to the exclusion of substance disregarded the important function which s.260 with its emphasis on "purpose" and effect was intended to serve in the Act as a whole (see 93).

This basic approach of emphasising substance over form has been adopted and extended in subsequent cases (e.g. the Full Federal Court decision in *Commissioner of Taxation* v. *John* (1987) 87 ATC 4713), leading one commentator to observe that the major rule of construction in relation to revenue statutes is that artificial arrangements devoid of commercial reality will not be treated as effective for tax purposes, without regard for s.260 and the current general tax avoidance provisions in Part IV A (1987) 61 ALJ 743. This case is now under appeal to the High Court.

As part of this change in approach the Courts have been prepared to use extrinsic materials in the interpretation of taxing Acts. Specifically, no Court has suggested that reliance on extrinsic materials to resolve ambiguities is ruled out by the view that taxing Acts should be construed strictly in favour of the taxpayer. The decision of the Full Federal Court in *Grant* v. *Deputy Commissioner of Taxation* (1986) 66 ALR 690 is representative of the current approach. There the Court, in determining the meaning of 'dividend' as used in s.6BA(1) of the Income Tax Assessment Act 1936 (as it stood before amendment in 1979) relied on the explanatory memorandum dealing with the Bill containing s.6BA. The explanatory memorandum set out both the reason for the enactment of s.6BA (i.e. to overcome the decision of the High Court in *Curran* v. *Commissioner of Taxation* (1974) 131 CLR 409), and the basic conditions under which s.6BA was to apply (at 696). In rejecting one of the arguments put forward by the taxpayer, the Court noted that acceptance of the argument would be contrary to the clear purpose of s.6BA which was to reverse the result in *Curran* (at 697).

In *Jax Tyres Pty Ltd* v. *Commissioner of Taxation* (1984) 3 FCR 252, Beaumont J., in holding that the retreading of tyres does not constitute manufacturing for the purposes of sales tax legislation, relied on two second reading speeches in relation to amending legislation to ascertain what was meant by the term "manufacture" (at 256–7).

Confirming the ordinary meaning

In *Queensland Electricity Commission* v. *Commonwealth* (1985) 61 ALR 1, Gibbs CJ. relied on the explanatory memorandum and second reading speech in determining the intended application of the legislation in question and in confirming the ordinary meaning conveyed by the text of the Act (at 8–9).

A similar approach was taken by the Full Court of the Federal Court in *Gardener Smith Pty Ltd* v. *Collector of Customs, Victoria* (1986) 66 ALR 377, where it was said that even where a provision is not obscure extrinsic materials may under s.15AB(1)(a) be used to confirm its ordinary meaning (at 303–4).

In *Kioa* v. *West* (1985) 159 CLR 550 reference to extrinsic materials (second reading speech, the report of the Administrative Review Committee, the Report of the Committee of Review of Prerogative Writ Procedures) was used to reinforce the view that the primary object of the Administrative Decisions (Judicial Review) Act 1977 was "to achieve procedural reform and not to work a radical substantive change in the grounds on which administrative decisions are susceptible to challenge at common law" (at 577, per Mason J.).

In *Television Capricornia* v. *Australian Broadcasting Tribunal* (1986) 70 ALR 147 Wilcox J. relied on the Administrative Review Committee report, the report of the Committee of Review of Prerogative Writ Procedures and the explanatory memorandum to ascertain the intended operation of s.5(3)(b) of the same Act. The point involved was an important one concerning non-jurisdictional findings of fact. The Parliamentary intent, as discerned by the Judge, was to require the applicant for review to show more than that there was no evidence before the decision-maker on the fact found as the basis of the decision. The applicant was required to show that this fact did not exist.

In *East* v. *Repatriation Commission* (1987) 12 ALD 389 the Full Federal Court cited second reading speeches to the Repatriation Amendment Bill 1985 and the Veterans Entitlement Bill 1986 to ascertain the Parliamentary intent on a very difficult question relating to the onus of proof on war-related disabilities. The second reading speeches indicated that the purpose of the amendments was to overrule the High Court's decision in *Repatriation Commission* v. *O'Brien* (1985) 155 CLR 422, which required the Commission, in effect, to negative a claim beyond reasonable doubt (12 ALD at 405, see also 403). This might have been inferred from the legislative language but the references put the matter beyond any real doubt.

Varying weight of extrinsic materials

In *Commissioner of Police* v. *Curran* (1984) 55 ALR 697 Wilcox J. said that "if the purpose of a reference to a Parliamentary debate is to determine what was the intention of those who framed the draft, assistance is not likely to be gained outside the speech of the responsible Minister or other informed proponent of that draft".

In *Flaherty* v. *Girgis* (1985) 63 ALR, Kirby P. in determining whether a Commonwealth Act intended to "cover the field" in relation to interstate service of process to the exclusion of State law, said (474-5) that little assistance can be derived from the 1901 Parliamentary debates in relation to the Act. The debates are "uninstructive and ambiguous". Moreover, "in the absence of a clear statement of the Minister in the second reading speech, observations by individual members of the Parliament concerning their expectation or intentions provide insubstantial basis for now determining the will of the Federal parliament to oust State law ..." When the matter went to the High Court a similar conclusion was

reached as to the Parliamentary intent. Interestingly some of the Judges resolved any equivocation there might have been in the second reading speech of the Minister (Edmund Barton) by referring to his judgment as a member of the High Court in *Renton* v. *Renton* (1918) 25 CLR 291 at 298, when he said that there was no displacement of State law!

Relevance to earlier legislation of later extrinsic materials

In *Hunter Resources* v. *Melville* – just decided by the High Court (18 February 1988) – the issue in dispute was whether strict compliance with the requirements of the Mining Act 1978 (W.A.) was necessary before a person could be granted a prospecting licence. After the Act had been enacted a Committee of Inquiry expressed the view that the requirement for strict compliance was clearly stated in the Act, and that an amendment to introduce a discretionary power to dispense with formalities would bring uncertainty and conflicting decisions. It therefore rejected a proposal for such an amendment. When amendments to the Act were made in 1985, the Minister stated in his second reading speech that the amendments generally followed the recommendations of the Committee's report and the Minister's second reading speech as indicating that Parliament intended that there should be strict compliance with the Act and regulations. Mason CJ. and Gaudron J. said (at 5 of transcript copy of the judgments) that the extrinsic materials were not materials which the Court should consider under the Western Australian equivalent of s.15AB. The extrinsic materials did not relate to the legislative history or antecedents of any of the provisions which fell for consideration in the present case. The materials merely provided a possible explanation for a legislative disinclination to amend those provisions. As such they amount to nothing more than an expression of opinion of what the relevant legislation means. Wilson J. also rejected reliance on the extrinsic materials. However Dawson J. (at 21–24) thought it possible to draw the conclusion from the nature of the amendments made to the Act in 1985 that the Legislature intended there should be strict compliance. That conclusion did not arise from the amendments themselves because none of them mentioned the need for strict compliance. It arose from the absence of any provision to that effect in the amending Act when that Act is read with both the Committee's report and the second reading speech of the Minister. He thought that it was possible to justify the use of these extrinsic materials in accordance with the general principle that an amending Act may be taken into account in the interpretation of prior legislation, and, having regard to the expanded scope of materials which now may be considered, the extrinsic materials could be, he thought, relied upon to show that the legislature amended the legislation, but refrained from amending it more extensively on the assumption that it already required strict compliance with the relevant positions.

ACCESS TO EXTRINSIC MATERIALS

A number of steps have been taken to make Parliamentary material more accessible:

(a) To allow easier access to Hansard reports of second reading speeches, the dates on which the speeches are made in each House of Parliament are, as from Act No.1 of 1985, set out at the end of all printed Acts. The dates also appear on the Acts when they are incorporated in the annual volumes of Commonwealth legislation.

(b) The two pre-requisites to the admissibility of explanatory memoranda under s.15AB(2)(e) are that the explanatory memorandum has been circulated to the members of Parliament, and this circulation has taken place before the provisions to which the memorandum relates are enacted. To facilitate proof of these matters, the Minister now presents the explanatory memorandum to the House at the conclusion of his or her second reading speech. This results in the presentation being recorded in the Votes and Proceedings of Parliament, and assists in bringing the explanatory memorandum within the terms of s.7(1) of the Evidence Act 1905. Section 7(1) of the Evidence Act provides, in part, that all documents purporting to be copies of the Votes and Proceedings or Journals or Minutes of either House of the Parliament which purport also to be printed by the Government Printer, shall on their production be admitted as evidence thereof in all Courts.

(c) Hansard, Bills and explanatory memoranda are supplied to all bodies on the free distribution list of Parliament. These bodies include all university libraries, and all State Supreme Court libraries apart from South Australia and Tasmania. (I understand that these two libraries requested that they be taken off the list.) Members of the public may subscribe to the Bills Service which provides subscribers with copies of all Bills and explanatory memoranda.

(d) At present the Australian Government Publishing Service (AGPS) does not retain indefinitely a complete set of Bills and explanatory memoranda. AGPS is, however, currently developing a mechanism for storing this material in a data base which will allow for retrieval and sale to the public of Bills and explanatory memoranda.

(e) Collections of Bills and associated material circulated to members of Parliament, including amendments, explanatory memoranda and notes on clauses are maintained by:

- Parliamentary Library
- National Library of Australia
- Australia Archives

(f) Section 16(5) of the Parliamentary Privileges Act 1987 provides that, in relation to the interpretation of an Act, neither the Parliamentary Privileges Act nor the Bill of Rights 1688 shall be taken to prevent or restrict the admission in evidence of a record of

proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

LIVING WITH SECTION 15AB

The High Court, the Federal Court and the State Supreme Courts of New South Wales and Victoria have issued practice directions regulating the use of extrinsic materials in judicial proceedings. The High Court direction (No.1 of 1984) is typical. It reads:

> "Where, in proceedings before the Court, a party proposes to rely on extrinsic material pursuant to s.15AB of the *Acts Interpretation Act*, that party shall give to any other party and to the Registrar at least forty-eight (48) hours notice of intention specifying the material on which it is intended to rely.
>
> The use of extrinsic material will not be allowed without leave of the Court in any case where the required notice has not been given to the other party.
>
> Subsection (2) of s.15AB provides guidance as to what may constitute extrinsic material."

In relation to legislation administered by the Attorney-General, the main extrinsic materials for each new Act is collected by the Attorney-General's Department in one publication along with the Act itself. At least one commercial legal information retrieval firm is working to produce compact discs containing such materials for legislation that is in great use and demand.

THE CASE AGAINST DETAILED GUIDELINES ON EXTRINSIC MATERIALS

The Victorian legislation corresponding to s.15AB (s.35 of the Interpretation of Legislation Act 1984) takes a different approach to s.15AB by avoiding any guidelines at all as to the use of extrinsic materials. The matter is left wholly to the Court's discretion. This was considered to be the preferable approach. The late Mr Justice Lionel Murphy of the High Court supports this kind of approach.

The issue raised by this approach seems to be mainly whether it is preferable to spell out guidelines that should be followed in using extrinsic materials, at the cost of inflicting some initial complexity on statute users, or whether we should leave those principles to be worked out by a series of judicial decisions and ask statute users to seek out those decisions. It seemed to me when I examined the matter in 1985 that the former (the Commonwealth approach) is the better approach. I found it interesting that some of the judicial decisions on the Victorian provisions used the concepts, and indeed

the very words, that appear in the Commonwealth provisions. Thus Hampel J. said in *Crawford* v. *Murdoch* (1985) VR, at 336, that the extrinsic materials in that case "confirmed" the conclusion he had reached. In *Motor Accidents Board* v. *Jovicic* (1985) VR, at 178, McGarvie J. said that as the object of the legislation was "obscure" it was proper to have regard to extrinsic material.

The journal, Statute Law Review, said that s.15AB, all in all, seemed to be a well aimed arrow for its target. It went on to say of its opening general statement, its specification of relevant documents, and the restrictions to be considered: "This coherent scheme seems well poised for future developments." See (1984) *Statute Law Review*, p 187.

CONCLUSIONS

It is noteworthy, having regard to the many misgivings expressed in 1981 about s.15AA and in 1984 about s.15AB, that these reforms have been readily accepted and used. They now are regularly used, not only by Courts but also by tribunals such as the Administrative Appeals Tribunal and by other statute users. The worst apprehensions that the ability to rely on extrinsic materials might cause substantially longer proceedings as well as significantly longer preparation for cases, leading to significantly greater costs, seem not to have been realised.

Lawmakers are conscious of the use now made by Courts of extrinsic materials. This has meant, I believe, that greater care is now taken with the preparation of second reading speeches and explanatory memoranda. Lawmakers are conscious that what is said in Parliament may influence the interpretation of legislation, and members of Parliament were among the most enthusiastic supporters of Sections 15AA and 15AB. *R* v. *Bolton*; *Ex parte Beane* referred to above, stands as a warning, however, that extrinsic materials will not necessarily redeem a failure to translate the intent of Parliament into the text of the law.

The old quip that it is only where the extrinsic materials are ambiguous that you turn to the text of the Act, has been given no room for application. The plain meaning rule remains alive and well.

The reforms have made a significant contribution to the purposive approach to legislation. They have done so in a way that has balanced the need for users of statutes to be able to rely on the ordinary meaning of Acts, with the principle of giving effect to the Parliamentary intent. The latter principle is no new notion. The Barons of the Exchequer in *Heydon*'s Case (1584) spoke of construing statutes according to the true intent of the makers of the Act *pro bono publico*.

I end with the words of the Chinese philosopher friends of "the Man in Black" as recounted in the 18th century essays of Oliver Goldsmith. His reflections were prompted by a visit to the Law Courts in London:

"To embarrass justice by a multiplicity of laws, or to hazard it by confidence in our judges, are, I grant, the opposite rocks on which legislative wisdom has ever split. In one case, the client resembles that emperor who is said to have been suffocated with the bedclothes which were only designed to keep him warm; in the other to that town which let the enemy take possession of its walls, in order to show the world how little they depended on aught but courage for safety."

EXTRINSIC AIDS: A PARLIAMENTARY VIEW

David McGee
Clerk of the House of Representatives

I have been invited to express a parliamentary view on the use of extrinsic materials. I wish to stress at the outset that this is all that I am setting out to do – to express *a* parliamentary view held by *a* particular parliamentary official.

We are discussing here statutory interpretation. A statute is a declaration of law by the body which is legally sovereign in New Zealand, the Parliament of New Zealand. In order for such a declaration to be of binding force it must have been agreed to by the House of Representatives and the Sovereign (either personally or by Her representative, the Governor–General). It is worth reminding ourselves that someone's personal conduct and freedom is infringed by every such declaration of law. This is not an insignificant thing. If it is to be done at all, it should be done according to proper forms that testify to its gravity. I think that this is often lost sight of in the general acceptance of legislation as just another incident of life.

Because we have a unicameral legislature we are, I suggest, inclined to overlook the significance of statute law. We regard it simply as an expression of opinion of the members of the House of Representatives – a thing that can be made easily and cheaply and changed more or less at will. I think this has had an unfortunate effect on the lack of respect and weight which we are prepared to accord to statutes. Thus it has been suggested that (in an appropriate case) the Courts could refuse to enforce an Act of Parliament. Statute law would then depend for its legal effect on recognition by the Courts rather than as having force in its own right.

Parliament itself has contributed to the debasement of the statutory currency by making it too easy for legislation to be passed. All procedural reforms but one, of the legislative process in the House of Representatives over the last quarter of a century have made it *easier* to pass bills and thus enabled a greater throughput of legislation. The one exception is an important one admittedly: it is the requirement for almost all Government Bills to be considered by select committees. But apart from this if efficiency were to be measured by the speed at which the House of Representatives can play its part in passing legislation, the House must be regarded as a very efficient organisation indeed.

My criticism then as to the cheapening regard had for statutes is not solely directed at the judiciary, but I do believe that the constant search for assistance outside the confines of what Parliament has enacted reflects this tendency.

The intention of Parliament

Bound up with the tendency is that old shibboleth – the "intention of parliament". It is strange how those who profess themselves to be concerned to adopt a more realistic approach to interpreting legislation – one that will put on record all the unspoken premises that may go into the decision–making process (such as making explicit reference to the parliamentary debates on the Bill which now is before the Court) – continue to maintain that what they are seeking is the intention of Parliament. I doubt very much whether seeking the fictional motives of an institution assists in the process of interpretation at all.

If it is the Courts' object in interpreting legislation to achieve a result as close as possible to the views of the 98 persons who between them have created the statute, this could be better achieved by asking for the opinions of the Sovereign and the House of Representatives on the meaning of the legislation then before the court. But I do not believe that that is the object in seeking the "intention of Parliament". Such a statement too often serves to signal a radical interpretation of the legislation under consideration, and specifically one that does not accord with a literal interpretation of the words used in the Act. It is more than likely to be an attempt to justify intellectually the reasoning process which the judge intends to apply to arrive at a decision which he or she has probably already formed. I do not mean to say by this that a non–literal approach to statutory interpretation is never justified. But what is not justified is hiding such an approach behind the supposed search for the intention of Parliament.

The relationship between Parliament and the Courts

There has existed in this country hitherto an unspoken compact between the Legislature and the judiciary. This compact is reflected in both legal and non–legal rules. It is designed, I believe, to avoid friction between these two compartments of government and to promote mutual respect between them. On the side of the Courts the most important of these rules is a legal one, being contained in article 9 of the Bill of Rights (1689 vintage) –

> "That debates or proceedings in parliament ought not to be impeached or called in question in any Court or place out of Parliament."

The restrictive rules concerning resort to parliamentary materials are another aspect of this compact. On the side of the House of Representatives the rules are non–legal, taking the form of self–denying ordinances in the House's own codes of procedure. Thus the Standing Orders forbid references in the House to a case pending adjudication in a Court (*Standing Order 167*). While the chair has a discretion to relax the prohibition, this is not done lightly. The House also has rules forbidding unbecoming references to members of the judiciary and rules about the manner in which the conduct of a judge may be brought into question in the House (as, ultimately, it

could be if the question of the removal of a judge came into issue). (See s.23, Constitution Act 1986.) It does seem to me that this compact of mutual restraint is in danger of breaking down and that if it did so this would be to the detriment of both the Courts and the House.

The increasing tendency to refer to *Hansard* is an example of one of those restraining rules breaking down. I do not say that to refer to a report of debates is automatically to "call in question" parliamentary debates in the Bill of Rights' sense, but it has a definite potential to cause the Courts to do just that. Furthermore, if Members become aware that their utterances during the passage of legislation are liable to be cited by some enterprising counsel if the legislation comes before the Court they may relish the opportunity to play a part in the judicial process. We are told that in the United States:

> "... it is accepted practice to place considerable stress on the legislative history of an Act in determining its meaning, and members of congress, recognizing the important role of legislative history, often take pains to get statements into the *Congressional Record* which will support their view of the intent of the legislative language being adopted." (Walter F. Murphy & C. Herman Pritchett, in *Courts, Judges, and Politics* (1961), New York.)

Do we want to see that happen here? No doubt a number of Members have views on how the Courts should interpret the legislation they are engaged in passing. While these views may legitimately be expressed to other Members of the House for the purpose of influencing them as to the shape of the legislation while it is being passed, I must confess that I am not comfortable with them having an indelible imprint on the meaning of the resultant statute *if* they are not embodied in the text of the statute itself. The chief effect that this resort to *Hansard* has is to enhance the authority of the pronouncements of Ministers, and consequently increase the importance of the departmental officials who draft their speeches. I will return to this later.

Professor Burrows, in the article contained in the papers distributed prior to this Seminar ("Approaches to Statutory Interpretation"), has helpfully identified many of the cases in which *Hansard* has been referred to and he has analysed their effect. One thing that does strike me as significant from examining these cases is the lack of an overall judicial policy or acceptance of the use of parliamentary materials. This does not mean that the judges have differed in their judgments as to the propriety of using *Hansard.* Rather, the judges in those cases who have ***not*** referred to *Hansard* have not mentioned the matter at all.

The judiciary's view of resort to *Hansard*

The unfortunate effect of this is that inferior Courts and tribunals may be led to believe that the authoritative and considered

view of the higher judiciary is that *Hansard* may be referred to in any circumstance as an aid to statutory interpretation. Take for instance a recent decision of the Licensing Control Commission (Decision 343/87; [1987] Butterworths Current Law 1644). This case involved an application by an airline for ship licences for six aircraft operated by the airline. The question for determination by the Licensing Control Commission was whether the word "ship" (which was undefined in the Sale of Liquor Act) included an aircraft. Objectors to the licence sought to adduce evidence of the parliamentary history of the amendment which introduced ship licences into the Act. This showed that the House had actually defeated a proposal to allow a passenger licence, which would have included ships and aircraft, and had plumped instead for a ship licence only. It was therefore clear that the House, when it considered the matter, did not believe that the word "ship" included "aircraft". The Commission was referred to authorities which stated that the parliamentary history of an Act is not available to the Court or tribunal when the Act is being interpreted. However, the Commission then referred to a passage in Cooke P.'s judgment in the New Zealand Maori Council case (*N.Z. Maori Council* v. *Attorney-General* (1987) 6 NZAR, 353) in which he said that he thought it right to refer to the parliamentary debates to assist him in that case. Without more ado, the Commission referred to the debates and this determined the issue before it. I do not quarrel with the result at which the Commission arrived in its interpretation of the Act. But what is not apparent from its citation of the NZ Maori Council case is that only two judges of the five member Court of Appeal which heard that case referred to *Hansard* in their judgments – the President and Richardson J. The other three judges did not refer to the existence of *Hansard* at all.

It is of course one of the aims of this seminar to make a contribution to the debate about how far, if at all, reference to *Hansard* and other parliamentary materials should be extended beyond traditional practices. However, it sometimes seems to be assumed that the Courts have already made up their minds on this issue and that commentators and other legal contributors can no more than rationalise the decisions in the wake of judicial activism. We should not allow ourselves to be railroaded in this fashion.

Some judges have extended the boundaries of the permissible uses of *Hansard*. Most judges, even when engaged in the same case in which one of their brethren has used *Hansard*, have not. There has been no decision by a Court of which I am aware in which a considered ruling on the issue has been given. The matter is still *res integra*. What are the grounds for importing into a judgment parliamentary materials? The well-established ground on which this can be done is to determine the mischief which the statute is designed to remedy. However, what we are really discussing here are those attempts to use parliamentary materials (usually *Hansard*) to indicate what members of Parliament thought that the legislation they were passing meant. In the past this has not been a recognised ground for using such materials although it has slipped in from time to time, even in England. (See Megarry, *Miscellany-at-Law*, pp.355–58, for example.)

In *Marac Life Assurance* v. *Commissioner of Inland Revenue* [1986] 1 NZLR 694 at page 701 Cooke J. said that a governmental statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it, but it could be used to support a provisional interpretation of the words in the Act or to help identify the mischief aimed at or to clarify some ambiguity in the Act. This is the most explicit statement I have seen as to the grounds on which *Hansard* may be used. Use to establish the mischief of the Act is in accordance with the traditionally understood position, but the other components of this dictum deserve further consideration.

Perhaps the most notorious example of the application of the Courts' practice of refusing to look at parliamentary debates arose in *Chandler* v. *D.P.P.* [1964] AC 763, when the House of Lords gave an interpretation of section 1 of the Official Secrets Act 1911 (U.K.) in flat contradiction to statements of Government Ministers on the meaning of the section when it was being passed. (See on this Donald Thompson, "The Committee of 100 and the Official Secrets Act 1911" [1963] *Public Law* 201.) In that case there was an arguable question as to the interpretation of section 1. Governmental statements could not be used to resolve the question, but the ambiguity was there.

If no ambiguity exists at all in the statutory provision then presumably no argument will be addressed to the Court about it. However, in Cooke J.'s formulation given above, it is conceivable that an ambiguity could exist in the provision (otherwise it would not be before the Court) but regardless of what the provision does actually mean it is apparent that it cannot mean what was said in the House about it. On the face of it this seems unlikely. If the Governmental statement is in plain conflict with the Act, why was it made at all? However, mistakes occur; this may be one of them.

Granted then that there is an ambiguity, granted also that the statement in the House cannot be what the words in the statute literally mean, is it still not permissible to give the words that meaning in resolving the ambiguity? In other words, if the Courts are so solicitous of the opinions of members of Parliament that they are willing to look at the parliamentary record, should they not allow an uncertain provision in an Act of Parliament to be given a plainly contradictory meaning in order to accord with that record? However, solicitude may have its limits.

Cooke J.'s next category is the use of a statement in the House to support a provisional interpretation of the words of the Act. The question that obviously arises here is – why should the record just be used to *support* a provisional interpretation? Professor Burrows has drawn attention to this point in a note he contributed to a recent edition of the New Zealand Law Journal when he asked the question – what happens when the parliamentary record tells you something you do not want to hear? I am afraid the answer to that may well be – ignore the record. The trouble with resorting to the opinions of members of Parliament on

what the law means is that it is a two-edged sword and until the Courts are willing to face up to the implications of the second edge they should, in my opinion, avoid conjuring with those opinions altogether. If *Hansard* can be used to ***support*** a provisional interpretation, it should also be available to displace one. If judges say that they will accept statements in the House when they agree with their accuracy but not accept them when they disagree (and to be fair to Cooke J., he did not quite say that), what contribution is the *Hansard* record making to the interpretation of the statute? The answer is, in these circumstances, none. Better that it be excluded altogether than given such a spurious authority.

It used to be said that one should not analyse the words of a judge as if they were the words of a statute. I do not know if this injunction still applies with full force. In any case Cooke J.'s categories do not purport to be exhaustive. What I wish to emphasise, however, is that the judiciary has been engaged in a process of sidling into the use of parliamentary materials. It has not formed and stated a coherent policy on their use, much less has it adverted to its constitutional relationship with Parliament in formulating that policy. The sooner the Courts apply themselves to these tasks the better.

Ministerial and departmental influence

I remarked earlier on the enhanced authority which a practice of referring to *Hansard* would give to Ministers and departmental officials.

Most references which the Courts make to parliamentary debates involve referring to what a Minister of the Crown has said. In *Marac Life Assurance Ltd* v. *Commissioner of Inland Revenue*, Cooke J.'s dictum was made about a "governmental" statement in the House. I would not read anything too restrictive into this because the learned judge was dealing with a speech by the Minister of Finance in that case, but it *is* almost invariably the case that when reference is made to *Hansard* it is to what a Minister has said about legislation. Indeed, in the Australian legislation on the use of extrinsic materials, subsection (2)(f) singles out the speech of the Minister when moving the second reading of a bill for special mention as one of the extrinsic aids that may be used.

I have not had a great deal of personal experience in drafting speeches for Ministers to deliver in the House, but those who have tell me that Ministers are very reliant on their officials in this regard. However good the Minister may be, he or she cannot do everything, and the preparation of speech notes for the introduction and second reading of a bill is something which Ministers rely on officials to draft. While the Minister is responsible for what is said to the House, the detailed views put forward on the legislation are those of an official or group of officials. To pay special regard to such speeches is to pay special regard to departmental views, and the department (as in *Marac Life Assurance Ltd* v. *Commissioner of Inland Revenue*) may be one of the parties to the action.

However, I would be more specific than this. The Minister of Justice, in his article on the legislative process circulated with the preliminary papers for this Seminar ("The New Zealand Legislative Machine" (1987) 17 VUWLR 285) tells us (at p.287) that the Department of Justice administers more statutes than any other department and promotes more Bills. Apart from the statutes it administers, the Department of Justice also becomes involved with many Bills promoted by other departments and has assumed something of a control department role in respect of social legislation in the way that the Treasury has in matters of finance and the State Services Commission has in matters of state sector personnel. The department which stands to profit most by exercising an indirect influence on statutory interpretation is the Department of Justice, and, in my experience, its officials are well able to appreciate this and to take advantage of the opportunities offered. I, for one, do not welcome such a development. The influence of the Department of Justice throughout the state sector is already strong and I do not favour it being extended by giving it a further means of influencing the interpretation of statutes by the Courts.

Finally, if parliamentary materials are to be relatively freely admitted as an aid to interpretation, what price the greater complexity and uncertainty of the law? *Hansard* can expect to reach its 500th volume early next year. While the parliamentary record will not on every occasion yield anything of value (see for instance *Attorney-General* v. *Whangarei City Council*, Court of Appeal, C.A.56/87) it must always be checked if it is accepted as a legitimate source. I am familiar with Jerome Frank's *Law and the Modern Mind* so I will not make a plea for certainty in the law at the risk of exposing myself to psychoanalytical conclusions as a result, but I would ask you to consider how complex the task of statutory interpretation can be allowed to become without making the whole system unmanageable. What is quite certain is that no mere layperson will be able to cope with it. For myself, I am not at all convinced that the supposed benefits are worth the price.

INTERPRETATION AND EXTRINSIC MATERIALS: A BARRISTER'S VIEW

J A Farmer, QC

Patrick Brazil has taken me somewhat by surprise by disclosing that there is recent legislation, at least in Australia, which protects counsel who refer to *Hansard* from suffering the same fate as was suffered by the unfortunate litigants in *Stockdale* v. *Hansard*. I had in fact intended to point out before I learnt that, that the risk of imprisonment at the bar of the House in fact provided an absolutely unanswerable argument against counsel, and for that matter judges, using extrinsic parliamentary material at all. But in the light of Patrick Brazil's revelation I will have to find some other arguments to support my general thesis that the use of extrinsic material has to be treated with the greatest of caution.

I begin my commentary on interpretation of legislation by making one or two preliminary observations. First of all I would like to welcome the plain English approach to statutory drafting which Professor Kelly is bringing to the subject. In my view the need for plain English drafting is much greater in Australia than it is in New Zealand. New Zealand legislation, by and large, is much more straightforward than the legislation I have seen in Australia. Professor Kelly gave an example from the Australian Futures Industry Act of some very convoluted and obscure drafting. I had the pleasure or misfortune of having to argue about the same statute for two days in the Supreme Court of New South Wales. The case concerned the meaning of the term "futures contract" which was defined as being one of three different kinds of phenomenon. First it was either an agreement that is or has at any time been an eligible commodity agreement or an adjustment agreement. Secondly, it could be a futures option or thirdly, it could be a prescribed exchange traded option. But it did not include, so the definition continued, an agreement that was a currency swap, an interest rate swap, a forward exchange rate contract or a forward interest rate contract. And when one then looked further to try and understand what each of those particular terms meant one found a number of further definitions. For example, an eligible commodity agreement was further defined as being a specified class of commodity agreement. The term commodity agreement itself was defined as meaning a standardised agreement, the effect of which is that (a) a person is under an obligation to make delivery or (b) a person is under an obligation to accept delivery at a particular future time of a particular quantity of a particular commodity for a particular price, or for a price to be calculated in a particular manner whether or not the subject matter of the agreement is in existence, the agreement has any other effect, or the agreement is capable of being varied or discharged before that future time. And that was not the end of it. The term standardised agreement was further defined. And then we had a further definition of a commodity. One of the very worst things about those definitions, apart from the necessity

when reading the statute to keep referring to further sub-definitions, was the fact that they employed language that was neither in every day usage nor, by and large, in usage in the futures industry itself. At the end of the case I am quite convinced that neither counsel on either side of the case nor the judge was at all confident as to what the answer was.

The second preliminary observation I want to make is that it is a mistake to think that reading *Hansard* will give any reliable indication of what is intended in a statute. I have read a great many parliamentary debates on Bills (and ministerial second reading speeches in particular) and I am very firmly of the view that they seldom provide any reliable indication of what the intention of Parliament is or was. Indeed such speeches in my view are more often than not quite misleading. In that respect I would like to give you another example from my own personal Australian experience: the case of *Regional Director of Education* v. *International Grammar School, Sydney* (1986) 7 NSWLR 302 (CA).

The case concerned the question of the right of a new private school to be provisionally registered as a school under a 1916 State statute. The basic issue was whether a provision in the statute which allowed for provisional registration as of right on application for a limited period applied only to schools which were in existence at the time the statute was passed in 1916 or whether it could still be applied today to new schools. In other words the question was whether the statutory provision was transitional only. Now when the case was first heard in the Supreme Court, counsel for the Director of Education handed to the judge a copy of the Minister's second reading speech given in 1916 and which seemed on the face of it quite clearly to support the Director of Education's view that the section was transitional only. At that stage the judge, Mr Justice Yeldham, took what I regarded as a very healthy robust view to the material, by asking the question "why should I be interested in what politicians have to say?" Notwithstanding that, the Director of Education persisted. He appealed the judgment and when the case reached the Court of Appeal we were faced with the same argument again. In the meantime, the school had, with considerable difficulty and at some great cost, researched the full history of the passage of the legislation through the State Parliament. It had found that some critically important amendments had been made to the Bill after the second reading which, of course, demonstrated that the Minister's statements were no longer apposite to the provision as it was finally enacted.

The President of the Court of Appeal, Justice Kirby, said at p.311 :

> "This historical excursus leaves the meaning and operation of section 10(1) as finally enacted still unclear. In the United States it is permissible, indeed common to have regard to the successive stages of legislation, as it passes through the legislature, in order to determine the meaning to be ascribed to the legislation, as finally enacted. In Australia, this course has hitherto been regarded as impermissible, in

> orthodox statutory construction. In the present case, it is not necessary to reconsider the orthodox rules. The Court was taken to this material by consent of both parties and at their invitation. Unfortunately when the journey is complete, it leaves the court, in this case, no more clear as to the meaning of the legislation than it was at the outset. The only value of the enterprise is to demonstrate the particular care which must be taken in utilising Second Reading Speeches to ensure that the Bill being addressed in *Hansard* is in the same form as the Act subsequently enacted."

So that clearly enough at the end of the day the only safe conclusion that could be drawn was that a Ministerial second reading was a dangerous source for determining statutory interpretation and meaning.

Perhaps that goes to emphasise the description which was given by Lord Simon in *Black-Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 that the task of the courts in interpreting a statute is to ascertain the intention of Parliament expressed therein, that is expressed in the words used in the statute itself. My own view is that even when the statute is poorly or inelegantly drafted or even when the statute used is ambiguous, it is far safer to restrict the search for statutory meaning and objective to the statute itself than to embark on a speculative search through a forest of disparate extrinsic material. I would concede that on occasions one will find a clear statement in, for example, a Law Commission report as to what was the previous mischief that a statute was designed to overcome. But in my view anything much beyond that sort of source is likely to add to the ambiguity, not to ease it. If necessary I would even go so far as to legislate against the Court of Appeal or any other court having access to parliamentary material. Certainly I think that any movement towards the preparation of the United States style Brandeis sociological brief which was in vogue at one time can only add greatly to the costs of running litigation and should be strongly resisted.

By that I do not mean to suggest that one should limit the interpretation of statutes to an unsophisticated debate as to what is the ordinary meaning of the words used. I think in this respect it has to be recognised that all words if they are taken out of context are inherently ambiguous. In short the meaning of words can only be determined by reference to the context in which the words are used. An illustration of this can be taken from the writings of the great linguist Wittgenstein which I think correctly shows the way in which the matter should be approached. He said:

> "'Show the children a game' the man said to me. I then showed them how to gamble with dice. He then testily responded, 'Not that sort of game'."

I think that clearly indicates that any word taken out of context is inherently ambiguous but that once put into a context the task to find its true meaning ought not to be all that great.

So far as statutes are concerned, the context in which the words are used may be a relatively narrow one. The context may be that of a section or part of the Act in which the words are used. Or it may be the somewhat wider context of the statute as a whole, having regard perhaps to the circumstances or mischief which led to its enactment. Clearly in determining the correct context, there is considerable scope for the application of judicial discretion to reach a sensible result. In my experience that discretion is usually exercised according to the court's notions of whether a particular interpretation argued for is sensible or just on the one hand or absurd, repugnant or unjust on the other.

Finally, in relation to the issue of judicial discretion, I would like to return to the question of drafting and to suggest that it is often preferable to draft statutes that emphasise principle rather than detail and then to leave it to the courts to work out the application of that principle to particular cases on an ongoing basis as changing circumstances demand. For example I would disagree with the approach which has been suggested recently by the New Zealand Securities Commission in its report on Insider Trading where it has recommended the enactment of some very detailed regulatory rules. I would suggest that such rules are likely to provide a coverage that will leave untouched various situations that have not been specifically foreseen. The Securities Commission in fact rejected more general wording which is in use in the United States and said that enactment of general principle was not in accordance with New Zealand constitutional tradition. However, take the analogy of s.9 of the Fair Trading Act (which is a re-enactment in this country of s.52 of the Australian Trade Practices Act) – the prohibition against misleading or deceptive conduct in trade or commerce. That sort of provision, certainly in Australia, has enabled the courts to apply legal remedies in a very wide range of circumstances as and when the need has arisen. It has also provided a legislative standard for conduct which has gradually become appreciated and understood by the commercial community as a whole.

Clearly enough any legislative standard of that kind must not be so vague or imprecise that its enforceability becomes a matter of bureaucratic whim. But on the other hand it certainly is my view that it is possible to adopt clear general standards or principles which the courts can apply sensibly and pragmatically and that that is much preferred to the sort of convoluted and detailed legislation which attempts to define in advance every conceivable situation that is thought to be needed to be addressed.

STATUTORY INTERPRETATION AND THE CRIMINAL LAW

Neil Cameron, Simon France, Glen Luther
Faculty of Law, Victoria University

This paper has been prepared with the intention of complementing John Burrows' paper "Approaches to Statutory Interpretation". Accordingly, where appropriate, we have endeavoured to follow his structure and use his terminology

INTRODUCTION

Criminal law presents a peculiar challenge for any discussion of statutory interpretation. In spite of the fact that the system is a codified one (and indeed so far as many offences are concerned has always been codified) it is an area which relies much more on judicial creativity and policy-making than most others. Although it is ostensibly governed by statute, that governance is openly incomplete in a number of ways and for a number of reasons.

First, the statute law is incomplete in that it lacks any "general part" or any general statutory principles as to the availability or non-availability of claims of lack of mental or volitional elements. This means that the courts, with little assistance from the legislation, have to decide what elements are relevant to any particular offence and how, in the particular case, such elements are to be defined.

Second, the retention of common law "defences" by s.20 Crimes Act 1961 leaves plenty of scope for the development of defences by the courts. Thus hitherto moribund defences can be revived by the courts with little hindrance from the proviso to s.20(1) that such defences must not be inconsistent with the offence provision. See, for example, Richardson J.'s rediscovery of the "defence" of impossibility in *Tifaga* [1980] 2 NZLR 235.

Third, even where criminal statutes do spell out the elements of an offence in some detail, key concepts are often left undefined and hence free for judicial development. Thus such terms as "unlawfully" give scope for social context (see for example *Woolnough* [1977] 2 NZLR 508, esp. per Woodhouse J. pp.520-521), while concepts like "disease of the mind" give scope for other forms of influence and development.

This means that judges in criminal cases are frequently (and often no doubt deliberately) left without any real legislative guidance at all. This is not to deny that Parliament, through its officials, has a general awareness of the trends being followed by the courts but nevertheless any control exercised is limited to correcting specific initiatives that are not liked. In such a context literal interpretation never made any sense, and "purposive" interpretation in the sense of endeavouring to discover and effectuate legislative

intent scarcely makes much more. Rather the courts are left to develop their own policy based on their own conception of social needs and social justice subject only to the power of the legislature to intervene ex post facto. These comments are as true of the more "regulatory" areas of the criminal law as they are of those "true crimes" covered by the Crimes Act. Many regulatory offences are very loosely drafted leaving the courts with considerable freedom to introduce mental elements or decline to do so, to require fault or impose absolute liability, to alter the burden of proof etc. Thus in these areas too the legislature has largely left the courts to determine the basic offence structure according to their own ideas of social needs and social justice. This the courts have done but, until recently at least, in a fairly haphazard and unprincipled way.

This essential freedom of the courts in "interpreting" criminal statutes of all kinds provides the background for this paper. Our brief is to identify interpretation practices within the criminal law and to make suggestions as to possible legislative initiatives. In addition to these two tasks, we have attempted to assess the role of the "strict construction" rule (sometimes referred to as the "penal presumption" rule). We have chosen two areas of the criminal law which we believe give sufficient coverage to enable the making of general observations (albeit with the reservations generalisations must always carry). First we will look at recent trends in the judicial treatment of so–called "strict liability" offences in statutes other than the Crimes Act and other major criminal legislation. Here most offence provisions are still silent as to the nature of the liability imposed although some do give guidance on some of the elements required and a few provide detailed, exhaustive definitions (e.g. the insecure load offences under s.70 Transport Act 1962 (as amended in 1985)). Second, we will look at three general defences – insanity (s.23 Crimes Act 1961), compulsion (s.24), self–defence (s.48) and one specific – provocation (s.169).

Strict construction has often been seen as the hallmark of the criminal law and even Burrows suggests that it is still a significant factor in some situations. Accordingly some preliminary observations would seem appropriate. It is the best known aid to the interpretation of ambiguous penal statutes. Criminal cases are replete with it even in jurisdictions like New Zealand which have ostensibly abrogated it by the passage of provisions such as s.5(j) Acts Interpretation Act 1924. (Cf. R. Granville Glover "The Interpretation of Penal Statutes in New Zealand: Acts Interpretation Act 1924, Section 5(j)" (1987) 11 *Crim* LJ 290.)

The principle is usually said to be that –

> "where a statutory provision affecting the liberty of the subject is ambiguous ... strict construction requires that the ambiguity be resolved by attributing to the provision the meaning most favourable to the accused." (S. Kloepfer, "The Status of Strict Construction in Canadian Criminal Law" (1983) 15 *Ottawa Law Review* 553.)

Such a principle presents a number of problems even to the casual observer. How are statutes to be identified as "affecting the liberty of the subject"? All statutes permitting imprisonment? All criminal statutes? Further, when will provisions be seen as ambiguous? How do we choose which meaning is more favourable to the accused in an insanity situation? More fundamentally, it is unclear what the term "strict construction" really means. For some it seems to mean that penal statutes be given the narrowest meaning consistent with the interests of the accused. (See *Dyke* v. *Elliott, The Gauntlet*, (1872) LR4PC 184, 191.) For others it is an approach that justifies slightly deflecting the ordinary principles of communication, which normally centre on the most plausible meanings, in favour of the defendant (Dickerson, *The Interpretation and Application of Statutes* (1975), 211.) Secondly there is the somewhat vexed relationship between strict construction and the operation of sections such as 5(j). While it may be that s.5(j) has been of assistance in weaning the courts away from the more extreme manifestations of strict construction, it could also be argued that it has not been effective in preventing them from resolving cases of real doubt in favour of the defendant rather than adopting a marginally more plausible interpretation favouring the prosecution. Our aim in relation to strict construction is to assess what impact it actually has and to consider whether a strengthening of s.5(j) is either desirable or likely to be effective.

STATUTORY INTERPRETATION AND STRICT LIABILITY

1. *Department of Civil Aviation* v. *MacKenzie*

Although given little prominence in most criminal law textbooks, strict liability is one of the central problems of modern criminal law. The existence of a large category of offences, sometimes carrying serious penalties, often having far-reaching consequences, and in which liability is imposed regardless of fault has been seen as unjust and arbitrary. It is a form of liability which places immense power in the hands of enforcement agencies and subverts the adversarial/protective ideology of the criminal courts. Paradoxically, strict liability in the form of liability without fault is an exclusively judicial creation. Most criminal statutes, especially in non-codified jurisdictions, are resolutely silent on the degree of fault required for liability. Faced with a plethora of such statutes regulating everything from the sale and use of dangerous drugs to riding bicycles, and fortified by a largely unexamined belief that to require *mens rea* would unduly hamper the enforcement of such necessary laws, the courts developed a set of criteria to distinguish "true crimes" from offences which were merely regulatory. "True crimes" required *mens rea.* Regulatory offences were classified as "strict liability" which in practice generally meant that the defendant would be convicted regardless of lack of fault. The criteria for distinguishing between such cases were vague and often contradictory. Furthermore courts occasionally worsened the confusion by attempting some half-way house between the two. Thus, for example, some statutes were held to impose liability only on the negligent, some were discovered to be subject to

defences like impossibility and some were held to shift the burden of proof of lack of *mens rea* or negligence to the defendant. In the result not only was strict liability criticised as arbitrary and unjust it was also seen as thoroughly unpredictable and uncertain, and hence as violating another central tenet of criminal law.

In 1983 a full Court of Appeal made a concerted attack on this area. *Civil Aviation Department* v. *MacKenzie* [1983] NZLR 78 involved a charge of operating an aircraft in such a manner as to be the cause of unnecessary danger to any person contrary to s.24(1) Civil Aviation Act 1964. Faced with the question of what mental element, if any, was required for such an offence the Court held that s.24(2) created what it described as a "public welfare regulatory offence". In such offences, once the facts have been proved liability will be presumed unless defendants can show that they were not at fault in producing the breach. The creation of such a category of offence clarified much of the previous law and the description of the requirements of the category provided a coherent and commonsense gradation of offences.

In delivering the majority judgment Richardson J. purported to rely initially on the principle of strict construction to exclude the possibility of what he described as "absolute" liability. Statutory silence was taken for statutory ambiguity and hence some qualification favourable to the defendant had to be read in. The form that qualification should take depended on the statute and could be either a requirement of *mens rea* or one simply of lack of fault.

> "What is important is to determine, having regard to the scheme and object of the statutory provision in question, what factor in addition to the external manifestation of conduct falling within the provision must be present in order to warrant attribution of criminal responsibility for that conduct." (p.81)

The scheme and object of s.24(1) pointed towards a no fault rather than a *mens rea* qualification. The section was "aimed at protecting the public safety" rather than at preventing personal injury or property damage. If such injury or damage actually occurred alternative "truly ... criminal" charges could be laid. Similarly the emphasis in the section was on the act, not the actor:

> "Liability arises where an aircraft is operated in the prescribed manner not where a pilot operates an aircraft in a particular manner. Exculpation by reason of absence of fault is more consistent with the scheme of the provision than exculpation dependent on proof of a particular state of mind." (p.82)

The scheme of the legislation was also important in that the existence of a statutory no fault defence for the owner suggested that the qualification intended for the pilot was unlikely to be one based on the higher standard of lack of *mens rea*. Interestingly,

however, the absence of an express equivalent for the pilot was not seen as suggesting absolute liability.

Richardson J. then went on to consider the question of burden of proof in such no fault cases. He concluded, following the decision of the Supreme Court of Canada in *R* v. ***City of Sault Ste Marie*** (1978) 85 DLR (3d) 161, that in this class of case the burden of proving no fault lay on the defence to the civil standard. Such cases are not subject to the ***Woolmington*** principle because they are not concerned with the proof or disproof of mental elements and involve public welfare regulatory matters. Furthermore the defendant is in the best position to know the facts and, where the public welfare is at stake, it is reasonable to shift the burden in this way.

In his dissenting judgment McMullin J. rejected the public welfare regulatory category with its no fault defence and reverse onus. By applying the presumption against absolute liability and by contrasting the s.24(1) offence with the lesser offence of dangerous flying under regulation 36(1) Civil Aviation Regulations 1953 he concluded that the offence was not one of absolute liability. Rather it is one where there was a defence of lack of mens rea or no fault available which must be raised by the defendant but which must ultimately be disproved by the prosecution. McMullin J. rejected the majority insistence on a reverse onus because:

> "There are a great number of statutes which provide that a defendant must prove the existence of a state of mind or state of facts to avoid liability ... If Parliament recognises a need to place such an onus on a defendant in these special cases it is difficult to see why this Court should now legislate to place it on him in all others." (p.96)

In a more general vein he concluded that:

> "Whatever advantages are to be derived from the suggested change, and there may be some, particularly in the areas of conservation and pollution, Parliamentary intervention, not judicial legislation, should bring it about. It is not important that the criminal law should be innovative; it is important that it be certain and seen as fair in its application by citizens whose lives it affects." (p.97)

The decision in *MacKenzie* operates at two distinct levels and, from the point of view of statutory interpretation, needs to be considered at both. At its most general it confirms the existence of a set of discrete, judicially defined categories covering all criminal statutes. At the more specific level it simply decides that the offence under s.24(1) Civil Aviation Act 1964 is a public welfare regulatory offence. Offence provisions will now fall into one of four categories. If the statute is clear as to the mental or fault element required then the defendant will be liable only if the prosecution can prove the required element beyond reasonable doubt. If the statute

is ambiguous but the offence is one involving "true crime" then, once the conduct has been proved, the defendant can produce evidence of lack of *mens rea* and is entitled to be acquitted unless the prosecution can prove its existence beyond reasonable doubt. In practice, and perhaps now in theory, the differences between these two categories are minimal. Thirdly, the provision may be interpreted as a "public welfare regulatory" offence in which case, once the conduct has been proved, it is up to the defendant to show lack of fault on the balance of probabilities in order to escape liability. Finally, the offence may be seen as one where liability is "absolute" in that all that needs to be proved is the prohibited conduct and lack of fault or *mens rea* is no defence.

As an exercise in statutory interpretation the setting-up of these categories and the subsequent locating of s.24(1) within them raises a number of questions. While the idea of no fault liability as providing an alternative to strict liability is scarcely novel, *MacKenzie* clearly marks a new and significant stage in its development. The Court authoritatively adopts a set of categories for which there is no statutory sanction and which is by no means self-evident - thus Cooke P. in *Millar* v *Ministry of Transport* (1986) unreported, CA.134/86, for example, discusses seven different categories of offences before returning to the *MacKenzie* scheme. How does this exercise fit with the approaches and themes outlined by Burrows in his paper? Perhaps more fundamentally, how far can it really be seen as an exercise in interpretation as opposed to simple judicial creativity? If it is the latter should it be encouraged? Can and do the approaches and techniques adopted in *MacKenzie* produce consistent, predictable and acceptable results in subsequent cases? Finally, what, if anything do *MacKenzie* and the cases which follow it suggest about the need for, and utility of, aids to statutory interpretation, styles of statutory drafting, and the content of criminal and regulatory statutes? For answers to these questions we need to look at the reasoning in *MacKenzie* and then at some of the themes and problems which emerge from succeeding cases.

At the first level mentioned above, the overall categorisation scheme that the Court arrives at in *MacKenzie* is largely the product of judicial creativity. The court is heavily influenced by the decision of the Supreme Court of Canada in *Sault Ste Marie* and essentially adopts the categories set up in that case. It is a structure which is justified by Richardson J. in general policy terms rather than in relation to any overall legislative intent. The appeal here is to underlying criminal law principles - a person should not be held liable "no matter how careful his conduct or how reasonable his judgment" (p.81) and "the principle that punishments should in general not be inflicted on those without fault" (p.84). If the legislature has not clearly abrogated such principles then they will be applied and the new category enters the judicial armoury by what is essentially legislative omission.

What we have here is a process which is common throughout the criminal law in New Zealand and which is encouraged by our

current approach to criminal law-making and codification. The courts fill the gaps left in statutes and apply common law principles and developments so long as they do not conflict with the wording or intent of the statute. There is certainly some suggestion in *MacKenzie* that the new scheme is consistent with legislative intent in regulatory statutes and will best achieve the purpose of such legislation but this is misleading. The new scheme is seen as consistent, workable and effective by the majority but there is nothing in the statute or its context which gives the slightest hint that such a solution was either contemplated by the legislature or can be seen as consistent with the "natural" meaning of the provision. Indeed, as McMullin J. points out, what legislative cues there are point the other way – in those special cases where defences are provided for strict liability offences, the legislation tends to spell them out and where reverse onus provisions are intended they too are either spelled out or the provision is drafted so as to make it subject to s.67(8) Summary Proceedings Act 1957.

At the more specific level, when it comes to locating s.24(1) within the new general scheme the Court has created, the traditional language of statutory interpretation is more in evidence. In particular the Court is concerned to see whether placing s.24(1) in one category or the other is consistent with the intent and purpose of Parliament. Here the Court proceeds in two stages and in doing so provides a model for the cases that follow (see below). First, in the absence of any clear indication that the section is intended to ban all dangerous flying come what may the penal statute presumption militates against absolute liability. Interestingly it is never suggested how a section that already says, "where an aircraft is operated ... [so] as to be the cause of unnecessary danger ... the pilot ... shall be liable" could be redrafted to express absolute liability more clearly.

Once absolute liability is excluded the question is simply whether the offence is true crime or public welfare. Here the immediate statutory context is called upon to reveal the legislative purpose with emphasis being placed on four factors – the fact that the section involves public safety not specific injury or damage; the existence of truly criminal charges if injury or damage occurs; the fact that the emphasis is on the act not the actor; and the existence of a no fault defence for the owner of the aircraft in the same section. At this level the interpretation process is fairly sparse. A set of rather ambiguous criteria is set up with some mention of most of the central tenets of the modern approach to statutory interpretation but it is difficult to assess how significant these are in the actual classification of s.24(1). This is perhaps hardly surprising since the main concern of the majority was to construct and establish the new public welfare regulatory category. The criteria and cues by which such cases could be recognised could be developed later. The cases which follow *MacKenzie* do indeed seek to develop the criteria for interpreting such statutes further and we need to look at that process next. Before doing so, however, it perhaps needs to be emphasised again that the process is a secondary and somewhat

artificial one. The development of the *MacKenzie* categories provides a judicially created framework within which the task of interpreting particular statutes takes place. Given that the framework is not legislatively sanctioned the search for legislative intent within it is bound to be somewhat artificial.

2. Interpretation after *MacKenzie*

In this section we want to examine the "features of modern statutory interpretation" outlined by Burrows in the context of a group of High Court and Court of Appeal cases which discuss and use the *MacKenzie* classification. There are fifteen cases, including *MacKenzie* itself, which fit into this classification:

Tawa Meat Ltd v. *Dept of Trade & Industry* (1984) unreported, M.542/83, Wellington;
Paul v. *Housing Corporation of N.Z.* (1984) unreported, M.31/83, Blenheim;
Campbell v. *Police* (1948) unreported, M.414/84, Christchurch;
Barrow v. *van den Beld* (1984) unreported, M.83/84, Dunedin; *Waikato Carbonisation Ltd* v. *Waikato Valley Authority* (1984) unreported, M.220/84, Hamilton;
O'Neill v. *Ministry of Transport* (1984) unreported, M.66/84, Auckland;
Browne v. *Auckland City Council* (1985) unreported, M.1672–84, Auckland;
AHI Operations Ltd v. *Dept of Labour* (1985) unreported, M.1736/84, Auckland;
Murray v. *Ongoongo* (1985) unreported, M.409/85, Auckland;
A. M. Savill Ltd v. *Ministry of Transport* (1985) unreported M.264/85, Hamilton;
Child Freighters Ltd v. *Ministry of Transport* (1985) unreported, M.10/85, New Plymouth;
Millar v. *Ministry of Transport* (1986) unreported, CA.134/86;
McLaren Transport Ltd v. *Ministry of Transport* (1986) unreported, App.81/86, Dunedin;
Waitaki Transport (Holdings) Ltd v. *Ministry of Transport* (1987) unreported, App. 46/86, Auckland.

There are a number of other cases which have simply adopted the *MacKenzie* scheme without significant discussion, e.g. *Hastings City* v. *Simons* [1984] 2 NZLR 502. They are not included here.

Before discussing the various features exhibited by these cases it is useful to assemble some basic information on the types of problems raised and the way in which each court handled those problems. The table (see p.206) attempts to do this. More detailed comments on significant aspects follow. Several preliminary points can be made about this table. First, if one compares the interpretation cues included in the table with the subheadings in Burrows' discussion of the modern approach and its antagonists it is evident that several areas are missing. Not surprisingly the *MacKenzie* cases make no use of analogy, do not refer to the so–called rules of statutory interpretation with the exception of

strict construction, and have no need to look at treaties and the like. More surprisingly, perhaps, there are no references to the other aspects of what Burrows describes as "external context" – other statutes, surrounding circumstances, committee reports, *Hansard* or other legislative material. Second, the table does show the thinness of the statutory interpretation exercise that is going on in many of the cases. In the two Court of Appeal decisions (*MacKenzie* and *Millar*) the process is certainly a fairly rich one with a number of internal and external cues being woven into the analysis. Three or four of the High Court decisions (*Waikato Carbonisation*, *Browne*, *AHI* and perhaps *McLaren Transport*) are of a similar type. The rest, however, simply accept (as they must) the *MacKenzie* scheme and then classify the offence on the basis of one or two features of the statute and the occasional assertion of statutory purpose. This, of course, may mean one of at least two things; either the courts are ignoring relevant cues and in effect hunching the result based on inadequate analysis, or the statutes in question and the social meanings surrounding the prohibited conduct simply do not yield an adequate range of cues. In either case describing what is going on as "statutory interpretation" may be somewhat misleading. Third, some of the columns which one might expect to be filled turn out to be very sparse indeed. Strict construction, for example, makes a strong rhetorical appearance in the Court of Appeal and may well affect the outcome in one or two cases but in nine of the cases it receives no mention. Similarly penalty, one of the mainstays of pre-*MacKenzie* strict liability cases, is only mentioned in five cases. Indeed another characteristic element in pre-*MacKenzie* reasoning, the extreme social danger presented by the conduct which accordingly calls for absolute liability, has virtually vanished, appearing only in *AHI*. Such departures from previous practice are to be welcomed. Penalty has always been a highly unsatisfactory and ambiguous tool in such cases, and the "extreme social danger" argument has well-recognised feet of clay.

Bringing these cases together in this way does give some indication of the significance of Burrows' "features" in criminal law and we will turn now to those points that the cases do illustrate. In doing so we will raise a number of ambiguities and contradictions that have appeared in the process of constructing the table.

a) *Literal interpretation*

To what extent do the *MacKenzie* cases still adhere to what might be described as a "literal approach"? This question raises a number of preliminary problems. First, in criminal law generally, as we have already pointed out, the frequent absence of any statutory wording at all on the questions that confront the court means that to talk of literal interpretation is unhelpful. However mere statutory silence without more has never been seen by the courts to be an indication that what is left out is necessarily irrelevant. Rather it is an invitation to interpretation. This is especially so in the cases to be considered here. Second, there is, in any event, considerable ambiguity in the so-called "literal rule" itself. Does it enjoin absolute literalness? Does it exclude context? If so what aspects of

context? For our purposes we will adopt Dickerson's formulation which sees the literal or "plain meaning" approach as requiring simply that words should be interpreted according to their plain meaning in their proper context so that they are rational and make sense in that context. Meanings which may be more desirable or which a court might consider to be more equitable should under this approach, be rejected. (See Dickerson pp.229–233.) This would seem to equate with Burrows' concept of "natural" meaning.

As the question of categorisation under *MacKenzie* only arises where the statutory provision is ambiguous as to the mental or fault element required, the scope for literal interpretation in such cases is naturally restricted. Indeed of the fifteen "*MacKenzie* cases" referred to, only two really provide any opportunity for literal interpretation. In one of these cases (*Paul*) the Court adopts what it sees as a literal meaning. In the other (*Browne*) the approach is rather more subtle.

In *Paul* Jeffries J. was clear that the words "stipulates" and "demands" in the Rent Freeze Regulations 1983 carried with them "intent, knowledge or recklessness as ingredients to be proved by the prosecution". Whether this interpretation is correct or not, the basic point is that the learned Judge simply assumes the literal meaning of the words and applies it. It is strongly arguable that the nature of the legislation and perhaps the penalty (three months' jail or a fine of up to $1,000) indicates that Parliament intended the offence to be one requiring a lower level of culpability. While Jeffries J. does admit that possibility, the literal meaning, as he perceives it, carries the day. In the context of the regulation it is a perfectly rational meaning even though it may not be the most desirable or effective one. It is also, of course, the meaning which is consistent with the principle of strict construction of penal statutes, although that principle is not used in the case.

In *Browne*, on the other hand, Chilwell J. was faced with a similar question as to the meaning of the phrase "permits a motor vehicle to be on a road". He held that "permits" is ordinarily synonymous with "knowingly permits" and hence requires proof of knowledge of the state of affairs permitted – in this case that the vehicle was being used on the road and that it did not have a current warrant of fitness. However he went on to argue that since the offence involved considerations of public welfare such a broad interpretation was inappropriate. Whether or not the use of the term "permits" required knowledge as to the operation of the vehicle on the road, it did not, in an offence of this nature, require knowledge as to the carrying of a current warrant of fitness. Hence in this respect liability was strict and the defendant should be convicted unless he could prove lack of fault.

Browne thus provides an interesting contrast to *Paul*. On the face of it one would have thought that the two sets of "*mens rea* words" – "permits" and "stipulates or demands" – were very similar in statutory interpretation terms. Both clearly require some mental element but, equally clearly, both are surely ambiguous as to whether you need to know or be reckless as to the precise nature of

the thing stipulated, demanded or permitted. One judge assumes a literal meaning and, accepting that approach, arrives at a tentative interpretation that on the face of it is not the most desirable or consistent result. The other recognises the ambiguity and works through it to a result which has the merits of consistency, workability and, one suspects, harmony with the Legislature.

Before leaving the literal rule mention should be made of the decision in *Ongoongo*. There Hillyer J. was faced with a provision that expressly excluded lack of knowledge as a defence. He concluded from this that the provision was unambiguous and imposed absolute liability. This may be an application of the literal rule – on its face the provision simply prohibited overstaying and Ongoongo had clearly overstayed. However, as was pointed out above, courts have not generally seen mere statutory silence as synonymous with absolute liability. Rather it is seen to be ambiguous and ripe for interpretation.

b) *Strict construction*

The *MacKenzie* cases illustrate at least a strong rhetorical commitment to a "soft" strict construction approach. This is generally expressed either in the terms indicated above or as the familiar presumption in favour of ***mens rea*** (i.e. the ***most*** favourable option) in criminal cases. It is a "soft" version of the approach in that even the rhetoric only contemplates strict construction as slightly deflecting the ordinary literal and contextual meaning.

At first sight it is tempting to see the whole *MacKenzie* development as an exercise in strict construction. The Court in *MacKenzie*, after all, develops a new doctrine and a new classification of offences in the face of statutory silence. In doing so it charts a course which it sees as highly beneficial to the accused. Such a view is misleading. In *MacKenzie*, and the cases which follow it, the concept of strict construction is fraught with ambiguity. Certainly many of the cases make some reference to it but it is frequently unclear whether this means that the "rule" should be seen as determinative of the outcome, or whether it is better seen simply as concealing or justifying rhetoric. In *MacKenzie* itself the majority frame their judgment within the general context of the penal statute presumption. They adopt, as many other courts have, Lord Reid's dictum from *Sweet* v. *Parsley* that –

> "... if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted." ([1969] 1 All ER 347, at 350)

However the Court then apparently uses this presumption simply to decide that the offence is not an absolute one. Even here there are ambiguities:

> "... we are in no doubt, without the assistance of authority, that the section falls within the principle referred to by Lord Reid in *Sweet* v. *Parsley* and that the liability of a pilot

> charged thereunder is qualified not absolute. Section 24 does not prohibit all aircraft operations: it is directed at those which cause unnecessary danger to persons or property. It should not be assumed that Parliament intended that the pilot should be guilty of an offence no matter how careful his conduct and how reasonable his judgment." (p.81)

This passage neatly combines strict construction with parliamentary intent. How significant is strict construction? The suggestion that the interpretation might differ if Parliament had expressed the offence as a prohibition on all aircraft operations is unconvincing. Many serious offences are expressed as absolute prohibitions (e.g. those involving dangerous drugs) without anyone seriously suggesting that liability is thereby absolute. Conversely, offences which are clearly only directed towards harmful manifestations of otherwise acceptable behaviour (e.g. importing prohibited goods or operating inadequately fenced machinery) have been held to be absolute. Furthermore whether an offence is expressed as a general prohibition followed by a series of exceptions (e.g. the offensive weapons legislation) or whether it is expressed as a specific form of otherwise acceptable behaviour seems often to be a matter more of legislative whim than of legislative intent.

Once the question of statutory form is dismissed as an argument all that is really left is the basic presumption against absolute liability. Certainly the Court gets some assistance from the question of penalty but it is wholly unclear how significant this factor is. Furthermore penalty may well only be significant in that a severe penalty will indicate that the offence cannot be one of absolute liability. This does not mean, of course, that a minor penalty is necessarily an indication that it is.

Once absolute liability is excluded the Court is left with a choice between a number of options. In *MacKenzie* it is assumed that only two are available – full *mens rea* or strict liability coupled with a no fault defence – whereas in *Millar* the Court traverses six non–absolute options and expresses some doubt as to whether even that list is exhaustive. In neither case, however, does the penal statute presumption play any significant part in deciding between these options. The analysis proceeds on the basis of wording, context and general statements about parliamentary intent. An option is eventually selected on the basis of plausibility, and strict construction is ignored.

In many ways this is to be expected from the general context of the *MacKenzie* approach itself. The Court there sees itself as setting up a categorisation scheme designed to benefit the accused. The scheme rescues the court from the tyranny of the old choice between full *mens rea* and strict (i.e. absolute) liability by introducing a new and advantageous category. Once the penal statute presumption has been used to avoid the most disadvantageous interpretation – that of absolute liability – then the other options are

clearly all to the defendants' advantage and the penal statute presumption is unhelpful. Hints drawn from context and general social policy can carry the day. This can be seen most clearly in the one case so far that has effected a downward reclassification in the wake of *MacKenzie*. In *O'Neill* v. *Ministry of Transport* [1985] 1 NZLR 513, Gallen J. held that the offence of driving with excess blood alcohol under s.58(1)(b) Transport Act 1962 was a public welfare offence rather than, as had previously been thought, a crime requiring proof of *mens rea* (albeit in a somewhat modified form). In reaching this conclusion Gallen J. noted that:

> "The criteria for the precise definition of public welfare offences are, with respect, not entirely clear from either the *Sault Ste Marie* case or the decision of the Court of appeal in *MacKenzie*." (p.517)

Nevertheless "with some hesitation and reservations" (p.518) he categorised the offence as public welfare regulatory thereby confirming it as one of negligence with the onus of proving lack of fault on the accused. Support for such a result is found in a weak analogy between drunken driving and risky flying, a generalised and unexplained concern with public welfare and a desire to reconcile New Zealand case law with that of England. If strict construction had been even faintly alive and well one would have surely expected the Judge's hesitations and reservations to be resolved in favour of regarding the offence as truly criminal. This was, after all, the view favoured by earlier decisions.

Nevertheless, as was indicated earlier the rhetoric of strict construction as a general aid is strong in these cases. This is particularly so in *Millar* where Cooke P. and Richardson J. take the principle well beyond the mere elimination of absolute liability and reiterate the presumption of *mens rea*, characterising the categorisation process as one where –

> "... when the words give no clear indication of legislative intent and there is no overriding judicial history, it will be right to begin by asking whether there is really anything weighty enough to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability." (p.20)

The problem with seeing this as the determining factor in judicial decision–making is that courts, at least in this area, rarely if ever interpret a statute as giving "no clear indication". The closest the *MacKenzie* cases come to this is in *O'Neill* and there the court did not even mention strict construction or the presumption of *mens rea*. In all except three of the other cases the courts were able to conclude, in statutes which were largely silent on the matter and which had been passed well before the creation of the *MacKenzie* categories, that one category was far more plausible than the others and to decide the case accordingly. In the remaining three cases – *Campbell*, *van den Beld* and *Paul* – the Court narrows the choice down to one out of two categories and leaves the final categorisation

open since, on the facts, the precise category will make no difference to the accused's liability. Nevertheless even in these cases the Court expresses a preference based on statutory "indications" rather than the advantage of the defendant.

This calls into question the initial comments in this part about the use of strict construction to exclude absolute liability. The fact that since *MacKenzie* (at least) the courts have regarded absolute liability as a highly implausible form of liability for Parliament to intend suggests that strict construction plays little part here also. Absolute liability is implausible because it is unjust and because, since the invention of public welfare regulatory offences, it is largely unnecessary as a means of enforcing proper standards. Indeed, by inducing cynicism in its victims it may even lead to a lowering of standards. Hence strict construction is consistent with current judicial practice and is frequently referred to by judges but its effect on outcomes is probably minimal.

c) *Statutory purpose*

The central feature of the modern approach identified by Burrows is the purposive nature of statutory interpretation: "... there is an overwhelming tendency today for courts to attempt to effectuate the parliamentary intent ..." (p.12). The problem with this is that in many of the interpretation issues that arise in criminal law it is difficult to see how such an approach can assist. To take an example cited by Burrows, it is easy to see that convicting a company for "discharging" a pollutant when in fact the pollutant merely seeped from a damaged pipe is within the intent of the legislation (see *Union Steamship Co of N.Z.* v. *Northland Harbour Board* [1980] 1 NZLR 273). It is not so easy, however, to see how intent enables you to distinguish between interpreting a statute as absolute and interpreting it as public welfare regulatory or even true crime. The intent of pollution legislation, for example, is presumably to prevent pollution by punishing or threatening to punish polluters. Equating seepage with discharge is consistent with this purpose. This statement of intent, however, provides no clue as to whether such polluters need to be aware of the pollution, simply be negligent in some way or may be held absolutely liable.

The Court in *MacKenzie* tries to deal with this by developing a more complex concept of legislative intent which differs according to whether the discussion concerns the true crime/public welfare regulatory borderline, or the public welfare regulatory/absolute liability borderline. Where the issue is whether the offence is truly criminal or not, the question asked by the Court is whether, given that the general intent is to prevent the prohibited conduct, the legislation is trying to do this by striking at the actor or whether it is aimed at the act. True crimes are those where Parliament is trying to punish the actor for "evil" conduct and traditional criminal culpability in the form of *mens rea* is therefore required. Public welfare and absolute offences on the other hand are those where the desire is simply to control the conduct and not to stigmatise the

offender as morally blameworthy. "Evil" is irrelevant, due diligence or complete avoidance is required and hence fault or simply conduct is the prerequisite rather than *mens rea*. Thus in *Millar*, for example, McMullin J. interprets driving while disqualified as a true crime at least partly because –

> " ... public safety is not foremost in imposing a sentence for driving in breach of a disqualification. The sentence then imposed is primarily intended as punishment of the offender for breach of a court order. The theme of punishment underlies the sentence." (p.7 of his judgment)

Out of the fifteen cases referred to earlier, seven discuss the true crime/public welfare regulatory borderline. Three of these expressly draw the distinction between the punishment of the culpable and the protection of society (*MacKenzie, Browne* and *Millar*). However, while this distinction has an illustrious lineage and is superficially attractive, it presents a problem in the context of statutory interpretation. With the exception, perhaps, of the level of penalty few statutes give any clue as to whether the objective is punishment or protection. Accordingly courts are thrown back on the nature of the conduct prohibited – if it is regarded as immoral, then the offence is true crime, if not then it is public welfare. This, however, is essentially a circular process. Thus, for example, Richardson J. in *MacKenzie* comments that –

> "Liability under legislation of this kind [i.e. s.24(1) Civil Aviation Act 1964] rarely turns on the presence or absence of any particular state of mind. But in social policy terms compliance with an objective standard of conduct is highly relevant." (p.85)

That is true but it is true only because "legislation of this kind" is initially defined as public welfare legislation not requiring proof of a particular mental state. What the court really seems to be doing here is deciding the type of offence it is by reference to rather vague judicial concepts of *mala in se* and *mala prohibita* and then taking from that the relevant statutory intent. This intent is then used to justify the decision as to the appropriate mental or fault element to be read in. There is thus a real danger that what we are seeing here is the process described by Dickerson when he comments that:

> " ... the concept of legislative purpose, despite its frequent usefulness, provides a strong temptation to perform the bootstrap operation of formulating a legislative purpose with one eye on the situation to which it is to be applied. While this is an appropriate way to pour the foundation for a judicial rule of law, it is of doubtful propriety and candor when the result is supposedly controlled by the independent purposes of the legislature." (p.94)

There is also perhaps a further problem with the true crime/public welfare regulatory distinction as a guide to legislative purpose. It is

simply not clear that the distinction in fact makes much sense. Thus Casey J. comments in *Millar* that there is –

> "... a mounting reluctance to accept as consistent with a civilised system of justice, the proposition that regulatory offences are not criminal and imply no moral condemnation. It is difficult to understand how this attitude ever gained ground as a justification for absolute liability, considering that some of the earliest prohibitions were aimed at such disgraceful conduct as the sale of poisoned food and drink." (pp. 1–2 of his judgment)

If this is correct it is difficult to see how the courts can continue to distinguish such cases on the basis that Parliament intended only to strike at the conduct.

Where the issue is whether the offence is public welfare regulatory or absolute a similar development has taken place which gives rise to other problems. In this context the act/actor distinction is obviously irrelevant since true crime is not a possibility. The general intent discussed initially in this part of preventing the prohibited conduct is unhelpful since either public welfare regulatory or absolute liability could fulfill it. To avoid this dilemma the courts have produced another limb of legislative intent which sees Parliament as being concerned not just with the prevention of the conduct, but rather with the prevention of the conduct to the extent that it is consistent with ordinary social and judicial understandings about the proper preconditions for imposing punishment. Thus in both *MacKenzie* and *Millar* there is considerable emphasis on the need for liability to be seen to be fair and on the fallacy of assuming that the legislature intends to punish the diligent. The point is perhaps made most clearly in a passage from Lord Diplock in *Sweet* v. *Parsley* [1970] AC 132, quoted by McMullin J. in *Millar*:

> "... it is contrary to a rational and civilised code, such as Parliament must be presumed to have intended, to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law ... and has taken all proper care to inform himself of any facts which would make his conduct [un]lawful." (p.163)

This extension of legislative intent is consistent with the distinction suggested by Dickerson between Parliamentary *intent* and Parliamentary *purpose*. While the intent may simply be to prevent conduct, the purpose is wider and includes general objectives of upholding conventional understandings about fairness, the encouragement of due diligence and so on. (Dickerson, pp.87–88)

Unfortunately this produces exactly the same problems as the more restricted concept of intention and as the act/actor distinction in truly criminal/public welfare cases. There is generally little objective material in the statute or in external materials which can inform the Court as to these wider purposes. Indeed, it may well be incorrect to assume, as Lord Diplock does, that Parliament would

see absolute liability as contrary to a rational and civilised code. This is certainly not the view of modern English courts nor of the bulk of pre-*MacKenzie* New Zealand cases. As has been commented in a rather different context:

> "Governments now see the criminal law and process as a means of responding to social and administrative problems rather than delimiting the minimum conditions which must be present before the State is entitled to marshal its forces against the individual." (University of New South Wales Criminal Law Teachers, "Some themes in the teaching of Criminal Law at UNSW" unpublished paper delivered at the 1987 AULSA conference, Melbourne, 27/8/87.)

If this is accurate then legislative aversion to absolute liability may be minimal. Again one wonders whether this is not a further example of the courts reaching their preferred conclusion and then constructing a legislative purpose to support it.

Parliamentary purpose in regulatory offences, such as it is, thus seems likely to be a good deal more diffuse than Lord Diplock suggests. Judicial attempts to come to grips with it may well be misguided. Indeed by suggesting that there is some discoverable purpose which reveals the form of liability intended, the courts may be doing themselves a disservice. By finding or seeming to find guidelines and declarations of policy in statutes which are resolutely silent on such matters, the courts enable the Legislature to continue to avoid the difficult tasks of providing such guidelines, and formulating and articulating proper policy.

d) *Internal context*

As can be seen from the table we have broken the category "internal context" into five specific sub-categories. Only one of these - "scheme of Act/section" - corresponds fully to Burrows' heading. The other four are largely concerned with the scheme and content of the offence provision under consideration and would, perhaps, normally be seen as simply part of the interpretation of that provision rather than as context. Nevertheless it is useful to consider them separately and to link them with wider contextual considerations - hence their placement under this heading.

Internal context is significant in ten out of the fifteen cases. In some, for example *McLaren Transport*, it seems to be critical. However there are a number of ambiguities and inconsistencies in the way the courts treat the various factors which make generalisations about the role of such factors difficult to sustain. Furthermore in some cases reference to context is once again more rhetorical than real.

(i) Scheme of Act/section

Burrows notes that:

> "It is increasingly common for a court concerned with the interpretation of a single section to set out in its judgment

> not just that section but a number of surrounding sections of close relevance." (p.133)

This is certainly not the case in the *MacKenzie* judgments. Certainly in *MacKenzie* itself McMullin J., in dissent, does make good use of the contrast between s.24(1) and the less serious offence of dangerous flying created by the Regulations. Thus the fact that the lesser offence permits the pilot to escape liability by proving the absence of actual danger "would not suggest that s.24(1) ... was intended to create an absolute offence" (p.90). However the majority, while emphasising the need to have close regard to the scheme of the "provision in question", make no mention of the rest of the Civil Aviation Act 1964 or of the regulations.

The only other case to make use of the scheme in this way is *Waikato Carbonisation* where Barker J. compares the offence of discharging waste under s.34(1)(b) Water and Soil Conservation Act 1967 with that of knowingly causing chemical waste to enter classified water under subs.(1)(d). The contrast does not persuade him that the offence under subs.(1)(b) is absolute – although, of course, prior to *MacKenzie* it might well have. The use of context in this way is nothing novel. In view of Burrows' comment it is perhaps surprising that it is not used more frequently and that Courts in the area of regulatory offending do not make more use of the overall regulatory scheme. Thus it can be argued that in cases like *Campbell, Tawa Meat, Paul* and perhaps *AHI*, as well as the various road traffic/heavy transport cases, the overall regulatory scheme or the relationship with other sections could well have been instructive. There are, however, at least two problems with this argument. First it may well be that the evident judicial caution in this area is based on a well–founded perception that in fact most of the statutes in question lack real internal coherence. Thus the legislation dealing with pollution, safety, or public health may simply be a potpouri of conflicting objectives and requirements which have arisen at different times and in response to different political, social, economic and bureaucratic imperatives. Second, even where some coherence can be detected in a statute there is still the question of interpretation. For example, what significance is really to be given to the fact that some sections include express *mens rea* requirements while others do not?

Such problems certainly justify judicial caution in looking at context. They do not, however, justify ignoring it. Many statutes, especially more recent ones, do represent a careful, coherent and well thought out approach to their subject matter which is adequately informed about the likely interpretive pitfalls. On the other hand, if the courts are to make more use of such material, the Legislature needs to be much more adequately informed about the details and significance of legislative structures that are being amended or revised, and much more prepared to formulate clear legislative policies.

(ii) Defences given to the defendant

Five of the statues involved in the survey provided express

defences to the defendant. Anticipating the view that was to be expressed in *Millar* to a similar effect, three courts held that the inclusion of such defences was a strong indication that Parliament intended the offences to be otherwise absolute (*AHI, Waitaki Transport,* and *McLaren Transport*). In *Child Freighters* the Court saw the express provision of a reverse onus defence as consistent with an interpretation allowing a general "no–fault" defence. In *Savill*, which involved the same provision as in *Waitaki Transport*, the Court merely observed that it did not regard the provision of express defences as precluding a public welfare categorisation while in *Tawa Meat* such a defence was simply not seen as relevant to the classification question. In the reverse situation – where the statute expressly deprived the accused of a *mens rea* defence – this was seen as leading inexorably to the conclusion that the offence was absolute (*Ongoongo*).

Despite its subsequent acceptance in *Millar*, (Cooke P. and Richardson J. at p.9 of their joint judgment and McMullin J. at p.14 of his), it is submitted that the approach taken by *AHI, Waitaki Transport* and *McLaren Transport* is vulnerable as a statutory interpretation technique on two grounds. First, it is simply not true to say the express conferral of a defence in one set of circumstances necessarily implies the denial of a defence in other circumstances. (See: Dickerson pp.234–235 for similar comments on the so–called rule *Expressio Unius est Exclusio Alterius* which is obviously a close relative of this proposition.) Sometimes it does, sometimes it does not. It depends on the context and on the nature of the defence given. Thus any tendency to see this factor as decisive should be avoided. Second, there is a more general difficulty produced by changes in drafting style – which in turn may, ironically enough, have been produced by changes in the caselaw. If it is true that more recent statutes have tended to spell out defences and reverse onus requirements in more detail and more frequently than in the past, then a strong theory of interpretation based on this tendency could produce real inconsistencies. Unfortunately we do not know for sure whether this has in fact occurred, and we are unlikely to do so until all the statutes are on computer.

(iii) Defences given to other parties

In *MacKenzie* the majority used the fact that s.24(1) Civil Aviation Act 1964 provided a reverse onus defence of lack of fault for the owner of the plane to argue that a similar defence should be extended to the pilot by the Court. Given the approach of the Court of Appeal to the significance of defences available to the accused in *Millar*, and the general acceptance in the High Court of the proposition that, all else being equal, such defences signify that liability is otherwise absolute, this analysis seems rather doubtful. If one were forced to depend on this point alone the better view would surely be that by specifically according the owner a defence the Legislature intended to exclude the pilot. Furthermore there are at least some policy grounds on which such a distinction could be justified.

(iv) Other means of enforcement

Regulatory offences often occur in the context of an Inspectorate and a general assumption that education and remedial programmes are likely to be more effective than punishment in ensuring long term compliance with the law. Inspectors often have powers to order remedial steps or to close down the hazardous operation completely. In such a context absolute liability may be seen as unnecessary – if the defendant is acquitted through lack of fault the hazard can still be dealt with. Indeed it may well be able to be dealt with more effectively since one such acquittal will generally preclude a second. Only two of the post-*MacKenzie* cases include regulatory provisions which combine offences with remedial steps of this sort and judicial opinion on their significance is directly contradictory.

In *Waikato Carbonisation* Barker J. was clear that the existence of administrative means of stopping an innocent discharge of waste militated against absolute liability. In *AHI*, on the other hand, Heron J. considered that a power to requisition protective devices for dangerous machinery was –

> "... not ... necessarily of great assistance in determining conclusively that an absolute duty was in any way being mitigated in the context of this Act." (p.11)

Whichever view one accepts, and both cases are richly argued, the fact remains that this is another inconsistency which coupled with a defence in *AHI* and the lack of a defence in *Waikato Carbonisation*, results in a radical distinction being drawn between two areas where one might have expected legislative policy to be similar.

(v) Penalty

Penalty is a factor that has always been given some significance in the search for the appropriate category. An analysis of the cases, however, suggests that its significance tends to vary according to the extent to which the penalty supports or militates against the category favoured by the court in question.

In the two Court of Appeal decisions penalty seems to have been used to confirm the offence in the preferred category. In *Millar*, for example, the Court saw a potential penalty of five years imprisonment, a fine of up to $4,000 and a semi-mandatory period of disqualification of twelve months as "telling in favour of some form of mens rea being an ingredient". However even such penalties as this were "far from decisive" (see Cooke P. at p.5 of his judgment). Indeed this is precisely what one would expect given the availability of the public welfare regulatory category which enables the courts to obtain the administrative and preventative advantages of absolute liability while retaining a way of avoiding the exposure of the innocent to offences with severe penalties.

The suggestion that penalty is no longer a very significant factor is confirmed by the four High Court cases which look at its

implications (*Tawa Meat, Browne, Waikato Carbonisation*, and *AHI*). In the first three of these cases the size of the penalty (two light and one serious) is used to confirm a categorisation arrived at from other, more potent, cues. In the fourth a "relatively severe" penalty is seen as not standing in the way of the categorisation indicated by the rest of the statute. The downgrading of penalty as an interpretive factor is to be welcomed. Severity of penalty is a highly flexible and subjective criteron. For example, Barker J. in *Waikato Carbonisation*, describes as "severe" a penalty which is 75 times greater than one described by Heron J. in *AHI* as "relatively severe". Furthermore the courts have not been particularly willing, at least in recent years, to distinguish between the types of penalties imposed. Imprisonment, for example, which one might have imagined to be indicative of "true crime" rather than of a legislative desire to educate and control the merely negligent, has not been discussed in this way. Yet in policy terms and in the more general context of recent legislative efforts to restrict the use of imprisonment such an analysis might make a lot of sense.

Given the reluctance to place emphasis on "type", and the subjectivity and unpredictability involved in the assessment of severity, the limited weight given to penalty in the *MacKenzie* cases seems appropriate.

(e) *Precedent*

As the table shows all the cases cite *MacKenzie*. Many quote from it at length and some also quote *Sault Ste Marie* and other pre-*MacKenzie cases*. *MacKenzie* is *the* authority on public welfare regulatory liability and on the reverse onus no fault defence. It is used as a precedent in the sense that it sets up an authoritative judicial scheme into which all the statutes examined so far have been fitted. Thus in a sense precedent can be said to govern statutory interpretation which is, on the face of it, a rather odd result.

In terms of the status of pre-*MacKenzie* precedent the situation is also rather ambiguous. On the one hand the authoritative systematisation of the classification process in *MacKenzie* and the insistence there of Richardson J. that the task in each particular case is to determine the precise statutory requirements should have reinforced the trend identified by Burrows where –

> "... what matters is the words of the statute itself and the parliamentary intent in enacting it, not some earlier judicial paraphrase." (p.26)

Furthermore, the "new" public welfare regulatory category is derived from the old strict liability category. The fact that that category has now been split into two highly dissimilar offence types should also inhibit the courts from using pre-*MacKenzie* judicial authority too freely. Yet, the Court in *Millar* is very clear that *MacKenzie* is not to be seen as effecting any radical change and that pre-*MacKenzie* dicta will continue to be highly significant in

approaching such statutes. Thus Cooke P. in reinforcing the *MacKenzie* categories states:

> "We are not attempting or proposing any drastic judicial surgery. Where the law is settled in New Zealand, as by decisions of the Privy Council in New Zealand cases or by this court on particular sections or their forerunners, it should remain undisturbed. *Civil Aviation Department* v. *MacKenzie* was not meant to disrupt firmly - settled patterns of statutory interpretation in particular fields." (p.19 of his joint judgment with Richardson J.)

Precedent will accordingly continue to be important, even for statutes amended or consolidated after *MacKenzie*, for as Casey J. puts it in *Millar*:

> "Many regulatory offences have already been fitted into one of the foregoing three classes by the Courts, and in any future legislation of the same kind Parliament can be assumed to intend a corresponding approach to mens rea." (pp. 5–6 of his judgment)

In the context of statutory interpretation and of the notional hunt for the intention of Parliament this produces a rather paradoxical situation. Prior to *MacKenzie* the no fault defence was only vaguely recognised by the courts and the only reverse onus requirements the courts would accept involved either express reversals or the operation of s.67(8) Summary Proceedings Act 1957. After *MacKenzie* the no fault defence is the preferred option for regulatory statutes and Parliament is suddenly revealed as having been much more enthusiastic about reverse onus clauses than anybody suspected. In terms of parliamentary intent this translates into a claim that prior to 1983 Parliament generally intended one of two options - true crime or strict liability - whereas since 1983 it has intended one of three - true crime, public welfare regulatory or absolute.

If the dicta in *Millar* are accepted cases will be distinguished on this basis and similar statutes will be interpreted differently according to the fortuitous existence of prior authority. Such an outcome would seem to us to be unacceptable. Unfortunately this situation has already occurred. In *van den Beld* Holland J. regarded himself as bound by the pre-*MacKenzie* decision of the Court of Appeal in *Fraser* v. *Beckett and Stirling Ltd* ([1963] NZLR 480), and therefore held that the offence of importing prohibited goods under s.48(7)(a) Customs Act 1966 is an offence of absolute liability. It is difficult to imagine that the case would have been decided in the same way if it had been a case of first impression. Yet the Court of Appeal's subsequent statements in *Millar* strongly suggest that it would be likely to take the same line as Holland J. felt himself bound to do. This is surely both unsatisfactory from the point of view of justice and insupportable as an exercise in statutory interpretation. Either (i) the *MacKenzie* scheme is an authoritative judicial construct imposed on largely silent statutes and justified by the recognition that, as Casey J. puts it in *Millar*, legislators -

> "... have usually left the Judiciary to work out a system which will protect the innocent without letting too many guilty people escape" (p.2 of his judgment)

in which case it should apply to all such statutes and entitle the courts to review previous decisions; or (ii) *MacKenzie* is simply a decision on s.24(1) Civil Aviation Act 1964 which is of only marginal significance in other cases. If this were so, the confusion that existed prior to *MacKenzie* continues. The Court of Appeal in *Millar* seems to have ended up somewhere between these two views. In the result it is unlikely to achieve either the consistency and fairness of the first approach or the ideological purity of the second.

3. *Conclusion*

Enough has been said to make it clear that we regard *MacKenzie* as essentially an exercise in largely unfettered judicial creativity. Furthermore it is a process of creativity that proceeds according to a set of guidelines, assumptions and understandings that are inherently vague and ambiguous. Too often the language of interpretation is called in aid as part of an exercise in judicial boot strapping. The result in *MacKenzie* and its progeny makes a lot of sense both in policy terms and in terms of individual justice. It has not, however, done much to deal with the problem of uncertainty and the question still remains as to whether judicial creativity, albeit exercised within a highly confining legal environment, is the best way of formulating social policy in such an area.

THE DEFENCES

1. *Introduction*

Four main defences have been codified in the Crimes Act 1961: compulsion (s.24), provocation (s.169), insanity (s.23) and self defence (s.48). No detailed consideration is given here to self defence as the format adopted for the defence in 1980 has rendered analysis largely unnecessary. It is perhaps worthy of noting, however, for that very reason. The simple approach now adopted is to protect conduct undertaken in self defence so long as the force used is reasonable in the circumstances as the accused believed them to be. In terms of intelligibility the test adopted is an excellent model.

2. *Compulsion*

Several problems have arisen with the interpretation of the compulsion defence. They were almost all dealt with by the Court of Appeal in *Joyce* [1968] NZLR 1070. The specific problems which arose were:

> a) The omission from a list of excluded offences of an offence which obviously should have been included – robbery was included but not aggravated robbery.

b) The defence was expressed as being unavailable to those who are parties to "an association or conspiracy whereby they are subject to compulsion". What sort of association is contemplated?

c) What meaning was to be given to the phrase "is present when offence was committed"?

Problem (a) was dealt with in the only way seemingly open to the Court – the obvious drafting mistake was not one which the Court could remedy. Problems (b) and (c) both raised the same difficulty – the wording of the legislation had been changed as part of the 1961 revision. Were the minor drafting changes intended to bring about a change in the previously settled interpretation or were they simply improvements in drafting? Within the Burrows' labels these problems could be described as issues of penumbral meaning (does this situation come within the meaning of the words?), partially brought about by a lack of explanatory material as to the reasons for the change.

The Court's response is more difficult to label. On the question of the nature of the association (which disentitles the accused from the defence) the Court's approach was to greatly limit the potential width of the plain words. They held that for the accused to fall within the exception it had to have been foreseeable that it was the type of association which by its very nature might have given rise to compulsion. Having narrowed the exception, the Court then stopped short of the most beneficial reading to the accused by accepting an objective test which turned on what the accused ought to have foreseen. Concerning the meaning of "present" the Court gave a very literal reading to the concept – a person inside the store was not "present" so as to compel a colleague standing guard outside the store. This had the effect of considerably narrowing the availability of the defence. None of the interpretations adopted by the Court was demanded by the wording of the legislation although the final definition is undoubtedly a legitimate one. The guiding principle used by the Court seems to have been a satisfaction with the previous position and a dislike of the proposed new approach. The Court was very much in the business of moulding an acceptable defence using statutory interpretation to justify their preferred result.

The absence of any extraneous aids which could assist with the reason behind the drafting identifies a problem which we assume is inherent in all revisions of large Acts – there is a dearth of background information on the reason for such changes. Further, as happened in 1961 with the capital punishment issue, Parliamentary debate will often prove unhelpful as attention will focus on the major policy issues involved. Minor changes to the other 300 provisions within the Act do not receive consideration.

3. *Provocation*

Dominant in any consideration of provocation is the Court of

Appeal decision in *McGregor* [1962] NZLR 1069. Faced with a new test which sought to introduce a hybrid test by investing the actual defendant with a reasonable person's self control, the Court struggled. Many commentators have expressed surprise at the degree of difficulty which the Court did experience. For example, the Criminal Law Reform Committee observed in its Report on Culpable Homicide (1976), "[b]ut for the decision in *McGregor*'s case we would have thought that the modification effected by s.169(2) was plain enough" (Appendix II, para.17). Whatever the correctness of the Court's approach, two features of the Court's handling of the section stand out. First, the guiding philosophy of the Court was obvious. It can easily be labelled as a "purposive approach", and this notwithstanding an apparent dislike of the new changes:

> "Notwithstanding the observation of the [House of Lords], to the effect that it was well-nigh impossible to invest a reasonable man with the peculiar characteristics of the accused without making nonsense of the test, it is apparent, even from a cursory examination of the new section, that those who were entrusted with the drafting and approving of the provisions of the Crimes Act 1961 have attempted that task. Therefore it is plainly the duty of the Court to endeavour to see that their efforts are not rendered unavailing notwithstanding the manifold difficulties that arise in defining what is meant by the somewhat vague words 'the characteristics of the offender'." (p.1077)

Second, the Court in its efforts to make the section workable in its eyes embarked upon a limitation of the word characteristics; this limitation was not really warranted by the wording of the section but made necessary by its interpretation of the section as a whole. This is not to say that "characteristics" is not susceptible to different interpretations, but that the approach of the Court was somewhat more selective than otherwise would have been the case. In order to carry out what it saw as the purpose of the section, the Court was willing to move a considerable distance from any literal meaning.

4. *Insanity*

Section 23 largely stemmed from the English Draft Code of 1878 which in turn was a codification of the M'Naghten Rules (*M'Naghten's Case* (1843) 10 C & Fin 200). Clearly the drafters expected substantial judicial development of the codified defence. The 1879 *Report of The Royal Commission on the Law Relating to Indictable Offences* (U.K.) expressed the view that the defence would develop as our scientific knowledge concerning "the nature of the will and the mind" increased. Further they felt that "[m]uch latitude must in any case be left to the tribunal which has to apply the law to the facts in each particular case" (p.17). In fact, the judicial role was left even larger than this suggests as the section includes many undefined terms. Indeed, at the outset little can be said of Parliament's intention concerning the meaning of those words other than that they intended to leave the crucial explicative task to the courts (e.g, the meaning to be given to "disease of the mind").

The penal statute presumption can not be said to have been of much assistance in the exercise. This is particularly the case because of the unusual context of this so-called "defence". While obviously a finding of insanity can save an otherwise guilty defendant from conviction, it can also in some situations catch individuals who are otherwise not guilty of any offence. The holding of epilepsy to be a disease of the mind (see *Sullivan* [1984] AC 156 which is seemingly consistent with NZCA in *Cottle* [1958] NZLR 99 at 1013 per Gresson P.) is an example of the latter situation. That is, it results in an accused being found insane who would otherwise be entitled in appropriate circumstances to an outright acquittal. Furthermore, due to the indeterminate nature of the subsequent detention, a finding of insanity is not always seen as a benefit to an accused, even in the case when the only other option is a conviction. All of this indicates that a wide reading of the defence of insanity is not always to be seen to be the interpretation most favourable to an accused. An interpretation that is favourable to the accused in one case may have the opposite effect when applied in the next.

In leaving this interpretive task to the courts Parliament is, of course, always free to intervene as they did in 1961 with an amendment that had the effect of divorcing New Zealand from the effects of *Windle* [1952] 2 QB 826. In that case the English Court of Appeal held that the requirement that the disease of the mind render the accused incapable of "knowing that the act or omission was wrong" meant "legally" wrong. The amendment added the word "morally" to "wrong", thereby removing any chance of *Windle* being adopted in New Zealand. However Parliament went further to say "morally wrong, ***having regard to the commonly accepted standards of right and wrong***". The Court in *Macmillan* [1966] NZLR 616, 622, was left in no doubt that what was intended by those words was, in effect, wrong in his or her own eyes not those of the wider community. The Court's interpretation, which considerably widened the defence, indicated that it did not agree with the consequences of a literal reading of the new phrase. As Sir Francis Adams observed, "[t]his is to speak frankly, but nevertheless with respect, directly contrary to the words of the Act" (Criminal Law and Practice in New Zealand, 2nd ed. 1971, p.123).

5. *Conclusion*

These three sections were all amended in 1961 and considered by the Court of Appeal in the early years following the revision. Immediately apparent are the difficulties posed by such a revision in terms of the lack of any explanatory material. On occasions this can be divined by reference to a development in the common law, but normally problems are caused by more minor adjustments which potentially can produce changes to the law, but which may also be explained away as an attempt at happier wording.

The problems posed tend to have common features – the words themselves are relatively straight-forward but the "penumbral issue" of which conduct is included within the section frequently arises. The approach of the Court of Appeal has not always been a

happy one, having "got it wrong" on at least two occasions in the eyes of most commentators. Whether this is caused by the style of drafting or could be improved by better drafting is not an easy question to answer. On the one hand the Court of Appeal made it clear it regarded the sections as being difficult to deal with. Theirs is an opinion one must always give much weight to. Yet on the other hand to most commentators the wording of the provisions seemed clear.

Perhaps we can show what in our view is the most significant problem in the defences area by considering a word in s.23 that is ready and waiting for judicial interpretation. The required alternative incapacity (to that of wrongness discussed above) is that the accused be incapable of "***understanding*** the nature and quality of the act". This wording originated, like the rest of s.23, from *M'Naghten's Case* but there the phrase was "***knowing*** the nature and quality of the act." To muddy the waters further, the English Draft Code used the words "***appreciating*** the nature and quality of the act". This latter formulation was adopted in the Canadian Criminal Code and the Supreme Court of Canada has made a great deal of the change from "knowing" to "appreciating". By applying a well known but often ignored canon of interpretation the Supreme Court held that "'appreciating' and 'knowing' must be different ..." as "[t]he draftsman of the Code, as originally enacted, made a deliberate change in language from the common law rule..." (*Cooper* (1980) 51 CCC(2d) 129 at 145; see also *Barnier* (1980) 51 CCC (2d) 193 at 201–202). In the result the phrase was greatly narrowed from the common law rule by requiring not only awareness of the act but also an awareness of its significance.

The New Zealand statute, of course, uses neither the common law's "knowing" nor the Draft Code's "appreciating", but rather its own word "understanding". Interestingly the notes to the New Zealand Criminal Code Bill of 1883 say:

> "In ... the next section the word "appreciate" is used [in the Draft Code] where it seems to us that "understand" or "know" would be preferable. Appreciation seems to imply an act of reasoning, or comparing the matter with some relative matter or standard, instead of a mere knowledge or understanding. The words "competent to know the nature and consequences of his conduct" seem to us open to objection; but we suggest with diffidence what appears to us to be a more satisfactory expression."

That note was written by the Statutes Revision Commission and it can be seen that it is particularly unhelpful. If we assume that the note is admissible what will a New Zealand court say about the word "understanding" in s.23(2)(b)? The Commission has done nothing more than decide they do not like the words "know" or "appreciate" and therefore has chosen "understand" without apparently considering what it means. The problem we see is that the drafters of any statute must first decide what they want to say and then say it rather than abdicate the first task altogether. But here again the

expectation is that the courts will come up with the just interpretation. Such a legislative approach surely puts an unfair and seemingly impossible burden on a court.

CONCLUSION

In substantial areas of criminal law the Legislature has largely abdicated its role to the courts. General provisions permit the courts to develop and apply the law with little legislative assistance. This the courts have done in accord with a few vague and defeasible general principles, and their own ideas of what is socially desirable and of what will and will not be workable in practice. This exercise is purposive in a wide sense but it is rarely, except rhetorically, purposive in so far as implementing the intention of Parliament is concerned. Parliament is concerned to handle the problem by making conduct an offence. The niceties of mental elements, defences and the like are left to the courts. If current statutes – from the Crimes Act down to the most trivial of regulatory provisions – do give the sort of latitude to the courts that we have suggested, the first question for the future is whether this is desirable. We have already commented on a number of instances where we believe judicial creativity has had unfortunate results. In particular the uncertainties and inconsistency created by judicial efforts to make sense of largely unhelpful regulatory statutes is a cause for serious concern. Clearly interpretation is always necessary and clearly the courts must have some freedom to develop and apply the law as circumstances and their own perception of justice dictates. Arguably, however, the present freedom goes too far.

Before considering changes of a more specific nature, we believe that even within the existing framework and approach drafting could be considerably improved so as to reduce the necessity for judicial interpretation. We take encouragement from, and offer as an example of what can be done, the proposed redraft of the Canadian Criminal Code. It is, as most would know, the product of years of endeavour (dating back at least to 1971). In a recent article two of its architects, the Hon. Mr Justice Linden and Mr P. Fitzgerald, have noted, with justifiable pride, that the new draft (as yet incomplete) has thus far reduced 223 sections to 89, and 90 pages to 20 (see A. M. Linden and P. Fitzgerald "Recodifying the Criminal Law" (1987) 66 Can Bar Rev 529).

An example of what can be achieved is provided by the basic assault provisions. Assault in New Zealand is defined in two stages. Section 196 provides:

> "Everyone is liable to imprisonment for a term not exceeding one year who assaults any other person."

"Assault" is defined in the interpretation section of the act (s.2) as:

> "the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or

> threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose, and to assault has a corresponding meaning."

This is then supplemented by the case law on such issues as consent.

In contrast the new Canadian draft has three main features – it creates offences of harming and touching or hurting, it moves threats out of assault to a separate offence, and it covers the issue of consent. Thus their proposed offences read:

> s.1(2) Harm means to impair the body or its functions permanently or temporarily
> Hurt means to inflict physical pain
>
> s.7(v) Everyone commits an offence who [offensively] touches or hurts another person without that other's consent
>
> s.7(2) Everyone commits an offence who harms another person
>
> (a) purposely;
> (b) recklessly; or
> (c) through negligence
>
> [These concepts are elsewhere defined.]
>
> s.7(3) Exceptions
>
> (a) Clauses 7(2)(a) and 7(2)(b) do not apply to the administration of treatment with the patients informed consent for therapeutic purpose or for purpose of medical research involving risk of harm not disproportionate to the expected benefits.
>
> (b) Sporting Activities. Clauses 7(2)(a) and 7(2)(b) do not apply to injuries inflicted during the course of, and in accordance with, the rules of a lawful sporting activity.

The advantages of the Canadian approach are many; the new provisions are easy to understand, briefer and yet comprehensive. The law is there for anyone to read. We put forward the Canadian draft solely as an example of legislative technique. We express no opinion on the substance, but the communication of that substance is, we believe, a significant improvement. Clarity of communication requires, of course, a corresponding clarity of purpose. This, as we have suggested, is too often missing in criminal statutes. For example, when the Crimes Amendment Act 1980 was first introduced it created an offence of sexual violation with the following mental element:

> (b) The person charged –

(i) Knows that the other person does not consent; or
(ii) Is indifferent whether the other person consents or not;
(iii) Knows or believes that there is a risk that the other person does not consent;
(iv) Fails to turn his mind to the question of consent when, if he were to turn his mind to that question, he would realise that the other person does not consent; or
(v) Believes, without reasonable grounds, that the other person consents.

This provision is not only confusing and poorly expressed, it also leaves it quite unclear what mental states are excluded. It is a provision ripe for judicial interpretation. By the end of the Select Committee process this provision had been replaced by the words –

> "without believing on reasonable grounds that the other person consents to that sexual connection".

By then, presumably, the policy decision had been made that the initial provision really did mean to impose liability for negligence – which was probably its effect – and the drafting could be clarified accordingly. The result is a provision which, while one may disagree on the policy, is a model of clarity which should be proof against even the most hostile judicial interpretation. We suggest that much could be done in this area by a greater willingness on the part of legislatory and departmental staff to clarify and express their policy objectives.

Simple drafting, the definition of fundamental terms and a much more consistent effort to spell out the basic policy objectives of legislation cannot be seen as an intrusion into judicial discretion. It should clarify the law and render it more certain but it will not deprive the courts of necessary flexibility in individual cases.

A number of more specific proposals should be considered:

1. *Section 5(j)*

Most writers on statutory interpretation downgrade the contribution of statutory rules like s.5(j). Burrows is no exception to this commenting that –

> "... probably ... these developments (i.e. the adoption of a purposive approach) would have happened anyway, simply because a thinking and socially-conscious modern society would have demanded them." (p 132)

We are in broad agreement with this view. As the discussion of the *MacKenzie* cases shows, the courts in criminal cases already emphasise statutory purpose as the principal consideration and go to some lengths to identify that purpose in the face of statutory silence. Strict construction may feature prominently in judicial rhetoric in such cases, and may lead to an enhanced judicial reluctance to see offences as absolute but its significance in practice

is minimal. A new or strengthened s.5(j) is unlikely to have much impact. In most cases the courts adopt its approach anyway. In the few where strict construction is significant at present it will in the absence of changes in drafting practice continue to be so. Since most statutes are ambiguous courts are able to make use of that fact if they wish.

2. *A General Part*

The current revision of the Crimes Act includes a proposal for a General Part. The lack of a General Part has, as the Law Reform Commission of Canada has pointed out:

> "... required our courts to fashion, without legislative guidance, many of the basic principles of criminal law dealing with mens rea, drunkenness, necessity, causation and other matters. It is incoherent and inconsistent. It is sometimes illogical. Its organisation leaves much to be desired. (Law Reform Commission of Canada, *Recodifying Criminal Law* Report 30 vol.1 1987 p.3)

We fully support this proposal and believe that it will do much to reduce the harmful effects of the present structure. Key criminal law concepts – for example intent, recklessness, causation, volition, consent – are currently left undefined in the statutes and are used in those statutes in a variety of confusing and conflicting contexts. Inconsistency of interpretation is inevitable as courts are left to "protect the innocent without letting too many guilty people escape ... in the absence of any clear guidelines or declarations of policy" (Casey J. in *Millar* at p.2 of his judgment).

Any General Part should define such terms in simple everyday language or adopt new terms that are easily defined and consistent with everyday usage. Such definitions should eventually be applicable to all offences. In addition any General Part needs to include general principles of the sort discussed in the *MacKenzie* cases. When will intention and recklessness be required for liability? When will proof of the prohibited conduct be all that is required? Which defences include an objective test and what precisely does such a test consist of? Such principles can be expressed either as general principles subject to explicit statutory exceptions, or, in some cases, offences can be grouped into categories to which different principles apply. In either case the task of interpretation will be much reduced.

However the General Part is to be drafted, attention also needs to be given to regulatory offending and offence provisions outside the Crimes Act. A general provision providing a no fault defence unless explicitly excluded by the statute in all summary offences, for instance, would be consistent with the spirit of *MacKenzie*. If one wanted to go further one could do worse than adopt the provision of the proposed Canadian code which creates a residual rule for all Federal offences carrying a sentence of imprisonment that:

> "where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose." (Law Reform Commission of Canada *supra* cls. 1(4) and 2(4)(d).)

In addition, clear general definitions of absolute, public welfare and truly criminal offences would provide a convenient and easily understandable statutory shorthand.

3. *Common law defences*

The provision of a General Part and the detailed consideration of matters of justification and excuse would seem to render a provision like s.20 Crimes Act superfluous. Currently s.20 is certainly useful. It provides an element of necessary flexibility in a system where the criminal code does not explicitly recognise defences such as impossibility and necessity. In our view the Legislature needs to make up its mind on the range of defences that should be available in any civilised criminal code and it needs then to define those defences clearly and comprehensively. Any other course invites confusion, inconsistency and ultimately injustice. Accordingly we suggest s.20 be repealed in any recodification.

4. *Drafting*

Offence provisions are many and varied. Even the small sample covered in the *MacKenzie* cases shows a variety of styles and wording. Some use "*mens rea* words"; some have provisos; some have defences; some prohibit subject to exceptions; some only prohibit specific types of general conduct; some clearly shift the onus of proof; some only hint at it; and so forth. It ought to be possible, especially with a computerised data base, to identify such features and produce a much more standardised result. All offence provisions should be drafted with the following considerations in mind:

a) The onus and standard of proof for each element of the offence.

b) Has the level of culpability required for each of the elements of the offence been stated?

c) Whether any defences, specific or general, are available.

d) Have any concepts or terms been used in any unusual form or context so as to be potentially misleading?

e) Whether the provision departs in any significant and potentially misleading fashion from similar provisions in the same statute (or, perhaps, elsewhere).

TABLE: MACKENZIE CASES

CASES	SUBJECT MATTER	ULTIMATE CATEGORY (OUTCOME)	CASELAW ON SECTION/ OFFENCE	LITERAL MEANING	STRICT CONSTRUCTION	PURPOSE	INTERNAL CONTEXT:- 1.SCHEME OF ACT/SECTION	2.DEFENCES FOR DEFENDANT	3.DEFENCES FOR OTHERS	4.OTHER MEANS OF ENFORCEMENT	5.PENALTY	PRECEDENT OR DICTA	LEGIS. HISTORY
MACKENZIE 1983	Dangerous Flying	PW	None	No words	Against absolute	Yes Act/Actor & not unfair	Yes		Yes Significant		Shows not absolute	Sault Ste Marie & Dicta	Yes - Dissent
TAWA MEAT 1984	Price Freeze Regs	PW (Perhaps MR)	None	No words	No	No	No	Defence of lawful excuse not relevant			Small consistent with PW	MacKenzie only	No
PAUL 1984	Rent Freeze Regs	MR (Perhaps PW)	None	Yes critical	No	No	No				No	MacKenzie only	No
CAMPBELL 1984	Dog Control	PW (Arguendo)	None	No words	No	No	No				No	MacKenzie only (But irrelev- ant on facts)	No
VAN DEN BELD 1984	Importing Prohibited Goods	Absolute	Yes (Plenty) Absolute	No words	No	No	No				No	Precedent (Fraser's case-CA)	No
WAIKATO CARBONIS- ATION 1984	Pollution	PW	Yes Overseas (Sault Ste Marie)	Available but not discussed	Against absolute	Yes "Social Welfare"	Yes MR Elsewhere Not persuasive of absolute			Yes - significant shows not absolute	shows not absolute (serious)	MacKenzie strongly followed.	No
O'NEILL 1984	Excess Blood Alcohol	PW	Yes - Holding modified mens rea	No words	No	Yes - High standards public welfare	No				No	MacKenzie strongly followed	No
BROWNE 1985	Minor traffic - WOF	PW	Not direct	Rejected	No	Yes - Public welfare not immorality	No				Yes light shows PW	MacKenzie Sault Ste Marie and dicta	No
ONGOONGO 1985	Overstaying	Absolute	Yes Prior to amendment	Yes ? Clearly excluding MR	Yes but not relevant	No	No	Yes - MR Defences excluded -absolute			No	MacKenzie but words clear	Yes
SAVILL 1985	Road User Charges	PW	Not direct	No words	Against absolute	Yes Public welfare	No	Specific Defences do not preclude PW			No	MacKenzie strongly followed	Yes
CHILD FREIGHTERS 1985	Road/Rail provisions	PW	Yes - on the defence	No words	No	No	No	Yes - statute gives MR defence but onus on D. hence P.W.			No	MacKenzie + HC Dicta	No
ABI 1985	Dangerous machinery	Absolute	Yes	No words	No	Yes - Health & Safety severe danger	No	Yes - defence shows otherwise absolute		No help on absolute	Severe. No great indicator	Machinery cases per- suasive	Yes
MILLAR 1986	Disqualified driving	MR	Yes	No words	Against absolute for mens rea	Yes - Moral obloquy- true crime	No	Dicta - defences may show absolute			"some weight" for MR	MacKenzie + common law dicta + NZ dicta	No
MCLAREN TRANSPORT 1986	Road user charges	Absolute	Yes (Savill above)	No words	No	No	No	Yes- critical showing absolute			No	MacKenzie + other RUC cases	No
WAITAKI TRANSPORT 1986	Road user charges	Absolute	Yes (Savill above)	No words	Against absolute	Yes - Public welfare	No	Yes - defence shows otherwise absolute			No	MacKenzie Millar	Yes

Note : MR signifies a truly criminal offence requiring mens rea. PW signifies a public welfare regulatory offence.

THE OMBUDSMEN ACT: DRAFTING AND INTERPRETATION

Professor Kenneth Keith
Deputy President, Law Commission

Writing and reading Ombudsmen Acts

[This paper draws very heavily on two earlier papers, "Judicial Control of the Ombudsmen?" (1982) 12 VUWLR 299, 307-323, and "Open Government in New Zealand" (1987) 17 VUWLR 333, 342-343. They provide fuller references.]

Those drafting and applying Ombudsmen statutes face the following principal questions (among others) –

1. What public bodies and officers should be or are subject to the Act?

2. What actions of those bodies and officers should be or are covered?

3. By reference to what criteria, standards or rules (e.g. of correctness, reasonableness, fairness) should or is the Ombudsman to assess those actions?

4. What procedure should or is the Ombudsman to follow in handling a complaint?

5. What powers does the Ombudsman have to dispose of the matter?

This paper is concerned with aspects of answers to the first and second questions as given by parliaments and courts in New Zealand and elsewhere. It concludes with the lessons for those drafting and interpreting ombudsmen legislation, and for the preparation of interpretation legislation.

I begin with the New Zealand legislation for a number of reasons – it will be more familiar than other statutes; as the pioneer statute it provided a model for the rest of the Commonwealth; it presents interesting drafting lessons; and its basic words have been interpreted in litigation and in practice here and elsewhere.

DRAFTING THE LEGISLATION

The central provision of the Ombudsmen Act 1975 is s.13(1):

> "13. Functions of Ombudsmen – (1) Subject to section 14 of this Act, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named or specified in Parts I and II of the First Schedule to this Act, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part III of the First Schedule to this Act, or by any officer, employee, or member of any such Department or organisation in his capacity as such officer, employee, or member."

Subsection (2) goes on to make it plain that recommendations made by the various persons or bodies to Ministers and Councils are included:

> "(2) Subject to section 14 of this Act, and without limiting the generality of subsection (1) of this section, it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such Department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part III of the First Schedule to this Act, as the case may be."

Those two provisions replaced s.11(1) of the Parliamentary Commissioner (Ombudsman) Act 1962 (the greater detail at the end of the present s.13(1) results from the 1975 extension of the jurisdiction to local government):

> "11. Functions of Commissioner – (1) The principal function of the Commissioner shall be to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named in the Schedule to this Act, or by any officer, employee, or member thereof in the exercise of any power or function conferred on him by any enactment."

The provisions have at their core two contrasting elements. The two elements answer the first and second questions set out above. The lists in the schedules determine precisely the public bodies and officers which are subject to the powers of the ombudsmen. The answer to the second question is given in much more general terms: decisions "relating to *a matter of administration* and affecting any person or body of persons in his or its personal capacity" are subject to the Act. That flexible central phrase has left to practice (and on occasion to the courts) the extent of the matters the ombudsman can consider. Such open textured drafting can more easily give rise to dispute. Parliament has not given a precise answer to that second

question. By contrast the specific lists in the schedule mean that Parliament has at the outset and from time to time deliberately made the decision about the range of agencies to be affected. I will come back to those two answers and the contrast between them at the end of the paper.

At this stage I can take further some of the formal and more detailed aspects of the drafting. "Person" is defined in the Acts Interpretation Act 1924 s.4 as including "a body of persons". Is there any reason then for the emphasised words in the phrase "any person *or body of persons*"? If there is, what is to be made of the very next provision which enables the ombudsmen to investigate "a complaint made ... *by any person*" and *not* by a body of persons?

A second question about the 1962 provision is of more substance. The various actions (at least if taken by individuals), it appears, have to be related back to an "enactment". The exercise of a common law or prerogative power appears not to have been caught. There is no logic in such a distinction between enacted and other powers. That matter was addressed in the 1975 revision and the limit was removed. That is a good thing in the 1975 provisions. But consider their bad aspects. First, the presentation. The central phrase granting power is now less prominent because of the introductory limitation and the replacement of the stronger language "the principal function" by "it shall be a function". The reference to s.14 in the introductory phrase to each subsection only ever had a limited application and its intended effect is long since spent. But it still remains, it delays entry into the substance of the provision, and, for the diligent, it causes and continues to cause unnecessary reading of s.14. The reference to that provision should never have been included in s.13. Section 14 is as follows:

> "14. Limitation of time for certain complaints in respect of local organisations – Nothing in section 13 of this Act shall permit an Ombudsman to investigate any decision or recommendation made, or any act done or omitted, in or by any committee or subcommittee of any organisation named or specified in Part III of the first Schedule to this Act (other than an Education Board or a Hospital Board), or by any officer, employee, or member of any such organisation to which this subsection applies in his capacity as such officer, employee, or member, unless the decision or recommendation was made, or the act or omission occurred or continued within 6 months before Part III of the First Schedule to this Act came into force."

The provision, it will be seen on further reference to the schedule, was designed to allow only a limited retroactive application of the Act to those local government bodies which were being brought under the ombudsmen's powers for the first time in 1975. It was therefore applicable to only a small part of those powers and had practical effect for only a short time. If it was needed at all, it should have been included in an application, commencement or transitional provision. (That it was not needed at all appears from

the absence of a parallel provision in the 1962 Act and the 1968 Amendments.) A second point about the provision is that all but the last three lines is an unnecessary repetition of words from s.13(1). The third point about s.14 is a substantive one. It requires that the subject matter giving rise to the complaint occur ***within*** the period 1 October 1975 ***to*** 1 April 1976, and not ***after*** 1 April 1976. In practice, whatever the law, the provision has not been given that restrictive reading.

*A **suggestion**:*

> Functions of Ombudsmen
> The principal function of the Ombudsmen is to investigate any decision or recommendation made or any act done or omitted relating to a matter of administration and affecting any person in his or her personal capacity –
>
> (a) in or by any of the Departments or organisations named or specified in Part I and II of the First Schedule, or
>
> (b) by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part III of the First Schedule, or
>
> (c) by any officer, employer or member of any such Department or organisation in his or her capacity as such.

(The detail of the final paragraphs of the draft arises from the form of the schedule and the exclusion from the ombudsman's authority of Ministers (in (a)) and of the governing councils of local bodies (in (b)). I have not included a ***separate*** phrase (as in 1962) or subsection (as in 1975) relating to recommendations since the one mention of "recommendation" appears to be sufficient.)

> If the substance of s.14 is needed, it could read as follows –
>
> Limitation of time for local government complaints
> An Ombudsman may not undertake an investigation in respect of any organisation named or specified in Part III of the First Schedule (other than an Education Board or Hospital Board) if the decision or recommendation was made, or the act or omission occurred, more than 6 months before Part III came into force.

Given their relative importance, the ***function*** provisions should appear much earlier in the Act, and the ***limitation*** provision at the end. That rewriting and repositioning of the principal provision of the Act would make it more accessible: it is more straightforward to read. The rewriting however has no effect on the provision's meaning, specificity or generality. At its core it retains the two features of the present law – the ***specific*** listing by Parliament of the ***bodies*** that are subject to the ombudsman and the ***generality*** of the statement of the ***actions*** covered.

INTERPRETING THE LEGISLATION

I turn now to some of the cases in which that general language and variations on it have been interpreted. I include as well Canadian cases relating to disputes about the application of the legislation to particular public bodies; the disputes have arisen because the legislation, departing from the New Zealand listing approach, applies it for instance to "*administrative* units of the government". (An adequate consideration of this matter would also include the practice of offices of ombudsman. See for example "What is a 'matter of administration'?" in *Conference of Australasian and Pacific Ombudsmen*, Wellington 1974, 13.)

The word "administration" accordingly is usually a critical element of the disputes. An approach based on the dictionary might suggest that only management actions are covered, and accordingly individual unauthorised actions are excluded; or that government administration but not commercial management is included. Or the structure of the political system might suggest that "policy" is separated from "administration", the latter being concerned solely with the implementation of the former. Constitutional law and the doctrine of the separation of powers might propose a third limit: would "judicial" functions (such as the work of planning and disciplinary bodies) be excluded? Would a complaint that might lead to a change in the law?

In broad terms the Victorian courts have given narrow answers to the questions asked in the last paragraph. By contrast, the Canadian courts have in general upheld the breadth of the ombudsman's powers. How have these courts reached their differing positions? This question can be considered under three headings: (a) the word, (b) the statute, and (c) the purpose, spirit or object of the legislation establishing the office. We shall see later that the order of consideration of those headings may be significant.

(a) *The word*

The Victorian Supreme Court has interpreted "administration" as being limited to the executive functions of government and as excluding judicial or legislative functions. (*Glenister* v. *Dillon* [1976] VR 550; *Booth* v. *Dillon (No. 3)* [1977] VR 143; and *Glenister* v. *Dillon (No. 2)* [1977] VR 151.) The principal statement of reasons appears in a case in which the Full Court held that the Ombudsman could not deal with complaints about failures by the Crown Law Department to bring matters to trial and to answer related letters. According to Gillard J. the word "administration" –

> "... in the context of this Act ... means the executive part of government. In the United Kingdom and the United States of America, it is apparently common practice to refer to "the Executive" as "the administration". As an illustration, I take

> what Professor Dicey wrote last century in *Law of the Constitution*, 8th ed. p.484, viz: 'The merits and demerits of a non-parliamentary executive are the exact opposite of the merits and defects of a parliamentary executive. Each form of administration is strong where the other is weak, and weak where the other is strong. The strong point of a non-parliamentary executive is its comparative independence. Wherever representative government exists, the head of the administration, be he an emperor or a President, of course prefers to be on good terms with and to have the support of the legislative body'.
> Another ready example of the use of the word 'administration' as synonymous with executive action is also afforded by the terms of Article II of the mandate given to the Commonwealth of Australia over the former German New Guinea on 17 December 1920 as follows: 'The mandatory shall have full power of administration and legislation over the Territory, etc.' ...
> The nature of the executive function and its relationship to the other traditional functions is aptly described by Isaacs J. in *N.S.W.* v. *Commonwealth* (1915), 20 CLR 54, at p.90, where he cited Marshall CJ in *Wayman* v. *Southard*, 10 Wheat. 1 at p.46: 'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law'. In my view, the word 'administration' in this definition denotes the performance of the executive function of government referred to in such dictum and was never intended to comprehend any activity (or inactivity) in the areas of the performance of the judicial or legislative functions of government. This view finds support from the statement of the principal function of the Ombudsman to investigate actions in government departments as set out above and also the provisions of s.16 of the Act." [See (b) below] (*Glenister* v. *Dillon* [1976] VR 550, 557-558)

With respect, this reasoning is not persuasive. It is not persuasive even in its own terms. So Dicey does not indicate that "the executive" or "the administration" could not exercise legislative or judicial power. Indeed elsewhere in the same edition he expresses some concern about the fact that judicial or quasi-judicial powers were being conferred on officials (pp. xxxviii-xxxix, 384,385). The text of the New Guinea mandate establishes, if anything, the point opposite to that for which it is used: because the mandate does not expressly confer judicial power, that power must have been vested in Australia as part of its "full power of *administration*". A similar flexibility of the words appears in the Judicature Act; the High Court of New Zealand has all the judicial jurisdiction which may be necessary to administer the laws of New Zealand.

The two cases referred to relate to the allocation of power in constitutions which exclusively confer "judicial power" on the "courts" established under the constitutions. It is clear that

the narrow definition for that purpose is not the only definition for all purposes; indeed if it were, the power in issue in the Victorian case either has been accorded unconstitutionally (since the Crown Law Department is not a "court" and cannot exercise judicial power) or is not judicial (and is accordingly "administrative"?). A second difficulty with the reasoning is that it appears to assume that the only possible approach to the word is a separation of powers one. The Ontario Court of Appeal shows that this is not so:

> "To base the jurisdiction of the Ombudsman on the distinctions between executive, administrative, judicial and quasi-judicial powers is to build it upon quicksand."

The Court then briefly referred to the difficulties caused by classification in the judicial review of administrative action and continued:

> "Much has been done in Ontario by the Judicial Review Procedure Act, 1971 (Ont.), c.48, to minimise the harmful consequences flowing from these difficulties of classification in the field of judicial review of administrative action and I think that it is unreasonable to approach the Ombudsman Act, 1975 with this type of conceptual thinking in mind." (*Re Ombudsman and Health Disciplines Board of Ontario* (1979) 104 DLR (3d) 597, 614)

This passage reminds us that classification arguments based on separation of powers ideas have been found in administrative law as well as in interpreting constitutions. The courts as well as parliaments have reduced the significance of that classification approach. Two of the general reasons for that reduction in significance might be brought together here. They bear on any suggestion that such classification might be used in interpreting ombudsmen legislation. The first reason is that the proposed meanings of the concepts vary greatly. The second point (which relates to the following parts of this paper) is that the definitions should relate to, and possibly vary by reference to, the purpose: one particular statutory power or body may be judicial for some purposes (e.g. in terms of the obligation to comply with natural justice), but not for others (e.g. for the constitutional requirement that judicial powers be exercised only by courts, or for the purpose of the protection of the body by the law of contempt). This, the Privy Council and House of Lords held, were the respective positions of a tax commissioner in Ceylon and a local valuation committee in England, *Ranaweera* v. *Wickramasinghe* [1970] AC 951 JC and *Attorney-General* v. *BBC* [1981] AC 308.

The Ontario Court of Appeal provides not just the warning about the dangers of conceptualism. It provides as well a constructive contribution to the meaning of "administration". Following a review of part of the wider context, it adopted as a proper approach some words of de Smith:

> "'administrative' is 'capable of a wide range of meanings'

> and ... in such phrases as 'administrative law', 'administrative tribunal' and 'judicial review of administrative action', 'it refers to broad areas of governmental activity in which the repositories of power may exercise every class of ... function'." (104 DLR (3d) 597, 608–609)

The Victorian and Ontario courts have also produced conflicting answers to the question: is "policy" within the scope of "administration"? Dunn J., in the former court, having quoted some of the relevant provisions, asserted "some general conclusions" the first of which was that –

> "... the matter to be investigated must relate to administration; a matter of policy is outside the scope of the Ombudsman's jurisdiction."

As a result he ruled that the ombudsman could not investigate whether young prisoners should be required to sleep in dormitories or be locked in individual cells. The provision of funds for particular purposes was also outside jurisdiction. *Booth* v. *Dillon (No.2)* [1976] VR 434, 435, 439. By contrast the Ontario Court of Appeal referred to "one of the most common meanings of ['administration']":

> "... a power of decision where the paramount considerations are matters of policy, as opposed to a power where the decision is to be arrived at in accordance with governing rules of law ..." (104 DLR (3d) 597, 614–615)

The Court did not in fact act on the (limiting) second part of this statement, but the passage is nevertheless valuable in illustrating yet another of the possible meanings of "administration".

The position of Victoria may not be as restrictive as the above decisions would indicate. The "judicial" classification is not necessarily fatal to the ombudsman's powers. The formula in the statutes is not just a "matter of administration". It is "any action *relating* to" such a matter. The emphasised words gives a wide connotation to the expression; any action which might be regarded as reasonably incidental to the performance of an executive or administrative function would be included. Accordingly, the ombudsman has been held to have jurisdiction in respect of the judicial functions of discipline exercisable by a prison governor: they were incidental to the exercise of his administrative responsibility for due order, management and discipline. (*Booth* v. *Dillon (No. 3)* [1977] VR 143) This liberalising gloss at the same time adds a further complexity to the task of determining whether the ombudsman has jurisdiction.

(b) *The law*

The discussion so far has been principally concerned with the

word "administration" and its variants. But the word must be read in its context. The context includes the other provisions of the Ombudsman Act in issue. Again the Victorian and Canadian courts have made varying uses of them. The Victorian statute contains the following two provisions which were seen as relevant in the case concerning the Crown Law Department discussed in part above:

> "13(3). Nothing in this Act shall authorise the Ombudsman to investigate any administrative action taken –
>
> ...
> (b) by a person acting as legal adviser to the Crown or as counsel for the Crown in any proceedings;
>
> ...
> 16. At any time – [various legislative bodies] may refer to the Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which that [body] considers should be investigated by him."

What is to be made of these provisions? In the Victorian Crown Law Department case separation of powers arguments led to the opinion that the lawyers' actions relating to a trial were not "administrative actions". But does not the first provision clearly state that such actions *are* "administrative actions" – and are to be specifically removed from jurisdiction? Not so said the court: these provisions were included out of an abundance of caution ([1976] VR 550, 559, 564). That would be a more persuasive argument had the introductory phrase not included the words "administrative action": under the main provision of the Victorian Act the ombudsman may investigate "any administrative action" of departments and public bodies.

What then of the second provision? Again, if judicial matters already do not fall within the basic grant, why must they be excluded by a separate provision?

Further, what is to be made in this context of the differential treatment of legislation? Is the inference that legislation is within the power of the ombudsman? The answer to the first question might be that the authority here is in respect of "any matter" referred by the legislative body rather than an administrative matter (or action). But Menhennitt J. took different ground. The provision, he said, strongly supported the conceptual division and had a double significance:

> "In the first place, it impliedly assumes that a matter of administration does not comprehend any aspect of legislative action and therefore it expressly requires the Ombudsman to investigate and report upon any matter referred to him by either arm of the legislature or committees thereof. In the second place, there is expressly excluded from the matters

> which may be so referred a matter concerning a judicial proceeding, thereby confirming the concept that a matter of administration is a matter that relates to the executive arm of government but not the judicial arm." ([1976] VR at 564).

The first point seems to proceed on the basis that any matter referred from the Legislature would have a legislative character. But why should it? Is it not more likely that it would involve a petition by an individual to the Legislature about alleged administrative error affecting that person? The second argument again must imply the abundance of caution argument.

The Ontario Court of Appeal in holding that a disciplinary body exercising judicial powers is subject to the power of the ombudsman, has referred to three other provisions (which are also to be found in the Victorian Act) which refer to rights of appeal, objection, hearing and review in respect of the decision. While not conclusive they provided some assistance for they –

> "... would all seem to have substantial relevance to decisions of administrative tribunals made on a judicial or quasi-judicial basis and they create an atmosphere inconsistent with the view that the Act applies solely to purely executive or administrative decisions." (104 DLR (3d) 597, 615)

Other provisions in the legislation – not mentioned in the relevant Victorian cases – appear to deny as well the proposition that legislative and policy matters cannot be considered by the ombudsman. An ombudsman who comes to the opinion that the administrative action investigated "was in accordance with a rule of law or a provision of an enactment or practice that is or may be unreasonable unjust oppressive or improperly discriminatory" can reach the opinion –

> "... that any practice in accordance with which the action was taken should be varied; [or] that any law in accordance with which or on the basis of which the action was taken should be reconsidered"

and make appropriate recommendations (Ombudsman Act 1973 (Vic) s.23(1)(c) and (2)(c) and (d)).

These provisions do not look directly to the "administrative action" investigated. The grounds they list may obviously, however, be inextricably entwined with that action. They also suggest something of the evolution of an investigation. They call to mind a provision of the legislation which challenges, in this context, the usual concept of jurisdiction as involving decisive determination at a preliminary stage:

> "The Ombudsman may entertain a complaint even if on the face of it the complainant does not refer to an administrative action by an authority to which this Act

> applies if in his opinion there is a likelihood that the cause for complaint arose from such an action." (Section 14(5) of the Victorian Act; see similarly s.13(3) of the New Zealand Act.)

Statements that "the Ombudsman must be able at any time to justify an investigation as being within his powers" and that the ombudsman "would have no authority whatever even to commence an investigation" into an action if the action, as it turned out, had been taken by a person or body excluded from the Act's coverage ([1976] VR at 554), appear to ignore this provision.

The practical importance of this preliminary power to determine whether in fact there is a matter which can be properly investigated even although the complainant has not identified it is emphasised in a case concerning the English local commissioners. The relevant legislation requires the complainant to specify "the action alleged to constitute maladministration". The High Court held that the complaint must allege not only that the complainant suffered injustice but also that it was due to maladministration which must be specified expressly or by necessary inference. The importance of this requirement appears to be enhanced by the absence of such a requirement in the Parliamentary Commissioner legislation. The Court of Appeal nevertheless reversed, Lord Denning arguing as follows:

> "In order to give sense to the provision, I think that the word 'action' there refers to the same 'action' as is mentioned earlier in section 26(1). Expanded fully, section 26(2)(a) should read 'specifying the action taken by or on behalf of the authority in connection with which the complainant complains there was maladministration.' I realise that this means departing from the literal words: but I would justify it on the ground that it will 'promote the general legislative purpose' underlying the provision: see *Nothman* v. *Barnet London Borough Council* [1978] 1 W.L.R. 220, 228. It cannot have been intended by Parliament that a complainant (who of necessity cannot know what took place in the council offices) should have to specify any particular piece of maladministration. Suffice it that he specifies the action of the local authority in connection with which he complains there was maladministration." *R* v. *Local Commissioner for Administration ex parte Bradford Metropolitan City Council* [1979] QB 287, 313

This passage reminds us of basic justifications for the ombudsman: ease of access to files and informality of process, especially as compared with the litigant restrained by public interest immunity and relatively inflexible pleadings. It also leads into the next section.

(c) *The spirit*

So far we have been concerned with the meaning of the word "administration", and its meaning in the context of the ombudsmen

statutes. General approaches to interpretation and the approaches adopted in the particular cases being considered sometimes go beyond those two matters: the wider context and purpose of the legislation are to be drawn on. Canadian judges have expressly used their jurisdictions' equivalent of s.5(j) of the Acts Interpretation Act 1924.

> "Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. (Interpretation Act, RSO, c.225, s.10)

The first Canadian judgment – that from Alberta – on the powers of the ombudsman adopted a similar approach, based in this instance on the case law about interpretation rather than on the Interpretation Act:

> "... in considering the jurisdiction conferred by the Ombudsman Act, we must start with a conception of its purpose and then construe it in order to achieve such purpose ... The real meaning to be attached to the words must be arrived at by consideration of the mischief that the statute was intended to remedy and the provisions of the statute as a whole, in addition to the particular language of the section in question." (*Re Alberta Ombudsman Act* (1970) 10 DLR (3d) 47, 51)

A common response to such legislative and judicial statements is to say that they are all very well in principle but to stress the difficulty of discerning the mischief and purpose, especially given the restrictions on access to legislative history. The Albertan judge had no such difficulty. He reviewed, in a general way, the recent growth in administrative power and the related boards and tribunals, and he pointed to the inevitability of resulting clashes, injustices and imperfections:

> "I am sure our ombudsman came into being because of an apparent necessity that the vast body of administrative laws and those who administer them in their complete matrix be subject to scrutiny and report to the Legislature which created them." (10 DLR at 53)

To substantiate this view he then quoted at length from the report of a committee established by the Legislature to advise on the need for a tribunal to which persons aggrieved by an administrative scheme might take their complaints. That committee proposed the establishment of the Office of Ombudsman. Having justified his reference to the report, the judge summarised as follows:

> "I am satisfied that the basic purpose of an ombudsman is

> provision of a 'watch-dog' designed to look into the entire workings of administrative laws. I am sure this must involve scrutiny of the work done by the various tribunals which form a necessary part of administrative laws." (at 58)

Later in the judgment, having mentioned the ombudsman's reporting powers, the judge changed his metaphor:

> "[H]e can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good." (at 61)

The specific issue in that case was whether the Planning Board was an "agency". (The ombudsman has jurisdiction over departments and agencies.) "Agency [according to the Act] means an agency of the Government of Alberta and includes the Workman's Compensation Board." The judge was not impressed by the adverse inference that might be drawn from the specific reference to one Board. The legislative purpose, he believed, would not be carried out by applying any refined or technical concept of the term "agency". The Planning Board was covered.

The Ontario Court of Appeal has similarly drawn on a general view of the structure of modern day government in deciding that the Health Disciplinary Board is a board of the Government of Ontario and, as such subject to the power of the ombudsman.

> "It is ... a well-known fact that a significant part of governmental responsibility is carried on by a host of bodies, often called boards and commissions, which are not part of departmental structures but generally do report to the Lieutenant Governor in Council through a designated Minister. These boards provide an organisational method of executing the Government's ... responsibilities ... which is an alternative one to that of the departmental organisation." (104 DLR (3d) 597, 607)

The more specific reasons for the finding were that the Board was established by a provincial statute, the government appointed its members, and it discharged a provincially-assumed regulatory responsibility in the course of which it was required to apply provincial law.

This emphasis on governmental responsibilities might raise the question - what is the proper range of these responsibilities? This in a sense was in issue in the case in which the Sydney Steel Corporation, a Nova Scotia Crown Corporation, was held not to be subject to the ombudsman of that province. The corporation came within the statutory definition of a department but was it engaged in "the administration ... of any law of the Province"? The court thought not. The Act is concerned with the supervision of the

performance of governmental functions in the broadest sense; however –

> "The corporation's function is not governmental but entirely industrial and commercial – to make and sell steel. It is distinguishable from any private manufacturing company only in that it is owned and financed by the Province ... It is not a public utility which may be charged with a public interest and thus performs a public function. It cannot be said to be administering in any governmental sense its Act of incorporation ..." (*Ombudsman of Nova Scotia* v. *Sydney Steel Corporation* (1976) 17 NSR 361, 367–368)

Such reasoning requires courts to make judgments essentially of a political and economic kind: what is the range of governmental responsibilities? What is the court to make of the fact that the government has decided to be the owner and operator of the steel mill – a major employer in the Province? What if it decides to operate railways or provide an air service? Is it for the court to say that such are not governmental responsibilities? Many governments are, of course, heavily involved in such commercial and industrial activity. Should that governmental activity fall outside the apparent scope of the ombudsman's powers?

The Ontario Court of Appeal in the Health Disciplinary Board case referred as well to the nature of the Ombudsman Office, although it went on to caution about the value that can be gained from such general ideas:

> "Immediately before addressing myself to the issues to be resolved I think that it would also be helpful to make a general statement of my approach to the legislation. The office of the first modern ombudsman, it would appear, was created in 1809 in Sweden (the Justitieombudsman). Since that time similar offices have been created in several other countries and jurisdictions. Undoubtedly, these developments and a substantial amount of literature on the subject of ombudsmen have created popular notions of what the office of an ombudsman is all about. The core running through these popular notions is that an ombudsman is a representative appointed by a democratically elected Legislature to inquire into and report upon governmental abuses affecting members of the public. I do not think that anyone would dispute this – but all these general understandings are of no real assistance in determining the exact reach of the Ombudsman's jurisdiction in Ontario. On this particular matter the legislators in this Province have passed a statute which contains expressions which are not the duplicate of those in the legislation of any other jurisdiction which has come to my attention. It is the meaning of these particular expressions which requires determination in this proceeding – and not a distillation of popular notions or of the principles running through judicial decisions in other jurisdictions." (104 DLR (3d) 597, 602)

(The balance of this extract might be compared with the balance in

the judgment of the Supreme Court of Canada discussed at the end of this paper.)

The purpose of the legislation was relevant in a further Canadian case in which the administrative power in question was exercised by a delegate. In the normal course the delegator was subject to the ombudsman, but the delegate was not. Could the ombudsman's powers be avoided in that way? No, said the court. It used the Alberta case to show the purpose of the legislation. The intention –

> "... could be defeated by placing a restrictive interpretation on those sections of the statute where no restrictions are specifically mentioned.
> ...
> The purpose of the Ombudsman Act cannot be frustrated by 'an agency of the government' delegating its responsibility to a body which, in ordinary circumstances, is beyond the investigatory scope of the Ombudsman." (*Re Board of Commissioners of Saskatoon and Tickell* (1979) 95 DLR (3d) 473, 479)

The office of ombudsman is however a creature of statute. As such it has only the powers conferred by the statute. The purpose cannot be allowed to outrun the legislation. The passage from the Health Disciplinary Board case as quoted above makes that point. So too does the unsuccessful attempt by the English Local Commission to extract relevant documents from the Liverpool City Council. The legislation conferred powers on the Commission to require the production of information. But it continued:

> "... [any] of the authorities [including the City Council here] may give notice in writing ... with respect to any document or information specified [by the Commission] ... , that in the opinion of ... the authority, the disclosure ... would be contrary to the public interest; and where such a notice is given nothing in this Part of this Act shall be construed as authorising or requiring any person to communicate to any other person ... any document or information specified ...: Provided that a notice given ... by any authority may be discharged by the Secretary of State."

The city argued that the words were plain and that it could prevent disclosure. The Commissioner responded that that could not be so:

> "... so to construe the Act would be to emasculate the powers of the local commissioner and would be totally contrary to the intention of the Parliament when this legislation was before it."

Using the parallel provisions of the Parliamentary Commissioner Act 1967, he argued that the provision was not concerned with the flow of information *to* the Commissioner but rather with the use that he made of it. The court's answer was simple: the local commissioner statute did not say so. It was concerned with *all* transmission of

information. The court was not able to use the "certain tolerance" in construing legislation which was not wholly clear (*In Re Liverpool City Council* [1972] 1 WLR 995 DC). In this case only Parliament could give proper effect to its alleged original intent – by amending the statute, as it did three years later.

Another possible gap in ombudsman legislation is the power to reinvestigate. Can the ombudsman take up a matter on which a final report has been made? A literal approach and one emphasising that a statutory creation has only the powers conferred by the statute suggest a negative answer. So would an approach that compared the ombudsman to a tribunal: concepts such as *res judicata* and *functus officio* would support that. The Ontario and New South Wales Courts have nevertheless given a positive answer. In the Ontario High Court the Chief Justice begins with the broad, remedial, purposive approach required by the Interpretation Act and stressed in the Health Disciplines Board case. The final admonition in the quote already set out above meant that the court could not bestow powers which in its opinion are reasonable. The positive pursuit of interest and purpose can, however, carry with it the implication of powers:

> "[The] Ombudsman implicitly has a continuous function and has the power further to investigate subject to certain restrictions ... I have been driven to this conclusion by the nature of his function, the broad discretionary powers to investigate and to report and the freedom ... to act of his own motion."

He saw the office as unique. He did not think that the court should approach the powers in the same way as it approaches the powers of the executive branch. He did, however, suggest, on the analogy of tribunal law, that the power to investigate again might be limited to evidence not previously known to the ombudsman. The Court of Appeal, in upholding his ruling (on this point almost without reasons), was not even willing to have that restriction as a matter of law. (It might be a matter for the ombudsman's discretion.) (*Re Ombudsman of Ontario* (1980) 117 DLR (3d) 613 affirming 103 DLR (3d) 117) The New South Wales court took a similar line: "There is a no res judicata or issue estoppel of any kind created by a decision of the Ombudsman." More positively, the court should be slow to construe the Act in such a way that the powers of full and proper investigation are circumscribed. (*Boyd* v. *The Ombudsman* [1981] 2 NSWLR 308)

The Canadian Supreme Court in a recent most interesting judgment provides us with a valuable demonstration of the whole of the interpretive process in this area. It draws on the full range of material considered in the earlier Canadian cases. It does not however follow the order I have used. That is it does not begin with the particular words and move outwards. Rather the broad historical background is the starting point and from that the Court moves inwards to the particular words. It is difficult to avoid the impression that this has important consequences for the reasoning if

not for the final result. The Court rejected a challenge to the power of the British Columbia Ombudsman. It held that the ombudsman could investigate a refusal by the British Columbia Development Corporation to renew a business lease (*British Columbia Development Corporation* v. *Friedmann* (1984) 14 DLR (4th) 129). It began with the British Columbia equivalent of s.5(j) of the Acts Interpretation Act 1924.

> "Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Interpretation Act RSBC 1979, c.206, s.8.

The Court's examination of the objects of the ombudsman legislation traced the historical development starting with the Roman tribune and the control yuan of the dynastic Chinese and moved to the recent extensive growth of the office (including reference to a lecture given in Canada by Sir Guy Powles on aspects of the search for administrative justice). That enabled a general conclusion in the following terms which once again emphasise the open scrutiny of the exercise of public power:

> "The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman 'can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds.' On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned." (14 DLR at 139-140 quoting the Alberta case, referred to earlier)

The Court, against that general background and conclusion, only then turned to the statute and at that point only to the general legislative scheme, rather than to the particular provisions. The legislative scheme contained important information elements. The provisions conferring power to recommend, to report to the cabinet, and to report publicly -

> "... ultimately give persuasive force to the Ombudsman's conclusions: they create the possibility of dialogue between governmental authorities and the Ombudsman; they facilitate legislative oversight of the workings of various government departments and other subordinate bodies; and they allow the Ombudsman to marshal public opinion behind appropriate causes.

> Read as a whole, the Ombudsman Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. There is an abundance of authority to this effect." (at 141)

The Court finally moved to the particular words on which the challenge to the ombudsman's powers were based – in particular the argument that commercial or business dealings between the corporation and the tenant were not "with respect to a matter of administration". The Court, against the earlier background, refused to read "administration" narrowly. There was nothing in the word to exclude proprietary or business decisions. The inclusion of Crown corporations within the scope of the ombudsman legislation and decisions in other Canadian courts giving parallel provisions a wide reading also supported that broad view. The phrase "a matter of administration", in the opinion of the Court, encompassed everything done by governmental authorities in the implementation of governmental policy. Earlier the judgment also includes within the scope of "administration" the adoption and formulation of general public policy in particular situations. Only the activities of the Legislature and the courts would be excluded.

THE LESSONS

What can we learn from these cases? The lessons are for those who draft ombudsman legislation, and for the courts if asked to interpret it, as well as for those who administer it and are subject to it (and might consider referring disputed issues to court). The lessons may be broader, and relate to other legislation, including legislation about interpretation.

1. *Drafting Ombudsmen legislation*

The New Zealand and Ontario legislatures provide the principal alternative answers to the first question set out at the beginning of this paper; in New Zealand particular departments and bodies are specifically listed while in Ontario the description remains general and includes "other administrative units of the Government of Ontario". As we see the second, general approach can be the source of dispute and litigation. That fact may be one reason for preferring the listing approach with the resulting certainty in an area in which that is obtainable. A second and (for me) more persuasive reason is that Parliament should deliberately determine the bodies to be covered: those with political responsibility should decide, for instance, whether the ombudsman has authority over the Police, planning bodies, mental hospitals or health discipline licensing bodies. That appears to me to be part of the basic decisions about

setting up the office and adjusting its authority from time to time. Those matters are not ones that need to be or should be left to the courts. That view does of course assume that the legislature will continue to make those decisions in a consistent and principled way. The Legislation Advisory Committee in its report, ***Legislative Change: Guidelines on Process and Content*** (1987), which was accepted by the Government last year states that –

> "As a general principle, the Ombudsmen should have jurisdiction over departments and other organisations that make decisions relating to matters of central or local government administration and affect members of the public" (para.117).

The Chief Ombudsman has recently called attention to some apparent inconsistency in legislation and legislative proposals in this area.

How should the Legislature answer the second question asked at the beginning, that is define the actions (as opposed to the actors) to be covered? The answers tend to coalesce around the original New Zealand wording, especially "administration".

At the 1974 conference of Australasian and Pacific Ombudsmen an official from Papua New Guinea, referring to the fact that his country was considering establishing the office of ombudsman, asked whether they should use the phrase "a matter of administration". Mr Dixon, the Western Australian Ombudsman, who had already had his difficulties with the phrase, was prompt and clear with his answer: "I would advise against it". The phrase or variants of it have been at the centre of major disputes some of which (we have seen) have gone to court. Does that suggest that the general phrases should be replaced or modified? Modification or qualification is in fact common. Thus ombudsmen legislation often deals expressly (usually by way of exclusion) with such matters as commercial activities, staff disputes, trustee obligations and police complaints. Such particular provision of course brings precision and greater certainty in those areas (although it might create uncertainty in related areas). But it leaves the flexibility of the general wording for the great bulk of the cases. Uncertainty and disputes can continue to arise from the general phrase. The Victorian cases show that the disputes can cause real problems for the operators of the office. But the Canadian cases and a great deal of practice – especially the practice – show that those problems need not loom large.

One significant difference between disputes about the two questions this paper considers is that while an answer to the first must generally be given at the outset of an investigation that is not so of the second. That is, the investigation cannot in general proceed unless it is clear that the body is subject to the authority of the ombudsman. But the second matter will often not be a precise one nor will it be capable in many instances of resolution at the outset of an inquiry. Consider in the first place the unwillingness of

some courts to give the phrase clear limits (an unwillingness which I generally support). Consider further some aspects of the ombudsman's processes: ombudsmen can act on a complaint even if it does not disclose at the outset a matter over which they have authority. Secondly, ombudsmen can act on their own motion and alter the shape of a complaint. Thirdly, ombudsmen have wide discretions not to continue an investigation. And fourthly in the course of considering the complaint there may be wide choices about the issues to be raised: they might be concerned with the adequacy of the departmental procedures (e.g., has all relevant information been weighed?), or with the correctness of the factual findings, or with the application of a policy to the facts, or with the policy itself ... Sometimes the ombudsmen might do no more than raise the issues; at other times they might pursue them. Many examples might be given of these features of their powers and procedures. Some appear in this review. Just one from Victoria helps make the point. Several inmates in a prison complained about conditions there. Some of the complaints involved funds for additional or improved facilities. But the ombudsman did not take the "policy" point (nor, to its credit, did the department) and did not stop at that stage. Rather his deputy inspected the prison, interviewed the complainants and made a number of observations to which the department responded. This indicated that a new building was being completed and other changes made. The ombudsman concluded:

> "In the light of the action taken by the Department to remedy some of the matters complained of and in view of the fact that the rectification of the balance of the matters is largely a question of the availability of funds, which is a matter of Government Policy, the Ombudsman considered that he was unable to take any further action other than to report to Parliament by way of this Case Note, his view that a number of the facilities at Fairlea are most unsatisfactory." March 1981 Quarterly Report of the Ombudsman (Victoria) 26.

The criticism might still be made that policy as such is not excluded from the ombudsman's jurisdiction. But that would be carping – he has in fact investigated the complaints, recorded some improvements and given publicity (through Parliament) to the remaining problems. The limit which he recognises relates not to his right to investigate or even to report but rather to the kinds of recommendations he makes and to his willingness to continue to press the matter.

The ombudsman then is different from a court or tribunal with "jurisdiction" – the word usually meaning a power to decide (which the ombudsman lacks) and suggesting disputes about jurisdiction which can be resolved at the outset. Louis Marceau, the first Quebec Public Protector, has developed the contrast:

> "A court whose sessions are public and decisions final cannot proceed without strict receivability conditions or fairly elaborate norms of procedure. It cannot give up all rules of

> evidence nor free itself from basic formalism, any more than it can in principle do without the auxiliary role of attorneys. Nor can it formulate conclusions exceeding the specific cases it handles. In contrast, because he has no coercive power and can only render opinions which he hopes will be shared by the authorities, and because his investigations are informal, direct and private, the Ombudsman can easily be more available, eliminate all formalities, complete files on his own, discuss solutions freely and, finally, go beyond specific cases if necessary to influence administrative policy or even the regulation or legal text concerned. The Ombudsman has certainly not the powers of a court since his action is more or less comparable to that of a conscience but in a way he can go further and, in any case, he does not seek to fill the same need." 1973 Report (Quebec) 66.

I earlier suggested a different version of the basic grant of power in s.13 of the Ombudsmen Act. The proposed differences were mainly to its form. In the light of the cases and especially the practice (which I have scarcely touched) should further changes be proposed? On the wider reading, say of the Canadian courts, is the reference to "administration" really serving a useful purpose? Might the provision simply read something like –

> "The Ombudsmen may investigate any decision or recommendation made or any act done or omitted, affecting any person in his or her personal capacity,
>
> (a) in or by –" [as above]

A lesser change would be to retain the word "administration" in a less prominent form – e.g.

> "personal capacity, *in the course of administration*,
>
> (a) in or by –"

There is good precedent for both. The Hawaiian Act avoids the word and the first ombudsman in that jurisdiction, Herman Doi, after listening to the debate in Wellington at the 1974 Ombudsman conference, shook his head and said he did not realise what problems he had. Canadian Acts provide models of the second type – but they do not appear to have removed the ground for argument. The word itself attracts contention. Does that contention serve a valid purpose?

2. *Interpreting Ombudsmen legislation*

I come now to consider the role of the courts in dealing with the two questions. The cases indicate two different approaches. They show there is a risk in the open textured drafting of legislation. How are those differing approaches to be related to the growing willingness of the courts over the past twenty–five years to reassert and widen their traditional authority to control public

power: the insistence on procedural fairness, on allowing litigants access to official information relevant to their litigation, on the lawful use of discretions by Ministers and local authorities, and on lawmakers and tribunals staying within the law. Why should the ombudsmen be seen differently? It is not really suggested that they should be. If they fail to comply with the fair procedures laid down in their Acts or if they attempt to exercise their powers over bodies which are not subject to their authority, the court should be able to intervene. But there are several important features of the law relating to the ombudsmen that suggest judicial caution. One is that they can, in the end, "do no more than recommend or comment" (*City Realties* v. *Securities Commission* [1982] 1 NZLR 74, CA). A second is that they are themselves control agencies rather than the direct wielders of public power: that is the ombudsmen and the courts are on the same side. A third is that the statutes confer the powers in broad, non-technical terms, with flexible procedures to match.

Those features suggest doubts about courts going beyond an insistence on the statutory procedures and the protection of authorities not subject to the legislation. When they are invited to go further, experience to date suggests that they will do one of two things: either they will give weight to what they see as the broad language and discretions of the statutes and leave the ombudsmen free to act, or they will impose conceptual or similar limits. It is submitted that the former approach to interpretation is a correct one: it recognises that the word "administrative" does not carry a single correct meaning and here carries a broad one, that the statute is to be read as a whole, that it is to be interpreted in the wide governmental context in which the office operates, and that the purpose and general history of the legislation is relevant to the interpreter's task. More specifically such an approach recognises the open textured and broad discretionary character of the Act. To borrow from Lord Wilberforce, this is a case where the legislature is prepared to concede a wide area to the authority it establishes; it is not a case in which Parliament is itself directly and closely concerned with the definition and determination of certain matters of comparative detail and has marked by its language the intention that they shall accurately be observed, *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 AC 147, 209-210. This approach to the interpretation of the Act also recognises the inappropriateness here of the usual notion of jurisdiction over subject matter.

But if the courts are rarely asked to rule on the ombudsmen's powers, and when they are, they interpret them broadly, are the ombudsmen then essentially above the law and not subject to control? This is, of course, too simple a view. It assumes that officials comply with the law only if it is enforced by the courts. It also ignores other external controls and influences. The ombudsmen's powers are subject to the influences exercised by the departments with which they deal and to wider political processes. Those influences are based in large part on the fact that an ombudsman cannot order and must persuade.

3. *Drafting interpretation legislation*

The discussion of the lessons for legislatures at the beginning of this section relates specifically to the drafting of ombudsmen legislation. What lesson might there be for the preparation of legislation about interpretation? What is to be made of the willingness of the Canadian courts to look very broadly at the history and context of the legislation and generously at its purposes as against the almost singleminded concentration of the Victorian courts on the words and in particular on "administration"?

One difference is that at the relevant times the Canadian courts had a s.5(j) direction in their interpretation acts while the Victorian courts did not. That direction appears to mean that the broad choice of courts between different approaches to interpretation is restricted – at least, to return to an earlier point, if the mischief and purpose can be satisfactorily determined and the remedy discerned. Such a direction certainly encourages, if it does not require, an interpretation of ombudsman legislation against the background to and purpose of the establishment of the institution. Part of that approach and process is in the material used – the reports which led to the creation of the office, accounts of the growth of state power and of the need for greater controls over it, including accounts of relevant developments in other countries – some very distant in time and place, and writings by holders of the office and others.

The direction in s.5(j) does not mention the material actually to be used by the court. It operates at a somewhat loftier plane. The cases considered in this paper show however that a purposive approach often brings with it a wider use of documentary sources of one type or another. Justice Frankfurter makes the point neatly when in his outstanding paper on the Reading of Statutes he moves from purpose to method:

> "Judge Learned Hand speaks of the art of interpretation as 'the proliferation of purpose'. Who am I not to be satisfied with Learned Hand's felicities? And yet that phrase might mislead judges less disciplined than Judge Hand. It might justify interpretations by judicial libertines, not merely judicial libertarians. My own rephrasing of what we are driving at is probably no more helpful, and is much longer than Judge Hand's epigram. I should say that the troublesome phase of construction is the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye." (1947) 47 Columb L Rev 527,529.

If the court is to be engaged in a pursuit of meaning against the background of purpose, does it require legislation first to tell it to do that and second to direct it to the possibly relevant documents? History shows that the answer to both questions is ***not necessarily***. After all the Barons of Exchequer more than 400 years ago without

the assistance of such a provision resolved that the court was to discern and consider –

(i) the common law before the making of the Act;

(ii) the mischief and defect for which the common law did not provide;

(iii) the remedy that parliament had resolved to cure the disease; and

(iv) the true reason of the remedy

> "And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and the remedy *pro bono publico*." (*Heydon*'s case (1584) 3 Co.Rep. 7a, 7b; 76 ER 637, 638)

The courts *can* adopt that approach. They are not however *obliged* to. And often enough they have not: consider the Victorian courts. Legislation like s.5(j) can impose an obligation and give a sense of direction. But how much obligation and how much direction? Judicial practices and approaches alter – often without legislative change.

The statement or adoption of such a purposive approach is only the beginning. How is the act of interpretation to be practised? I take up Justice Frankfurter's reference to extraneous documentation and external circumstances. Do the cases indicate the value of provisions such as those included in the Australian interpretation acts which enable reference to extrinsic material? Again, the first answer is ***not necessarily***. In the cases reviewed above the Canadian courts have used that documentation and those circumstances without such specific legislative assistance. It may be that the s.5(j) equivalent has required that kind of reference: The pursuit of the object of the legislation according to its true intent, meaning and spirit cannot be determined otherwise. The Victorian courts by contrast did not look to that context.

There are two ways in which provisions about extrinsic material may be in effect limited; usually they merely ***enable*** use of the material (while s.5(j) is in ***mandatory*** form); and the purpose of the reference is usually limited. Thus the Australian provisions permitting consideration of extrinsic material operate "in the interpretation of a provision" of legislation and to assist "in the ascertainment of the meaning of the provision". The courts of course often use extrinsic documentation and circumstances for reasons other than the direct interpretation of particular disputed words and phrases. So they will go outside the strict words of the statute to discern the four matters listed by the Barons of Exchequer in *Heydon*'s case or to determine (to use the words of s.5(j)) the relevant public good, or the object, intent and spirit of the Act.

Judges and counsel, as members of the community in which the law has developed, will indeed sometimes do this unconsciously. So they cannot fail to be aware of, and to take into account, very much as a matter of course, the way in which the law in a particular familiar area has developed specially during their professional lives.

The contrasting views of a very experienced Australian lawyer-politician on the two kinds of provisions I have been considering can, subject to one qualification, bring this paper to an end. At a symposium held in Canberra five years ago on statutory interpretation Justice Murphy stressed the important effect of the purposive provision included in the Australian interpretation act two years before. That had given the courts a significant direction. He did not, on the other hand, think that he required a provision enabling him to read his Senate speeches (or others' for that matter). He was a conservative on that score. Later Australian experience may help us decide whether that is the right balance.

The qualification mentioned at the beginning of the previous paragraph relates to a further category of material extrinsic to the particular statutory provision. It is more important. The extrinsic material considered so far consists of the circumstances from which ***the particular provision*** arose and to which ***it*** is a response. The further category is the wider legal and constitutional context. An example helps make the point. The ombudsmen have wide powers to require individuals to provide information to them. The information must of course relate to the particular inquiry – that is one limit on the power, in this case ***arising out of the particular Act***. The Act recognises the existence of limits, in this case arising from ***other*** parts of the law:

> "Every person shall have the same privileges in relation to the giving of information, the answering of questions and the production of documents and papers and things as witnesses have in any Court."

Parliament then has expressly brought in that other body of law as a limit on the ombudsmen's powers. What if it had not? One thing is clear the privileges, say, against self-incrimination or in respect of professional communications could be argued to be limits on an apparently unfettered statutory power which it might have been thought could not possibly be read down; the argument has succeeded often enough, e.g. ***Commissioner of Inland Revenue*** v. ***West-Walker*** [1954] NZLR 191, CA, ***Rosenberg*** v. ***Jaine*** [1983] NZLR 1.

Arguments and cases like those remind us that in the public law field arguments based on constitutional principle or approaches to interpretation of powers typically (or at least often) come from outside the particular statute. Indeed they are often seen as having an autonomous existence. And they – along with similar and related methods and approaches to many other categories of legislation – raise for us a substantial question. Is it misleading for interpretation legislation to direct attention to the particular statute (and ***its***

purposes, origins and drafting history) but not to the wider values and principles of our legal and constitutional system which might affect interpretation? Consider for instance the Treaty of Waitangi and international obligations under such treaties as the International Covenant on Civil and Political Rights. The question is partly one of legal technique. It also has a large political component in terms of judicial response to legislative meaning.

DISCUSSION
Comment by participants

Roger Barker, Parliamentary Counsel, gave an example of a recent case study in which he had been involved which touched the range of issues addressed by the seminar. One of the reasons behind the Rape Law Reform Bill had been to lessen the trauma faced by a complainant giving evidence by limiting the number of people present in court. It was therefore proposed that during the complainant's evidence, only officers of the court and a support person requested by the complainant be present. In case there was anyone else who should be present, the Judge was also given the power to admit other persons. During the Select Committee's deliberations Mr Barker had been asked by one of the members what would happen if a complainant asked for more than one person to be present. He had answered that the Acts Interpretation Act would apply and "person" could be read in the plural. Another member of the Select Committee responded that the courts would then be full of placard waving feminists who would intimidate the jury. Roger Barker pointed out that the Judge had an overriding duty towards a fair trial and in any case the section [s.375A(2)(h) of the Crimes Act] read, "any person whose presence is ***requested*** (not 'required') by the complainant". Despite the supposed plain meaning of these sections, in a recent case a judge had held that the section meant ***one*** person only, as otherwise he would have no way of controlling placard waving feminists. He did however allow other people to be present under the other limb [i.e. s.37A(2)(i) "Any person expressly permitted by the judge to be present".]

The question now was how to amend the section to reflect parliamentary intention – does one say "any person or persons requested by the complainant except feminists carrying placards"? Mr Barker said that this was an instance where the Select Committee was properly advised, and now the law was in a mess in that the complainant had fewer rights than she would have had in the past.

Pat Brazil believed in such a case the court would have been assisted by counsel's views at the Select Committee. David McGee, however, pointed out that counsel's view would not be on the record. Professor Keith said this was not necessarily so: for example a recent judgment by Smellie J. examined the ambit of s.16 of the Criminal Justice Act (witnesses as to cultural and family background of offender), which was added in the course of the Bill's passage. Smellie J. examines the reporting back speech of the chairman of the Select Committee, the second reading speech of the Minister and the report of the Department of Justice, which was the clearest exposition of the provision. Professor Keith said this was the first time he had seen the departmental documents, which had gone directly to the point of issue and confirmed the Judge's view, used in this way, *Wells* v *Police* [1987] 2 NZLR 560.

Graham Taylor, a barrister of Wellington said he had noticed a different approach to interpretation in New Zealand and Australia in that Australian courts would start with the statute and define the purpose from the wording set down, whereas New Zealand courts, having looked at the section and statute, tried to work out what Parliament was trying to get at and then interpreted words to fit the purpose they had divined from their general first scan. With CER, he asked, should New Zealand courts harmonise and follow the Australian approach?

Graham Taylor also cited his experience of using parliamentary material in the Court of Appeal in a recent case. As counsel, he had put forward the text of a debate, part of which went against his argument, but was told that there was no obligation on counsel to bring to court aspects of Hansard which went against them.

Graham Taylor said he believed that legislative history of a provision was often more useful than what was said in Parliament. He gave the example of a recent High Court decision on the Contractual Remedies Act. One side had relied on a report of the Contract Law Reform Committee but a search of the legislative process had shown that the Committee's recommendation had been expressly disagreed with by the Select Committee and a small amendment made.

Graham Taylor's final point related to the possibility that the Government Printer could change the way Acts were interpreted. He gave the example of s.6(c) of the Official Information Act where the draft Bill had proposed that one of the grounds for information to be withheld was the "maintenance of the law, including the prevention, detection and investigation of offences". During the Bill's passage the words "and the right to a fair trial" were added to this clause. This provision was interpreted by Jeffries J. as having two distinct limbs. In the recent statutes reprint, however, a semi colon appears after the maintenance of the law, instead of the original comma. As a result it was recently argued before the Court of Appeal that the right to a fair trial was merely one of a number of examples of the maintenance of the law.

Professor Burrows agreed that one had to be careful in dealing with Select Committee reports to ensure that the recommendations were in fact adopted. Otherwise they were a very useful source.

Pat Brazil said he thought that the attitude of the New Zealand Court of Appeal and the High Court of Australia to interpretation were substantially the same today, and that CER should not lead to absolute harmonisation.

David McGee was surprised at the suggestion that counsel were not required to put all materials before a court, whether they favoured counsel's position or not. He suspected that this was a moment of blinding honesty by the judiciary, whom he believed used extrinsic materials as a further tool to reach the result which they wanted to in any case. He thought the more tools that were available, the more opportunities there would be to reach a decision further away from what the statute plainly said.

On the question of the Government Printer's insertion of a semi colon, David McGee said the question was "what is the authentic text?" Two Acts were signed by the Governor– General, one of which was lodged in the Wellington High Court and the other was kept in David McGee's room. The Government Printer's copy was evidence on its face but if in doubt the original should be looked at. In this case it may have been a simple printing error. Jim Cameron noted that annotators also sometimes picked up mistakes.

David McGee added that if parliamentary materials are going to be used, judges and lawyers would have to learn a lot more about what Parliament does and how it does it, as otherwise courts could be led into error. He gave an example of the Springbok tour case, *Finnigan* v. *NZRFU*, where the judgment of Casey J. refers to a copy of a unanimous resolution of the House of Representatives of 20 March 1985 which urged the Rugby Union not to proceed with the tour. The case was heard on the 11th, 12th and 13th July, at which time there was no printed Journal of the House of Representatives to satisfy s.30 of the Evidence Act. Instead, the resolution had been annexed to a letter from the Deputy Prime Minister to the chairman of the Rugby Union. David McGee said he did not regard this as sufficient evidence of the correctness of what the House might determine. Also the description of the resolution as unanimous was misleading as although no vote was taken, there were members of the House who did not approve of the resolution.

Grant Liddell noted the steps taken in Australia to specify what types of material could be relied upon, and David McGee's point that the procedures of Parliament are not just found in Hansard but a combination of records. This raised two problems in New Zealand, the first that the departmental reports were often not readily available, and Committee stages of the House were not recorded at all.

Professor Burrows agreed that references to Hansard were spasmodic and unorganised, and there needed to be a statutory provision saying what could be looked at. Important changes were often made at committee stages and it was hard to get even supplementary order papers.

David McGee said that the Journal of the House was the official record as recognised in the Evidence Act. Hansard, as a report of what was said, is not entirely reliable.

Bevan Greenslade had reservations about courts referring to introductory notes or other departmental material, as the department would often be a party in the case. In addition if the department's notes were ambiguous, where did one turn next. He believed that reliance on extrinsic material would lead to laxity in drafting, but that Ministers often were not worried about this, as they simply wanted to get the Bill through Parliament.

He then raised the question of whether all words were not ambiguous, as they may have more than two plain meanings. Professor Burrows said that words which often appeared clear

within one context were unclear when applied to a certain set of facts – for instance the provision that "every jury shall have twelve members". Although this requirement was totally clear on its face, other provisions were needed to explain what would happen if a jury member became sick or otherwise unavailable.

Simon France said that often the clearest indication of a Bill's intent came from materials prepared by departmental officers, who in any case prepared most Bills. If one was concerned about being dictated by the department, one should not refer to extrinsic aids at all, and should not stop half way.

David McGee said this led to the question of what is the intention of Parliament. Courts should look at what statutes mean and not what some department intended. The department's job was to ensure legislation was clear, and if it fails, it can't have a second bite.

Professor Keith believed the words "extrinsic" and "intention" caused problems. The Vienna Convention on Treaties uses the word "supplementary" instead of extrinsic and this may be more appropriate. In looking at Parliament's intention, we are looking at finding the meaning of what Parliament said. This meaning must be seen in context of society as a whole, the grammar used, and the area of the law. He gave the example of a recent tax decision by Richardson J. and noted it would be impossible for the judge to put out of his mind everything he knew about taxation. It was inevitable that judges would bring their own way of thinking to a problem.

Pat Brazil said that courts have always looked at extrinsic aids, and the Australian legislation recognises the practice. The real question was do you tell the courts they must stop somewhere – i.e. they can look at this document but not that one?

David McGee thought the question was rather what purpose you put extrinsic aids to. Some aids have always been used e.g. the Law Reports, but if one is using aids to find out what the legislature meant, that is very different from the traditional methods of establishing what the mischief is. Pat Brazil believed that the distinction between mischief and intent was very thin and had just about disappeared.

Professor Keith spoke of an experience he had had where Counsel had argued that the court could look at extrinsic materials to determine the mischief but not the remedy. This was impossible because the very sentence looked at indicated both the mischief and the remedy.

CLOSING REMARKS – Sir Owen Woodhouse

As you all appreciate, this seminar was set up by the Law Commission as one of the aids (if I can use that word) towards meeting one of its principal functions in terms of its Act, that is, to try and promote law that is both accessible and comprehensible and in particular the reference that has been given to the Law Commission by the Minister in relation to legislation.

We have received the most valuable help during these last two days. I really am amazed that so many people should have turned up to the discussions that we have been having here. In our wildest hopes we did not imagine we would be able to fill this lecture hall. So may I thank you on behalf of the Law Commission for the interest that you have taken. The Law Commission hopes that the kind of help that you have been giving us will not end with these formal kinds of seminars. Please keep in touch with us. We have got a great deal to learn from you all and we hope that either formally by letter or informally you will get in touch with us if you feel that we need to be prodded along.

To all those who presented papers, those who made comments and to our overseas visitors of course we express our very great appreciation. I now declare the proceedings closed.

APPENDIX A

NZ ACTS INTERPRETATION ACT 1924

Construction of Acts, etc.

5. General rules of construction – The following provisions shall have effect in relation to every Act of the General Assembly or the the Parliament of New Zealand except in cases where it is otherwise specially provided:

(a) Every Act shall be deemed to be a public Act unless by express provision it is declared to be a private Act:

(b) Every Act shall be divided into sections if there are more enactments than one, which sections shall be deemed to be substantive enactments, without any introductory words:

(c) Every Act passed in amendment or extension of a former Act shall be read and construed according to the definitions and interpretations contained in such former Act; and the provisions of the said former Act (except so far as the same are altered by or inconsistent with the amending Act or Acts) shall extend and apply to the cases provided for by the amending Act or Acts, in the same way as if the amending Act or Acts had been incorporated with and formed part of the former Act:

(d) The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning:

(e) The preamble of every Act shall be deemed to be part thereof, intended to assist in explaining the purport and object of the Act:

(f) The division of any Act into parts, titles, divisions, or subdivisions, and the headings of any such parts, titles, divisions, or subdivisions, shall be deemed for the purpose of reference to be part of the Act, but the said headings shall not affect the interpretation of the Act:

(g) Marginal notes to an Act shall not be deemed to be part of such Act:

(h) Every Schedule or Appendix to an Act shall be deemed to be part of such Act:

(i) Wherever forms are prescribed, slight deviations therefrom, but to the same effect and not calculated to mislead, shall not vitiate them:

(j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to

the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit:

(k) No provision or enactment in any Act shall in any manner affect the rights of [Her Majesty, her] heirs or successors, unless it is expressly stated therein that [Her Majesty] shall be bound thereby; nor, if such Act is of the nature of a private Act, shall it affect the rights of any person or of any body politic or corporate except only as is therein expressly mentioned:

(l) Every Act may be altered, amended, or replaced in the same session of the General Assembly or the Parliament of new Zealand in which it is passed.

Cf. 1908, No. 1, s. 6; 1908, No. 242, s. 4

Para. (a): See also s. 28 of the Evidence Act 1908 (reprinted 1965, Vol. 3, p. 1407).

Para. (k): The reference to Her Majesty has been updated from a reference to His Majesty. See also s. 5 of the Crown Proceedings Act 1950 (1957 Reprint, Vol. 3, p. 521).

As to power to insert additional explanatory words in notices prohibiting consumption of liquor in roads or streets closed for public events, see S.R. 1975/268/2 (2).

APPENDIX B

COMMONWEALTH OF AUSTRALIA

Construction of Acts to be subject to Constitution

15A. Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

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.

Use of extrinsic material in the interpretation of an Act

15AB.[2] (1) Subject to sub-section (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material—

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when—

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of sub-section (1), the material that may be considered in accordance with that sub-section in the interpretation of a provision of an Act includes—

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

COMMONWEALTH OF AUSTRALIA

Acts Interpretation Act 1901

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with sub-section (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to—

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

The New South Wales and Western Australia Interpretation Acts provisions relating to extrinsic material are similar to those of the Commonwealth of Australia, unlike the more general Victoria Interpretation of Legislation Act 1984:

VICTORIA INTERPRETATION OF LEGISLATION ACT 1984

PART IV.—PROVISIONS APPLICABLE TO ACTS AND SUBORDINATE INSTRUMENTS

Principles of and aids to interpretation.

35. In the interpretation of a provision of an Act or subordinate instrument—

(*a*) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(*b*) consideration may be given to any matter or document that is relevant including but not limited to—

(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.

INTERPRETATION ACT BRITISH COLUMBIA

Enactment remedial

8. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

ONTARIO ACTS INTERPRETATION ACT 1980 RSOc 219

Effect of preamble

8. The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act. R.S.O. 1970, c. 225, s. 8.

Marginal notes, headings, etc., not part of Act

9. The marginal notes and headings in the body of an Act and references to former enactments form no part of the Act but shall be deemed to be inserted for convenience of reference only. R.S.O. 1970, c. 225, s. 9.

All Acts remedial

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1970, c. 225, s. 10.

VIENNA CONVENTION OF TREATIES

LAW OF TREATIES

SECTION 3. INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

VIENNA CONVENTION OF TREATIES

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.