

**SUMMARY**

**REPORT ON EXTRINSIC MATERIALS  
AS AN AID TO STATUTORY INTERPRETATION**

**ISSUED BY  
THE LAW REFORM COMMISSION OF HONG KONG**

**Part I**

**Introduction**

1. This paper summarises the issues involved in this reference and the conclusions and recommendations of the Law Reform Commission. Part 1 deals with the background and the issues involved in considering extrinsic materials as an aid to statutory interpretation. Part II will deal with the recommendations of the Commission. The formal terms of reference are as follows:

*“Should the law governing the use of extrinsic materials in relation to the interpretation of statutes be changed and, if so, in what way?”*

**What is the importance of statutory interpretation?**

2. “Legislation constitutes the single most important source of law in our society. There is hardly any aspect of the education, welfare, health, employment, housing, income and public conduct of the citizen that is not regulated by statute”.<sup>1</sup> Every day, officials, private individuals, and professional advisers interpret legislation in order to carry out their functions. However, it is only where there is a doubt about the meaning or scope of a statutory provision, or about its relationship with other provisions that recourse to judicial interpretation is made.<sup>2</sup>

3. The interpretation of statutes is not only a matter to be considered by reference to the decisions of the courts. A statute is directed according to its subject matter, to audiences of varying extent. The intelligibility of statutes from the point of view of ordinary citizens or their advisers cannot be dissociated from the rules of interpretation followed by the courts, for the ability to understand a statute depends on intelligent anticipation of the way in which it would be interpreted by the courts.<sup>3</sup>

4. The United Kingdom Law Commissions in their joint Report stressed the importance of rules of interpretation of legislation being workable rules of

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<sup>1</sup> Preface to D.R. Miers and A.C. Page, *Legislation* (1st edition, 1982).

<sup>2</sup> *Ibid* at 177-178.

<sup>3</sup> The Law Commissions, *The Interpretation of Statutes* (1969), (Law Com No 21), (Scot Law Com No 11), paragraph 4.

communication between the legislator and the legislative audience as a whole.<sup>4</sup> This consideration is particularly important in any assessment of the value of the aids to interpretation extraneous to the statute itself.<sup>5</sup>

## What are extrinsic aids to interpretation?

5. Briefly, they are as follows:<sup>6</sup>

- (1) the historical setting;
- (2) parliamentary history and debates;<sup>7</sup>
- (3) official reports including Law Reform Commission reports;
- (4) explanatory memoranda issued by government departments;
- (5) textbooks and dictionaries;
- (6) international conventions;
- (7) *travaux preparatoires*;<sup>8</sup>
- (8) other statutes;
- (9) conveyancing and administrative practice;
- (10) uniform court decisions and usage;
- (11) statutory regulations made under an Ordinance.

6. These aids are discussed in detail in chapter 2. Extrinsic aids have become more important to the interpretation of legislation since the judgement in *Pepper v Hart*,<sup>9</sup> where the House of Lords held that the rules excluding reference to parliamentary materials should be relaxed on certain conditions.<sup>10</sup>

## Background : constitutional theory<sup>11</sup>

7. The dynamic between Parliament and the courts in relation to the creation and interpretation of law, and the need for a harmonious balance between them, must always be borne in mind in the debate whether, and to what extent, the courts can look at extrinsic aids. The doctrine of the sovereignty of Parliament has been traditionally understood to include the proposition that the judicial function in relation to legislation is confined to its interpretation and application.<sup>12</sup>

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<sup>4</sup> *Idem*

<sup>5</sup> *Idem..*

<sup>6</sup> Stair Memorial Encyclopaedia, *The Laws of Scotland*, Vol 1, paragraph. 1143 *et al.*

<sup>7</sup> Parliamentary debates are recorded in *Hansard*

<sup>8</sup> The documents that form the preparatory works of a treaty and include such matters as the proceedings of an international conference which produced the treaty.

<sup>9</sup> [1992] 3 WLR 1032

<sup>10</sup> See *infra* in paragraph 12.20

<sup>11</sup> See chapter 1.2-1.6.

<sup>12</sup> Miers and Page, "*Legislation*" (1982), 180.

### *Parliamentary intention*<sup>13</sup>

8. The court's duty when construing a statute is to determine what was the intention of Parliament and this could only be ascertained from the language of the statute.<sup>14</sup> Lord Diplock in *Fothergill v Monarch Airlines Ltd*<sup>15</sup> described the role of the courts *vis a vis* Parliament thus:

*"The court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state".*

9. Lord Roskill<sup>16</sup> queried Lord Reid's statement on parliamentary intention<sup>17</sup> by asking how the true meaning could be found unless the court ascertained what the user of the language really intended by the words he chose.<sup>18</sup> Burrowes argues that this view reflects the constitutional convention that the courts and the legislature should not inquire into each other's internal processes.<sup>19</sup> Lord Roskill suggested that the nearest one would get to a sensible meaning of the "intention of Parliament" is the intention of the draftsman, "treating him as the agent of those who intended and secured that this legislation, with this objective, should find a place on the Statute Book".<sup>20</sup>

### *Rules of construction*

10. The courts developed various rules for the interpretation of legislation. These were the mischief rule,<sup>21</sup> the literal rule<sup>22</sup> and the golden rule.<sup>23</sup> In Hong Kong, unlike the United Kingdom, the mischief rule, which has been superseded by the term "purposive construction", is incorporated into legislation. Section 19 of the Interpretation and General Clauses Ordinance (Cap 1) states:

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<sup>13</sup> See chapter 3.7-3.10.

<sup>14</sup> See *Salomon v Salomon* [1897] AC 22, 38.

<sup>15</sup> [1981] AC 251, at 279.

<sup>16</sup> *Infra*.

<sup>17</sup> "We often say we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant, but the true meaning of what they said" - in the *Black-Clawson* case [1975] AC 591 at 613.

<sup>18</sup> *Supra* at 80.

<sup>19</sup> "Interpretation of Legislation: a New Zealand perspective", 9th Commonwealth Law Conference, April 1990.

<sup>20</sup> "Some Thoughts on Statutes, New and Stale", [1981], Stat LR 77, 80.

<sup>21</sup> See chapter 1.4-1.7. The focus was on the defect for which the statute was passed and the remedy provided in the statute.

<sup>22</sup> This provided that the words in the statute had to be given their literal meaning no matter how absurd the result. See chapter 1.8-1.10.

<sup>23</sup> This was a modification of the literal rule which provided that the literal meaning was not relied on if this would result in an absurdity or inconsistency with the rest of the statute.

*“An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit”.*<sup>24</sup>

## **Purpose of extrinsic aids**

11. The context for looking at the purpose of extrinsic aids to statutory interpretation has been described thus:-<sup>25</sup>

*“It is self-evident that in order to understand a statute a court has to take into account many matters which are not to be found in the statute itself. Legislation is not made in a vacuum, and a judge in interpreting it is able to take judicial notice of much information relating to legal, social, economic and other aspects of the society in which the statute is to operate”.*

12. The United Kingdom Law Commissions classified the sources of extrinsic aids by reference to the purpose for which they might be used in interpretation:<sup>26</sup>

- (1) a judge might wish to inform himself about the general and factual situation forming the background to the legislation;
- (2) a judge might wish to know about the ‘mischief’ underlying the enactment - the state of affairs within the legal or factual situation which it is the purpose of the legislature to remedy or change; and
- (3) he might look for information which might bear on the nature and scope of the remedy or change provided by the legislation.

## *Admissibility*

13. The courts held in the pre-*Pepper v Hart*<sup>27</sup> judgements that they could only have resort to extrinsic aids where there was ambiguity or doubt, or if a literal construction appeared to conflict with the purposes of the legislation.<sup>28</sup> In deliberating on the admissibility of extrinsic aids, the Commissions<sup>29</sup> considered how far the material admitted might be relevant to the interpretative task of the courts, how far it

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<sup>24</sup> There is a similar provision in section 5(j) of the New Zealand Acts Interpretation Act 1924, section 15AA of the Acts Interpretation Act 1901 (Cth), section 15 of the United States Uniform Statutory Construction Act, and section 15 of the Canadian Interpretation Act 1927.

<sup>25</sup> (Law Com No.21) (Scot Law Com No.11)(1969), at paragraph 46. See chapter 2.1-2.4.

<sup>26</sup> *Idem*.

<sup>27</sup> [1992] 3 WLR 1032.

<sup>28</sup> Lord Scarman, in *Fothergill v Monarch Airlines* [1980] 3 WLR 209, 235, stated this with regard to an international convention, but it is equally applicable to domestic legislation.

<sup>29</sup> *Ibid*, at paragraph 53. It restricted this test of admissibility to Parliamentary proceedings but it is useful to extend this test to all extrinsic aids.

would afford them reliable guidance, and how far it would be sufficiently available to those to whom the statute is addressed.<sup>30</sup>

### **Rationale of the courts in excluding extrinsic aids<sup>31</sup>**

14. Various reasons have been given for excluding extrinsic aids:- that it would upset the constitutional balance between parliament and the courts,<sup>32</sup> that it breaches the conventions concerning parliamentary intention,<sup>33</sup> that it is in breach of the traditional rule of parliamentary privilege,<sup>34</sup> that it may give scope to the executive to dominate the way that the courts interpret ambiguous legislation which affects the rights of the individual,<sup>35</sup> and the need for legal certainty.<sup>36</sup> There are also the practical aspects that the materials may not be accessible or available, it may lead to lengthier trials, more legal costs researching the materials, and that the extrinsic material may be unreliable<sup>37</sup>.

15. Lord Diplock in *Black-Clawson Ltd v Papierwerke Waldhof-Aschaffenberg AG*<sup>38</sup> explained the link between the rules of construction of legislation, and the rule concerning the use of extrinsic aids thus:

*"When it was laid down, the 'mischief' rule did not require the court to travel beyond the actual words of the statute itself... for this would have been stated in the preamble. In construing modern statutes which contain no preambles to serve as aids to the construction of enacting words the 'mischief' rule must be used with caution to justify reference to extraneous documents for this purpose. If the enacting words are plain and unambiguous in themselves there is no need to have recourse to any 'mischief' rule"....*<sup>39</sup>

### **Rationale of the courts in allowing extrinsic aids<sup>40</sup>**

#### *Official reports*

16. In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg A-G*<sup>41</sup> it was held that the court was entitled to have regard to statements of the mischief aimed at contained in an official report,<sup>42</sup> but not to the

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<sup>30</sup> See chapter 2.3

<sup>31</sup> See chapter 3.

<sup>32</sup> See chapter 3.6.

<sup>33</sup> Chapter 3.7-3.10.

<sup>34</sup> See chapter 3.11-3.13.

<sup>35</sup> See chapter 3.14-15.

<sup>36</sup> See chapter 3.16-3.18.

<sup>37</sup> See chapter 3.19-3.23.

<sup>38</sup> [1975] AC 591, 614.

<sup>39</sup> *Ibid* at 638.

<sup>40</sup> See chapter 4.

<sup>41</sup> [1975] AC 591. See chapter 4.4-4.11.

<sup>42</sup> Viscount Dilhorne said that the reason why the court can look at the mischief is that it will reveal the object and purpose of the Act, that is to say the intention of Parliament (at 622). Therefore, it was legitimate to have regard to the whole of the committee's report, including

report's recommendations, nor to its comments on the draft Bill contained in the report. Viscount Dilhorne criticised this distinction as artificial and serving no useful purpose.<sup>43</sup> Instead, the test should be the weight attached to the recommendations. Where there was no difference, or no material difference, between the draft Bill in the report and the Act, it was legitimate to conclude that Parliament had accepted the recommendations and had intended to implement them.

17. Some courts upheld looking at such materials as reports of a Law Reform Commission as they were directly relevant to the issue before them. In *R v Warner*<sup>44</sup> it was suggested that there was room for an exception to the rule excluding the use of *Hansard*, "where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other." As *Hansard* was available in some textbooks, such materials were indirectly used by the court.

### *Purposive construction*

18. It could be argued that the courts more truly give effect to the intention of Parliament when they adopt a purposive approach. The trend towards a purposive construction, rather than a literal construction, has given an impetus to the courts to use extrinsic aids to resolve a question of ambiguity in the legislation.<sup>45</sup> Indeed, Lord Griffiths, in *Pepper v Hart*, stated "The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."<sup>46</sup> In New Zealand and Australia the courts have justified recourse to extrinsic aids by reference to statutory provisions for a purposive construction.<sup>47</sup>

19. There has been a somewhat inconsistent evolution of the principles concerning the admissibility of extrinsic aids. It seemed inevitable that the House of Lords would proceed to hold that, if courts can already look at white papers, official reports and Law Reform Commission reports, then it is arguable that they can also look at *Hansard*.<sup>48</sup>

### ***Pepper v Hart***<sup>49</sup>

20. The new rule of *Pepper v Hart* is outlined in the headnote as follows:

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the draft Bill, their notes on the clauses of the Bill and the draft conventions annexed to the report (at 623).

<sup>43</sup> At 622H. Lord Browne-Wilkinson in *Pepper v Hart*, *op cit* at 1056-7, also criticised the distinction as highly artificial.

<sup>44</sup> [1969] 2 AC 256, at 279, per Lord Reid, dissenting.

<sup>45</sup> Samuel "The Interpretation of Statutes" [1980] Stat LR 86, at 99.

<sup>46</sup> [1992] 3 WLR 1032, 1040 D.

<sup>47</sup> In *Brown & Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63, section 5(j) of the Acts Interpretation Act 1924 (New Zealand) was so used. The Australian section 15AA of the Acts Interpretation Act 1901 (Cth) provides for a similar purposive rule. This was before the legislation providing for extrinsic aids was enacted.

<sup>48</sup> *Pepper v Hart* [1992] 3 WLR 1032.

<sup>49</sup> See chapter 5.

*“Subject to any question of Parliamentary privilege, the rule excluding reference to Parliamentary material as an aid to statutory construction should be relaxed so as to permit such reference where (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied upon were clear”.*

## **Arguments in favour of admissibility**

21. Lord Browne-Wilkinson set out the arguments for allowing parliamentary materials as extrinsic aids as follows:<sup>50</sup>

- (1) Some statutory provisions are ambiguous. This can arise because Parliament may have been told what result certain words are intended to achieve. Later, the courts have to decide what the words mean and they may be capable of having two meanings.
- (2) The courts are ignorant of the underlying Parliamentary purpose, unless it is disclosed in another part of the legislation.
- (3) The very question to be decided may have been considered by Parliament.
- (4) The courts can already look at white papers, official reports, and Law Reform Commission reports to find the mischief.
- (5) A ministerial statement in Parliament should be an equally authoritative statement.
- (6) Judges have been inconsistent in their views about the admissibility of Parliamentary materials in past cases.<sup>51</sup>
- (7) The distinction between looking at reports to identify the mischief aimed at, but not to look at the intention of Parliament, by looking at the debates, is highly artificial.
- (8) Textbooks, which are allowed as an extrinsic guide, include references to explanations of legislation given by a minister in Parliament.
- (9) A number of judges have admitted in judgements that they have looked at *Hansard* to seek the intention of Parliament.<sup>52</sup>

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<sup>50</sup> At 1056-1061. See chapter 5.19.

<sup>51</sup> He referred to *R v Warner* [1969] 2 AC 256, at 279 where Lord Reid said “ ... this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other”. He also referred to Lord Wilberforce’s comments at the seminar in Canberra, *Symposium on Statutory Interpretation*, (AGPS, 1983, at 13).

## Arguments against admissibility

22. Lord Browne-Wilkinson set out the arguments against the use of *Hansard*, based on the objections of the Attorney General, as follows:<sup>53</sup>

- (1) Parliamentary materials are not readily available, in that they are not widely held in libraries outside London, and the Committee stages are not sufficiently indexed.
- (2) There is expense and effort in going through the materials.<sup>54</sup>
- (3) Lawyers and judges are not familiar with Parliamentary procedures and therefore will have difficulty in giving proper weight to the Parliamentary materials.
- (4) There will be more court time used in ploughing through a mass of Parliamentary materials.
- (5) There will be wasted research time and expense in lawyers trying to identify Parliamentary intention, where there may not be an answer in *Hansard*.
- (6) There is a constitutional objection, and the question of Parliamentary privilege.

## Response

23. Lord Browne-Wilkinson responded to most of these points as follows:

- (1) It is possible to obtain Parliamentary materials. No one suggests that Statutory Instruments<sup>55</sup> should not be referred to, and they are not available in an indexed form for a year after they are passed.

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<sup>52</sup> Lord Denning in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 admitted that *Hansard* had helped him reach his conclusions. Counsel on the appeal to the House of Lords protested that if he had known at the time he could have addressed the court on other passages of it (at 233).

<sup>53</sup> Lord Browne-Wilkinson set out the arguments of the Attorney General at 1055G. He then responded to these arguments at 1058B - 1059D. See chapter 5.20-5.21.

<sup>54</sup> Lord Griffiths did not agree with this point (at 1040G-H). Lord Mackay expressed concern that allowing *Hansard* would “involve the possibility at least of an immense increase in the cost of litigation in which statutory construction is involved” (at 1038B).

<sup>55</sup> Lord Mackay, who opposed the admission of *Hansard*, did not object to using *Hansard* for ascertaining the purpose of subordinate legislation, as such statements would be readily identified (at 1038H).

- (2) If significance is attached to the clear statements made by a Minister or other promoter of a Bill, then there will not be such a difficulty in assessing the weight to be attached to such statements.<sup>56</sup>
- (3) There will be an increase in court time but this will be balanced by the small number of cases where materials will be admissible,<sup>57</sup> and where the material will give a clear indication of the intent.
- (4) There can be a penalty of costs for those who attempt to introduce materials which do not meet the criteria.
- (5) There will be the expense of research but where there is nothing of significance in the ministerial statement, then further research will be pointless.<sup>58</sup>

There have been judicial developments of the new rule since *Pepper v Hart*. The numerous judgements are dealt with in chapter 6.

### Impact of *Pepper v Hart* in Hong Kong

24. The courts in Hong Kong have already applied the criteria of *Pepper v Hart*, though only a small number of cases have been reported. That is not to say that counsel are not referring the court to it when they produce *Hansard*. One difficulty is that many judges do not refer to *Pepper v Hart* when they are relying on or referring to *Hansard* so it can be difficult to trace the cases in some of the reported casebooks.<sup>59</sup> Despite the differences between the legislative process here and in the United Kingdom, only in *Ngan Chor Ying v Year Trend Development Ltd*<sup>60</sup> was a reservation expressed as to this fact by Findlay J. In *Matheson PFC Limited v Jansen*<sup>61</sup> Penlington J regarded a statement in the explanatory memorandum by the Attorney General as “a clear statement from the equivalent of a Minister...”.

25. The courts sometimes refer to the relevant extract from the legislative debates even where they have decided that the legislation is not ambiguous, obscure or absurd. In *Hong Kong Racing Pigeon Association Limited v Attorney General*,<sup>62</sup>

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<sup>56</sup> The judgment seemed to emphasise the quality and clarity of a ministerial statement. For example, Lord Browne-Wilkinson said at 1058G: “What is persuasive in this case is a consistent series of answers given by a minister, after opportunities for taking advice from his officials, all of which point the same way and which were not withdrawn or varied prior to the enactment of the Bill”. Lord Bridge was even stricter. At 1039H he thought there would only be rare cases where the very issue the court is asked to resolve has been addressed in Parliamentary debate, and where the promoter has made a clear statement directed to that very issue.

<sup>57</sup> See headnote which summarises the criteria.

<sup>58</sup> Lord Bridge, at 1040 recognised that where *Hansard* does provide the answer then it should be clear that the costs of litigation will be avoided.

<sup>59</sup> Hong Kong Cases does list out the extrinsic materials relied on, so making it easier for this research.

<sup>60</sup> [1995] 1 HKC 605, 610. See *supra*.

<sup>61</sup> (1994) Civil Appeal No. 72 of 1994, (CA) 26 July 1994.

<sup>62</sup> [1995] 2 HKC 201(CA). See chapter 6.19.

Nazareth J noted the purpose of the Bill as stated by the Secretary for Health and Welfare in moving the second reading. Nazareth J emphasised the constraints on the relaxation of the exclusionary rule, as set out in *Pepper v Hart* by Lord Bridge,<sup>63</sup> Lord Oliver<sup>64</sup> and Lord Browne-Wilkinson.<sup>65</sup>

### *Draft Clauses*<sup>66</sup>

26. The Commissions attached a number of Draft Clauses on extrinsic aids as an appendix to their report, as follows:

- “(1) In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say:*
- (b) any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed;*
  - (c) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time;<sup>67</sup>*
  - (d) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time; and*
  - (e) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section.*
- (2) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection(1) shall be no more than is appropriate in the circumstances; and*
- (3) Nothing in this section shall be construed as authorising the consideration of reports of proceedings in Parliament for any*

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<sup>63</sup> [1995] 3 WLR 1032, at 1039H.

<sup>64</sup> *Ibid* at 1042H.

<sup>65</sup> *Ibid* at 1056B.

<sup>66</sup> See chapter 7.17-7.18.

<sup>67</sup> It is interesting to note that the Civil Jurisdiction and Judgments Act 1982 provided that reports on the relevant Convention and Protocol might be considered, “in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances”.

*purpose for which they could not be considered apart from this section”.*<sup>68</sup>

## **New Zealand**

27. The New Zealand Law Commission did not recommend incorporating the rules on the use of extrinsic materials into legislation even though it could define the conditions on which resort might be had to *Hansard*, and the guidelines for its use. The Commission thought it preferable to leave this to judicial development.<sup>69</sup> This recommendation reflects the fact that the New Zealand Court of Appeal has maintained control over the development of the use of extrinsic aids. The New Zealand judiciary has been encouraged to develop the use of such materials by adopting a purposive interpretation called for by section 5(j) of the Acts Interpretation Act 1924, which is similar to section 19 of the General Clauses and Interpretation Ordinance (Cap 1).<sup>70</sup> “No doubt if left to themselves, the courts will work out such criteria on a case by case basis, but it will take time.”<sup>71</sup>

## **North America**

28. The Canadian courts have developed their own rules about the admissibility of extrinsic aids without recourse to legislation.<sup>72</sup> Lord Browne-Wilkinson, in *Pepper v Hart*, noted the dangers of the system in the United States where there has been abuse of the rules and pointed out the importance of strictly controlling admissibility.<sup>73</sup> However, the situation in the United States is unlikely to arise in our more controlled legislative process.<sup>74</sup>

## **Australia**<sup>75</sup>

29. The (Federal) Acts Interpretation (Amendment) Act 1984 inserted a new section 15AB into the Acts Interpretation Act 1901 (Cth) which provided for the use of extrinsic materials. This assisted the implementation of section 15AA,<sup>76</sup> which had been interpreted as providing a mandatory preference for a purposive interpretation.<sup>77</sup>

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<sup>68</sup> It is not proposed to deal with this suggestion as the judgment of *Pepper v Hart* has overtaken this matter.

<sup>69</sup> “Legislation and its Interpretation”, Preliminary Paper No 8, Paragraph 61. (December 1988)  
See further chapter 7.50-7.75.

<sup>70</sup> The New Zealand section provides that every enactment shall 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.”

<sup>71</sup> At 140.

<sup>72</sup> See chapter 7.76-7.86.

<sup>73</sup> [1993] 3 WLR 1032, at 1059.

<sup>74</sup> Chapter 7.88-102.

<sup>75</sup> See chapter 8.

<sup>76</sup> This had been inserted into the 1901 Act in 1981.

<sup>77</sup> “Current Topics Statutory guidelines for interpreting Commonwealth statutes”, (1981) 55 ALJ 711.

30. Despite section 15AB, and similar provisions in other Australian States allowing reference to reports of official bodies,<sup>78</sup> most of the judgements on extrinsic aids focus on *Hansard* rather than on official reports. The judiciary have relied more on the second reading speech of the Minister as an extrinsic aid than the speeches of members of Parliament. The judiciary have resisted attempts to persuade them to refer to extrinsic aids when the text appears to them to be clear. The Australian judiciary have responded in a balanced and controlled way to the new legislation providing for the admissibility of extrinsic aids. Even in Victoria, where the legislation provides a broad discretion, the judiciary have responded in a similar way to the judiciary in those other States where stricter criteria must be applied.

31. The Australian case law on Section 15AB(1)(a), which allows extrinsic materials to be used to confirm the ordinary meaning, has decided that they can be used even if the provision is otherwise clear on its face, although such materials cannot be used to alter its meaning.<sup>79</sup> Such alteration can only be effected if the conditions in subsection (1)(b) are satisfied.<sup>80</sup>

32. Some of the fears expressed by commentators in the United Kingdom after the judgement in *Pepper v Hart* have not been realized in Australia.<sup>81</sup> Indeed, Lord Browne-Wilkinson in that judgement<sup>82</sup> noted that Australia (and New Zealand) had relaxed the rule to the extent that he favoured. He also said that there was no evidence of any complaints coming from those countries. There has been a dearth of commentators in Australian legal journals on the various statutory provisions.

## Singapore

33. As a result of the decision in *Pepper v Hart*, Singapore amended its Interpretation Act to allow the use of ministerial statements as extrinsic aids. The Interpretation (Amendment) Act 1993<sup>83</sup> has a provision which is similar to section 15AB of the Australian Acts Interpretation Act 1901 (Cth).

## The drafting process<sup>84</sup>

34. There is an argument that if the draftsman drafts the statute “correctly” then the meaning of his words should represent what the promoter of the Bill meant

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<sup>78</sup> New South Wales, Queensland, Tasmania, and the Australian Capital Territory have similar legislation. Victoria has a shorter list of extrinsic materials and allows more judicial discretion. See chapter 8.47-56.

<sup>79</sup> Beckman and Phang “Reform of Statutory Interpretation in Singapore”, 15 Stat LR 69, (1994) rely on *Commissioner of Police v Curran* (1984) 55ALR 565 and *Gardner Smith Pty Ltd v Collector of Customs*, Victoria (1986) 66 ALR 377.

<sup>80</sup> See Annex II.

<sup>81</sup> See chapter 6.

<sup>82</sup> [1992] 3 WLR 1032, at 1059.

<sup>83</sup> It was brought into force on 16 April 1993. See further, Commonwealth Law Bulletin, October 1993, 1364. Section 9A of the Interpretation Act 1985 as inserted by section 2 of the Interpretation (Amendment) Act 1993.

<sup>84</sup> See chapter 9.3 *et al.*

to say.<sup>85</sup> Thus there would be no need to have recourse to extrinsic aids. But in reality words can have different meanings and so it can be difficult for the draftsman to accurately convey the meaning intended by the promoter. In those circumstances, the courts are justified in looking at extrinsic aids.

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<sup>85</sup> See Lord Simon, *supra* in the *Black-Clawson* case at 645.

## Sources of law post handover 1997

35. There are significant differences between the systems of statutory interpretation in the PRC and Hong Kong.<sup>86</sup> Consideration needs to be given as to how the judiciary, lawyers and the public will gain access to such sources as Standing Committee of the National People's Congress (SCNPC) interpretations of the Basic Law, and indeed the extrinsic materials which would assist in understanding such sources.

36. One way would be to continue to obtain expert evidence of Chinese law, which could include the production of extrinsic aids for interpretation of Chinese law. Section 59 of the Evidence Ordinance (Cap 8) provides that expert evidence can be given "as to the law of any country or territory outside Hong Kong ...".<sup>87</sup> It seems that this section will not be applicable after 1 July 1997, given its jurisdictional parameters. However, it could be argued that, since section 59 would not apply, an expert could then be called to give evidence of his opinion in the ordinary way. It may be that then there could be problems with proofs of "foreign" documents, as the courts might adopt less strict criteria for looking at foreign materials than they do at present.<sup>88</sup> This may be an area that needs some further consideration.<sup>89</sup>

37. We have to consider whether or not the courts in Hong Kong will consider themselves bound by the decision in *Pepper v Hart*, a House of Lords decision after 1 July 1997. Article 84 of the Basic Law provides that the courts of the Hong Kong SAR may refer to precedents of other jurisdictions. While it can be said that the existing body of jurisprudence will continue after 1997, that does not mean that the courts will regard themselves as bound by House of Lords decisions after 1997.<sup>90</sup>

## Part II

### Recommendations<sup>91</sup>

#### *Per incuriam*<sup>92</sup>

38. Some commentators have expressed concern as to whether previous statutory interpretation decisions, given in ignorance of *Hansard*, can now be regarded as given *per incuriam*.<sup>93</sup> This principle means that decisions were given in ignorance

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<sup>86</sup> See chapter 10.33.

<sup>87</sup> It is submitted that post-1997, this could not be interpreted to regard China as being "a country...outside" Hong Kong. See chapter 10.36.

<sup>88</sup> See *Li Jin-fei and Others v Director of Immigration* [1993] HKLR 256, at 264-5.

<sup>89</sup> Section 31 of the same Ordinance is also relevant, as it refers to judgments of any court of justice "in any foreign state", being proved by an authenticated copy being sealed with the seal of the court.

<sup>90</sup> See Wesley Smith's arguments in chapter 10.45.

<sup>91</sup> See chapter 11, Part II for more on the recommendations.

<sup>92</sup> See chapter 11.18 *et al.*

<sup>93</sup> Bates, "Parliamentary Materials and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*" 14 Stat LR 46, 50 (1993) and Zander, *The Law Making Process* (4th ed, 1994) 155.

of some inconsistent statutory provision or of some authority binding on the court concerned, thus making them non-binding.<sup>94</sup>

39. Since *Pepper v Hart* the courts have not yet decided whether parliamentary material indicating a clear parliamentary intention would justify a departure from the rules of *stare decisis*.<sup>95</sup> **The Commission shares the concern expressed by commentators as to whether previous statutory interpretation decisions given in ignorance of extrinsic materials would be vulnerable as being *per incuriam*. However, the Commission concludes that this is a matter which should be left to the courts to determine.**

## Legislating for extrinsic aids

### Advantages

40. There are unresolved areas that are not covered by the criteria in *Pepper v Hart*, and there are some uncertainties even for those areas covered by the criteria. This may hinder the interpretation of legislation. The limits of the parliamentary materials falling within the criteria are not entirely clear. One example would be explanatory memoranda. There has been little analysis as to whether the criteria should be used to include reports from, or speeches in, Standing Committees. The criteria in *Pepper v Hart* have not yet had an impact on treaties.<sup>96</sup> Neither *Pepper v Hart*, nor the judgements since, make clear the respective weight of different aids other than *Hansard*, nor their weight *vis a vis Hansard*.

41. Lord Lester summarised the main arguments in favour of abolishing the exclusionary rule as follows:

- “(1) *The purpose of using the parliamentary record is to help give better informed effect to the legislative outcome of parliamentary proceedings. ...*
- (2) *The history of a statute, including the parliamentary debates, may be relevant to determine the meaning where a provision is ambiguous or obscure, or where the ordinary meaning is manifestly absurd or unreasonable.*
- (3) *The parliamentary record may be of real assistance to the court :*
  - (a) *by showing that Parliament has considered and suggested an answer to the issue of interpretation before the court;*
  - (b) *by showing the object and purpose of the legislation and the mischief which the Act was designed to remedy;*

<sup>94</sup> *Morelle v Wakeling* [1955] 2 QB 379

<sup>95</sup> The doctrine of binding precedent or previous judgments of the courts.

<sup>96</sup> In *R v Foreign Secretary, ex p Rees-Mogg*, which arose out of the United Kingdom's accession to Europe, there was reference to *Pepper v Hart*. See *supra*, at 6. 72.

- (c) *by explaining the reason for some obscurity or ambiguity in the wording of the legislation; and*
  - (d) *by providing direct evidence for the origins, background, and historical context to the legislation.*
- (4) *Where a statutory provision has been enacted, following an authoritative ministerial statement as to the understanding by the Executive of its meaning and effect, such a statement may provide important evidence about the object and purpose of the provision and the intention of Parliament in agreeing to its enactment, and may create reasonable expectations among Members of Parliament and those affected by the legislation.*
  - (5) *The courts do not consider themselves confined exclusively by the text for the purposes of interpreting the statute. There is no basis in principle or logic for them to be willing to have regard to extrinsic aids in White Papers etc. while rigidly excluding any recourse to parliamentary debates.*
  - (6) *A purposive approach to interpretation requires the courts to construe legislation in accordance with its purposes. ...*
  - (7) *The argument based on delay and the increased cost of litigation applies to the use of any extrinsic aids to statutory interpretation....*
  - (8) *a rule permitting recourse to the Parliamentary record does not and should not mean that the courts are bound by any statement of Parliamentary opinion outside a statute as to what the statute means....*
  - (9) *Parliament could and should assist the courts ... by enacting legislation prescribing the circumstances and the extent to which extrinsic materials can be of assistance in the interpretation of statutes and subordinate legislation."*

He concluded that "Parliament should also ensure that the text of legislation is well drafted and that the legislation is readily accessible to the public."

## **Disadvantages**

42. Oliver expressed concern that selective use of ministerial statements favourable to government might reinforce the dominance of government and reduce the power of the courts to operate as checks against the dominant executive.<sup>97</sup> Most of the academic commentators were negative in their initial reaction to *Pepper v Hart*.

<sup>97</sup> Oliver, "*Pepper v Hart*", Public Law, 5, at 13, (1993).

They suggested that there would be increased costs to clients and the legal aid fund if lawyers routinely comb *Hansard* for the basis of an argument.<sup>98</sup> For the judiciary and members of Parliament there was concern over the extent to which in practice the rule would require the construction and evaluation of parliamentary statements and procedure, and the implications for the existing constitutional relationship of the legislature and the judiciary.<sup>99</sup>

43. **Having considered all the arguments, the Commission concludes that it would be desirable to codify and modify the existing common law principles and in the process extend and clarify the position by way of legislation.**

44. **The Commission recommends that it would be more useful to incorporate the criteria for the use of extrinsic aids in legislation by appropriate amendments to the Interpretation and General Clauses Ordinance (Cap 1)<sup>100</sup>. These would most suitably be included as section 19A, just after section 19, which is the existing guide to a purposive construction of legislation.<sup>101</sup>**

### **Federal Australian model**

45. **The Commission did not favour using the legislation from the State of Victoria as a model.<sup>102</sup> On balance, the Commission recommend that the Commonwealth of Australia model of section 15AB of the Acts Interpretation Act 1901,<sup>103</sup> with modifications for the Hong Kong context, should be adopted as the basis for legislative reform.<sup>104</sup>**

### *Confirming the meaning*

46. The Consultation Paper did not make any recommendation as to whether section 15AB(1)(a) should be adopted in Hong Kong.<sup>105</sup> None of the consultees supported its inclusion. There was concern that it would lead to an escalation of legal costs. One consultee thought that it would also make it difficult for judges “to limit the introduction of these materials and even more difficult to discipline parties by making adverse awards of costs”. The Commission accepts these submissions. **The Commission does not recommend that extrinsic materials be used to confirm the meaning of a statutory provision.**

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<sup>98</sup> Miers, “Taxing Perks and Interpreting Statutes: *Pepper v Hart*”, (1993) 56 MLR 695 at , 706.

<sup>99</sup> Bates, *supra*, at 55. He stated that his concerns had not been greatly alleviated in subsequent reported cases.

<sup>100</sup> See chapter 11.55.

<sup>101</sup> The full text of section 15AB is in Annex 1. For ease of reference the draft section 19A of the Interpretation and General Clauses Ordinance (Cap 1) is set out in Annex II.

<sup>102</sup> See Chapter 8.49 for the text of the Victorian provision. See chapter 11.56.

<sup>103</sup> This seems to have worked well in practice. See chapters 8 and 11.56.

<sup>104</sup> For the original text of section 15 AB, see Annex I, and the draft Hong Kong section, see Annex II.

<sup>105</sup> See chapter 11.62.

47. Section 15AB(1)(b) is similar to the criteria in the first limb of *Pepper v Hart* and thus seems to be unobjectionable.<sup>106</sup> **The Commission recommends that section 15AB(1)(b) be adopted, subject to deletion of the word "manifestly".**

### List of extrinsic aids

48. **The Commission recommends that the legislation encompass the list of extrinsic aids, as modified, which are included in section 15AB(2) of the Acts Interpretation Act 1901.<sup>107</sup> Thus the words "Legislative Council" should be substituted for "Parliament" in sections 15AB(2)(c), (e) (f) and (h). The term "policy Secretary or other promoter" should replace the word "Minister" used in sections 15AB(2)(e) and (f).<sup>108</sup>**

49. To maintain flexibility, one option would be to include in a schedule the list of aids in section 15AB(2) (as amended).<sup>109</sup> Power to amend the list of aids could be given to the Governor.<sup>110</sup> Alternatively, this could be by resolution of the Legislative Council. **The Commission did not favour this approach, and considered it inappropriate that the list of materials should be capable of amendment by the executive alone.**

### *Internal aids*

50. **Users of statutes do in practice use annotations, marginal notes, headings, and similar materials to assist in discerning the meaning of legislation.<sup>111</sup> The Commission recommends that the adoption of a provision such as section 15AB(2)(a) would be a sensible and useful development.**

### *Law Reform reports*

51. **The Commission recommends that section 15AB(2)(b) be amended to read "any relevant report of a commission, the Law Reform Commission, committee of inquiry or other similar body which was published before the enactment of the provision."<sup>112</sup>**

### *Other common law reports<sup>113</sup>*

52. **The Commission recommend the adoption of a provision along the following lines:**

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<sup>106</sup> See chapter 11.64.

<sup>107</sup> See Annex 1 and chapter 11.66.

<sup>108</sup> This would include the Attorney General.

<sup>109</sup> See chapter 11.67.

<sup>110</sup> Section 101 of the Interpretation and General Clauses Ordinance gives a similar power to the Governor.

<sup>111</sup> See chapter 11.69.

<sup>112</sup> See chapter 11.70.

<sup>113</sup> See chapters 10.38-39 and 11.71-72.

**“any relevant report of a body similar to the Law Reform Commission in any jurisdiction other than Hong Kong where the provision was modelled on legislation from such a jurisdiction implementing any recommendations of the report .”**

*Reports of legislative committees*

53. The Commission did not favour reference in the list of extrinsic aids to minutes of meetings of Bills Committees, as these are not always accurate and are not included in *Hansard*.<sup>114</sup> However, subsection (2)(c) is broad enough to include the report of a Select Committee<sup>115</sup>, though these are rarely established in Hong Kong. There are also references in the Standing Orders to reports of other committees, such as the Public Accounts Committee,<sup>116</sup> and Panels.<sup>117</sup>

54. **The Commission recommend that section 15AB 2(c) be amended to read:**

**“any relevant report of a committee of the Legislative Council before the time when the provision was enacted”.**

*Explanatory materials*

55. The breadth of the phrase "any relevant document" in relation to other explanatory materials in subsection 2(e) was queried by some members of the Commission.<sup>118</sup> It would appear to include Legislative Council briefs.<sup>119</sup> These briefs are prepared by the policy branch and forwarded to the Legislative Council when a Bill is introduced into the Legislative Council.. They are for the use of the Members of the Legislative Council. These briefing notes may come within the second limb of the criteria in *Pepper v Hart*.<sup>120</sup>

56. **The Commission agree to the inclusion of section 15AB (2)(e).**

*Second reading speech: subsection 2 (f)*

57. The Commission believe that it is important that materials should be accessible and available to the public. **The Commission has no difficulty in recommending the adoption of section 15AB(2)(f).**<sup>121</sup>

*Any document declared by the ordinance to be relevant: subsection 2(g)*

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<sup>114</sup> See chapters 9.58 and 11.74..

<sup>115</sup> See Order 61 and 62 (10).

<sup>116</sup> Order 60A(5A).

<sup>117</sup> Order 60E(14).

<sup>118</sup> See chapter 11.75.

<sup>119</sup> See chapter 9.63.

<sup>120</sup> This states “such other Parliamentary material as was necessary to understand such statements and their effect”.

<sup>121</sup> See chapter 11.76.

58. This is a useful provision. An example of its use would be where an ordinance is implementing a treaty. In those circumstances, the treaty and its *travaux préparatoires* can be treated as relevant documents which are extrinsic aids.<sup>122</sup>

59. **The Commission recommends the adoption of section 15AB(2)(g).**

*Relevant material in official record of debates: subsection 2(h).*<sup>123</sup>

60. **The Commission recommends that section 15AB(2)(h) should be adopted, and amended to read:**

***“any relevant material in the official record of debates in the Legislative Council”.***

*Weight*

61. **The Commission favoured the adoption of the draft clause suggested by the United Kingdom Law Commissions, rather than section 15AB(3).**<sup>124</sup> This reads:

***“The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (2) shall be no more than is appropriate in the circumstances.”***<sup>125</sup>

*Treaties*<sup>126</sup>

62. **The Commission recommends that clause 1(1)(c) of the draft Bill appended to the United Kingdom Law Commissions’ report be reworded as follows:**

***“any relevant treaty or other international agreement that is referred to in the Ordinance or in any of the materials that are referred to in this subsection.”***

63. **The Commission recommend that the draftsman use section 15AB(2)(g) to provide in a statute implementing a treaty that the treaty and its *travaux préparatoires* are relevant documents as extrinsic aids.**

64. **However, the Hong Kong Commission thinks it unnecessary to include a clause on the lines of Clause 2(b) of the United Kingdom Law Commissions draft Bill.**<sup>127</sup>

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<sup>122</sup> See chapter 11.77 and 11.93 .

<sup>123</sup> See chapter 11.83.

<sup>124</sup> (Law Com No.21) (Scot Law Com No.11)(1969). See chapter 7 also on the Commissions Report.

<sup>125</sup> See chapter 11.85.

<sup>126</sup> See chapter 10.51 *et al* and 11. 89 *et al*.

<sup>127</sup> For text see *supra* at paragraph 12.26.

65. **The Commission recommends that where an ordinance implements a treaty, the draftsman should include a clear statement to that effect and provide that the treaty and its *travaux préparatoires* are relevant documents as extrinsic aids.**

### **Application of section 15 AB to prior legislation**

66. There is an argument that no specific provision needs to be made as it may be covered by section 2(1) of the Interpretation and General Clauses Ordinance (Cap 1).<sup>128</sup> **The Commission recommends the adoption of section 2 of the Acts Interpretation Act 1984 (Cth), adapted to read:**

***“Except as otherwise provided by this Ordinance, the amendments made by this Ordinance apply in relation to all Ordinances whether passed before or after the commencement of this Ordinance.”***<sup>129</sup>

### **Interaction between the legislation and the common law**

67. Concern was expressed as to whether legislating for extrinsic aids would prevent developments in the common law and whether the common law would continue to run parallel to the legislation or would be consolidated, modified or abolished.<sup>130</sup> There is an advantage in the common law providing for matters not covered by the legislature. **The Commission favour a saving provision such as the following:**

***“Nothing in this section shall prejudice any right to rely on extrinsic materials as provided for under common law.”***

### **Rights of the individual**

68. There is a canon of construction in the common law that Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was the intention.<sup>131</sup> Any ambiguity has to be resolved against the creation of a criminal offence. In Hong Kong such common law rules of construction are governed by section 3(1) of the Bill of Rights Ordinance (Cap 383).<sup>132</sup>

69. The Commission queried whether the common law rule of construction was the same as the principles set out in the Bill of Rights Ordinance (Cap 383).

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<sup>128</sup> For text see chapter 11.98.

<sup>129</sup> See chapter 11.99.

<sup>130</sup> See chapter 11.100.

<sup>131</sup> *R v Hallstrom, ex p W (No.2)* [1986] QB 1090, at 1104. See chapter 11.107 *et al.*

<sup>132</sup> See chapter 10.2 for text.

The Commission also notes that the Australian provisions have not inhibited the courts developing a jurisprudence which has balanced the needs of the citizen with the needs of the executive.<sup>133</sup> **However, for the avoidance of doubt, the Commission recommend that a provision be inserted in the proposed legislation to the effect that extrinsic material not be used to derogate from the rights of the individual:**

***“Nothing in this section shall prejudice the common law rule that ambiguous legislation cannot be construed to derogate from the rights of individuals”***

## **Non-statutory reform**

### *Objects clause*

70. The Renton Committee recommended that an objects clause could be used when it was the most convenient method of clarifying the scope and effect of legislation<sup>134</sup>. The *Hansard* Commission on the Legislative Process<sup>135</sup> did not agree and did not consider it would assist the principle of certainty in the law. It can also be argued that the purpose should be apparent on the face of the Bill by incorporating a purposive meaning into a clause itself. The Commission considered the argument that incorporating objects clauses<sup>136</sup> might reflect more clearly the purpose of legislation.<sup>137</sup> It might also be more in keeping with the spirit of section 19 of the Interpretation and General Clauses Ordinance (Cap 1). **On balance the Commission considers that mandatory objects clauses would cause practical difficulties and impose strictures on the draftsman.**

## **Specially prepared explanatory memoranda<sup>138</sup>**

71. The explanatory memoranda of Hong Kong Bills<sup>139</sup> are not very detailed. The only requirement is that they should state the contents and objects in non-technical language.<sup>140</sup> The United Kingdom Law Commissions recommended specially prepared explanatory materials to accompany Bills.<sup>141</sup> Zander described

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<sup>133</sup> See chapter 8.28-8.31.

<sup>134</sup> The Renton Committee Report on “The Preparation of Legislation”, paragraph 11.8 (1975: Cmnd 6053). See chapter 9.20 *et al.* Also, the discussion paper, “Extrinsic Aids to Statutory Interpretation”, (1982), and the *Symposium* on Statutory Interpretation, Canberra, February 1983 (see chapter 8).

<sup>135</sup> (*Making the Law*) (1992). See chapter 7.

<sup>136</sup> See chapters 9.23.and 11.114.

<sup>137</sup> In New Zealand, statutes increasingly include a purpose clause. See “A New Interpretation Act”, Report No. 17 of the New Zealand Law Commission, paragraph 70 (1990).

<sup>138</sup> See chapters 7.8, 9.35 and 11.115-117.

<sup>139</sup> The Bill is published, with the explanatory memorandum, in Supplement No 3. When enacted the Ordinance, without a explanatory memorandum, is published in Supplement No. 1. Subsidiary legislation, with explanatory notes, are published in Supplement No. 2.

<sup>140</sup> Order 38(6) of the Standing Orders of Legislative Council. See chapter 9.29.

<sup>141</sup> (Law Com No.21) (Scot Law Com No.11)(1969). See chapters 7.8-7.16 , 9.45 and 11.119 .

their proposal as a mixture of the preamble, the existing explanatory memorandum and notes on clauses.<sup>142</sup>

72. The Commission gave serious consideration as to whether to recommend a specially prepared explanatory memorandum,<sup>143</sup> which included the background, object and purposes of the legislation, and which was amended to reflect changes as the Bill went through the Legislative Council.<sup>144</sup>

73. However, there would be disadvantages in relying on such an explanatory memorandum.<sup>145</sup> It would be more useful to have longer objects and reasons set out in the existing explanatory memorandum. **After considering the arguments for and against the use of specially prepared explanatory memoranda, the Commission does not recommend their adoption.**

## Explanatory material

74. The Hansard Commission on the Legislative Process,<sup>146</sup> like the Renton Committee, recommended that the needs of the users should govern the legislative process rather than the needs of those who passed the legislation.<sup>147</sup> They recommended that explanatory notes on sections, based on Notes on Clauses,<sup>148</sup> would be approved by the Minister and laid before Parliament, but should not require formal approval. These would be published at the same time as the Act.<sup>149</sup> They also recommended that the courts should be allowed to make use of explanatory notes on sections in Acts and statutory instruments.<sup>150</sup> A similar suggestion had been made by the New Zealand Law Commission.<sup>151</sup>

75. **The Commission considers that the inclusion of explanatory notes would present practical difficulties, similar to those identified in relation to the proposed specially prepared explanatory memorandum, and does not recommend the adoption of this approach.**

76. The New Zealand Law Commission in their more recent report<sup>152</sup> recommended cross-references to other Acts, to cases, or to reports of law reform or other relevant bodies, on which legislation is based (possibly in the form of a table).

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<sup>142</sup> *The Law Making Process*, (4th edition, 1994), at 157.

<sup>143</sup> See chapter 7.8 *et seq.*

<sup>144</sup> Chapter 9.35-37

<sup>145</sup> See chapter 9.36 and 11.117.

<sup>146</sup> "Making the Law: The Report of the Hansard Society Commission on the Legislative Process" (1993).

<sup>147</sup> *Ibid* at paragraph 7.

<sup>148</sup> These would be modelled more on the Notes on Clauses, which contain an explanation of the purpose and effect of each clause, often including practical examples of its application.

<sup>149</sup> Paragraph 250, at 63.

<sup>150</sup> See chapters 7.37, 9.45 and 11.119.

<sup>151</sup> See chapter 9.76 and 77.

<sup>152</sup> "The Format of Legislation", Report No. 27, December 1993, paragraph 33. See Commonwealth Law Bulletin, January 1994, at 202 for a useful summary. See chapters 9.78 and 11.120.

**77. The Commission considers that it would be useful to include in each ordinance references to other relevant legislation, or to reports of law reform bodies on which the ordinance is based. This should include overseas legislation where that was the source of the Hong Kong provision.**

*Explanatory memorandum*

78. The Commission considered the Renton Committee's recommendation that notes on clauses and similar additional explanatory material should be made available at Committee stage debates.<sup>153</sup> The Commission consider that an authoritative memorandum with the Bill at the initial stages would be sufficient.

79. **The Commission does not consider that it would be necessary to deflect resources to prepare an explanatory memorandum for all amendments, but it would be of considerable assistance for complex or sensitive Bills.**<sup>154</sup>

80. **The Commission concluded that it was unrealistic to have a final version of an explanatory memorandum, revised to reflect all amendments passed, incorporated into every ordinance**<sup>155</sup>.

81. **The Commission considers that it may be appropriate in complex legislation, legislation implementing a report of a law reform body and legislation with an international element to refer to the extrinsic materials in a schedule.**<sup>156</sup> This would be similar to the Arbitration Ordinance (Cap 341),<sup>157</sup> where a schedule of extrinsic materials was inserted which facilitates tracing the relevant documents.

82. The New Zealand Law Commission had recommended that the following information should be included in any ordinance: the date of the second reading speech; the name of the Bill as introduced; the date of other parliamentary stages; the number of the Bill and of its later versions and of any relevant supplementary order paper; and a reference to any printed report on the Bill.<sup>158</sup>

83. There are practical difficulties in implementing these recommendations in Hong Kong.<sup>159</sup> The front page of the Laws of Hong Kong already contains the previous legislative history. Especially when there was a long Ordinance with a large number of amendments, it may be confusing if more than the date of the Second Reading Speech was inserted.

84. **The Commission considers that the New Zealand proposals should be adopted in a modified form: the date of the second reading speech should be inserted in each ordinance as originally printed but omitted from the revised edition.**<sup>160</sup>

85. The New Zealand Law Commission suggested that a brief summary of the Act's legislative history could include references to any relevant law reform

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<sup>153</sup> Paragraph 15.10 of the report, *supra*.

<sup>154</sup> See chapter 9.31- 9.32,9.78 and 11.120.

<sup>155</sup> See chapters 9.33-4, and 11.122.

<sup>156</sup> See chapters 9.80 and 11.123..

<sup>157</sup> Sixth Schedule. It also included a report of UNCITRAL and of the Secretary General.

<sup>158</sup> Paragraph 115 of "A New Interpretation Act", (Report No 17, 1990). See chapters 7.73, 9.73-4 and 11.124-5.

<sup>159</sup> See chapter 9.74.

<sup>160</sup> See chapter 9.75.

publications.<sup>161</sup> This information could not just be inserted into the explanatory memorandum as it is not part of the ordinance.

86. **The Commission recommend that where legislation implements a law reform report it should refer to any relevant law reform publications.<sup>162</sup> The Commission also recommends that legislation could include a reference to a law reform report from overseas where that was its source.<sup>163</sup>**

87. **The Commission believes that further consideration should be given by those involved directly in the legislative process to the type of explanatory materials which are needed, their availability, and the weight to be attached to them.<sup>164</sup>**

88. Section 35 of the Evidence Ordinance provides that in civil proceedings the *Gazette* may be proved by the production thereof.<sup>165</sup> This would not cover references to *Hansard*. Section 7(1) of the Evidence Act 1905 provides 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 mere production be admitted as evidence thereof in all courts.”<sup>166</sup> This provision facilitates the proof of *Hansard* in court.

89. **For the removal of doubt, the Commission recommends that a provision similar to section 7(1) of the Evidence Act 1905 to allow such extrinsic materials to be proved by their production, ought to be inserted in reforming legislation.**

#### *Accessibility*

90. If extrinsic aids are to be truly accessible to the users of statutes, then consideration must be given to what changes are needed in the legislative process itself. Every assistance must be given to the draftsman so that draft legislation is prepared under less pressure of time. Accessibility must also be improved by increasing the availability of *Hansard* and its index at the earliest possible time.<sup>167</sup>

#### *Status of government circulars*

91. The list of extrinsic aids set out in section 15AB(2) of the Acts Interpretation Act 1901 (Cth) does not cover government circulars or other post enactment explanatory materials. Jenkins suggested that since *Pepper v Hart*<sup>168</sup> the

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<sup>161</sup> “The Format of Legislation” report, *op cit* at paragraph 37. See further chapters 9.79 and 11.126.

<sup>162</sup> This was done in the Sixth Schedule to the Arbitration Ordinance (Cap. 341).

<sup>163</sup> There is a separate issue as to whether it is appropriate for courts in Hong Kong to refer to official reports from other jurisdictions unless they deal with legislation on which the Hong Kong legislation was modelled. See chapters 10.38-39 and 11.67- 68.

<sup>164</sup> See chapters 9.100 and 11.128.

<sup>165</sup> See chapters 9.72 and 11.129.

<sup>166</sup> This is a Federal Australian provision. See Brazil “Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials” (1988) 62 ALJ 510.

<sup>167</sup> Chapters 9.96 and 11.130.

<sup>168</sup> [1992] 3 WLR 1032.

draftsman may have to take a more active part in checking documents which brief the promoter of a Bill or Members of Parliament to ensure that they accurately and comprehensively explain the Bill.<sup>169</sup> For Hong Kong, this would include Legislative Council Briefs, and notes on amendments. This may extend to press releases, circulars, or advertisements issued by Government Departments which explain new legislation. Any submissions by a government department to an official committee<sup>170</sup> may also be regarded as falling under the second limb of *Pepper v Hart*. He also recommended that the draftsman and civil servants will have to check what was actually said in Parliament to ensure that no additional statements or corrections are required.<sup>171</sup>

92. The draftsman and legal advisers in Government may have to vet more closely documents or statements made in explanation of a Bill, whether pre- or post-enactment. More attention needs to be paid to assurances given in such documents as regards the consequences of a particular Bill to a particular identifiable class of persons.<sup>172</sup>

93. **The Commission recommends that the Administration draw up guidelines for its civil servants as to which documents fall within the categories of extrinsic materials that could be used as an aid to statutory interpretation.**<sup>173</sup>

#### *Practice Direction*

94. **The Commission recommends that a Practice Direction governing the production of extrinsic materials before the courts should be introduced in Hong Kong without waiting for legislative reform in this area.**<sup>174</sup>

#### *Other extrinsic aids*

95. **The Commission does not recommend that other extrinsic aids be included in a statutory provision, such as historical setting, textbooks, other statutes, conveyancing practice, and uniform court decisions, which are rarely of relevance.**<sup>175</sup>

96. Section 59 of the Evidence Ordinance (Cap 8) provides that a person who is suitably qualified can give expert evidence “as to the law of any country or territory outside Hong Kong ...”.<sup>176</sup> It seems that this section will not be applicable after 1 July 1997, given its jurisdictional parameters.<sup>177</sup> Such a section is one way to obtain expert evidence of Chinese extrinsic aids for the interpretation of Chinese law.

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<sup>169</sup> “Pepper v Hart: A Draftsman’s Perspective” 15 Stat LR 23 (1994)

<sup>170</sup> *Wells v Police* [1987] 2 NZLR 560. See chapter 7.57.

<sup>171</sup> Jenkins, *op cit*. See also chapters 9.18, 9.65 and 11.131.

<sup>172</sup> See chapter 9.63.

<sup>173</sup> If it is for internal use then this briefing document should not itself come within the criteria. See chapter 9.66 further.

<sup>174</sup> See chapters 9. 97-99 and 11.134.

<sup>175</sup> These are dealt with in chapter 2.

<sup>176</sup> It is submitted that post-1997, this could not be interpreted to regard China as being “a country...outside” Hong Kong.

<sup>177</sup> See chapters 10.36 and 11. 136.

However, it could be argued that, since section 59 would not apply, an expert could then be called to give evidence of his opinion in the ordinary way. It may be that in this case there could be problems with proofs of “foreign” documents, as the courts might adopt less strict criteria for looking at foreign materials than they do at present.<sup>178</sup> This may be an area that needs some further consideration.<sup>179</sup>

## Conclusion

97. The common law position concerning extrinsic aids is complex and not readily understood. The Commission believes that it would be sensible to codify and extend the common law principles so long as the legislation could provide comprehensive and easily understood criteria for the use of such aids.<sup>180</sup>

98. **The Commission has concluded that the Australian model of section 15AB, with modifications, serves this purpose.** The original section 15AB is contained in Annex I. A draft section 19A of the Interpretation and General Clauses Ordinance (Cap 1) which incorporates the recommendations which modify section 15AB is at Annex II.

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<sup>178</sup> See *Li Jin- fei and Others v Director of Immigration* [1993] HKLR 256, at 264-5.

<sup>179</sup> Section 31 of the same Ordinance is also relevant, as it refers to judgments of any court of justice “in any foreign state”, being proved by an authenticated copy being sealed with the seal of the court.

<sup>180</sup> See chapter 11.137-8.

**Section 15AB of the Australian Acts Interpretation Act 1901 (as amended)**

*“15AB (1) Subject to subsection (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 subsection (1), the material that may be considered in accordance with that subsection 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;*
  - (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 subsection (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.”*

**Draft proposed section 19A to be inserted into the Interpretation and  
General Clauses Ordinance (Cap. 1)**

- 19A. *“(1) Subject to subsection (3), (4), (5) and (6), in the interpretation of a provision of an Ordinance, if any material not forming part of the Ordinance is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:*
- (a) 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 Ordinance and the purpose or object underlying the Ordinance leads to a result that is absurd or is unreasonable.*
  - (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Ordinance includes :*
    - (a) all matters not forming part of the Ordinance that are set out in the document containing the text of the Ordinance as printed by the Government Printer;*
    - (b) any relevant report of a commission, the Law Reform Commission, committee of inquiry or other similar body that was published before enactment of the provision ;*
    - (c) any relevant report of a body similar to the Law Reform Commission in any jurisdiction other than Hong Kong where the provision was modelled on legislation from such jurisdiction implementing any recommendations of the report;*
    - (d) any relevant treaty or other international agreement that is referred to in the Ordinance or in any of the materials that are referred to in this subsection;*
    - (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 the Legislative Council by the policy Secretary or other promoter before the time when the provision was enacted;*

- (f) *the speech made to the Legislative Council by a policy Secretary or other promoter on the occasion of the moving by that policy Secretary or other promoter of a motion that the Bill containing the provision be read a second time in the Council;*
  - (g) *any document (whether or not a document to which a preceding paragraph applies) that is declared by the Ordinance to be a relevant document for the purposes of this section;*
  - (h) *any relevant report of a committee of the Legislative Council before the time when the provision was enacted.*
  - (i) *“any relevant material in the official record of debates in the Legislative Council.”*
- (3) *the weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) or (2) shall be no more than is appropriate in the circumstances.*
  - (4) *“For the avoidance of doubt, the amendments made by this Ordinance shall apply in relation to all Ordinances in force whether such an Ordinance came or comes into operation before or after the commencement of this Ordinance.”*
  - (5) *“Nothing in this section shall prejudice any right to rely on extrinsic materials as provided for under common law.”*
  - (6) *“Nothing in this section shall prejudice the common law rule that ambiguous legislation cannot be construed to derogate from the rights of individuals.”*

This Draft Bill is subject to final drafting and approval of the Law Drafting Division of the Attorney General's Chambers.