

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

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

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MARCH 1997

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Introduction

Terms of reference

1. The request for a study of extrinsic aids to statutory interpretation arose from a discussion by the Law Reform Commission of a recommendation in the Sub-Committee Report on the Adoption of the UNCITRAL Model Law of Arbitration, that the Courts should be permitted to refer to the report of the Commission as an aid to interpretation.¹

2. That request was made in May 1987. A preliminary background paper was prepared and was sent to certain interested parties² to canvass their views on whether the present law was satisfactory, or whether it required further study.

3. As a result of the views expressed, it was decided that the subject merited further study, and that there should be a formal reference to the Commission for consideration and report.

4. 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?"

5. These were signed by the Acting Chief Justice and the Acting Attorney General on the 3rd and 4th June 1992 respectively.

Background Paper

6. Since the many judicial developments that have taken place over the years, particularly the seminal judgment of *Pepper v Hart*,³ the Secretariat decided that the subject merited a more detailed and updated Background Paper. This was tabled before the Commission in March 1995. The Commission decided to establish a sub-group to consider the recommendations contained in the Background Paper.

¹ The Final Report on UNCITRAL Model Law recommended inclusion of its Report as an aid to interpretation. The Arbitration (Amendment)(No. 2) Ordinance 1989 made provision for documents specified in the Sixth Schedule to be used as aids. That Schedule specifically named the Report.

² The Bar, the Law Society, the Judiciary and the Law Faculty of Hong Kong University.

³ [1992] 3 WLR 1032. The House of Lords held that the rules excluding reference to parliamentary materials should be relaxed on certain conditions. See chapter 5 and 6 *infra*.

Membership and method of work

7. The membership of the sub-group was as follows:

Professor Peter Wesley-Smith (Chairman)	Dean of the Law Faculty University of Hong Kong
Mr Eric Cheung	Solicitor Johnston Stokes & Master
Mr Andrew Liao QC	Queens Counsel
The Hon Mr Justice Nazareth	Court of Appeal
Mr Tony Yen	Law Draftsman
Miss Paula Scully (Secretary)	Senior Crown Counsel Law Reform Commission

8. The sub-group met on six occasions. A report was prepared, summarising the sub-group's deliberations, which was submitted to the Commission in November 1995. In the light of the views of the sub-group and the Commission itself, the original Background paper was amended and a Consultation Paper issued in February 1996. Because of the nature of the subject the Commission solicited views directly only from the Bar Association, the Law Society, the Judiciary, the Universities, the Legislative Council Secretariat and the Legislative Council's Panel on Legal Services. The paper was of course also made publicly available to anyone else who wished to express a view. The Commission considered the submissions made by the consultees at its meeting in July 1996. This Report is the culmination of the work of the Commission, having taken account of the submissions made to it by the consultees. The Commission expresses its gratitude to all those who made submissions.

What is the importance of statutory interpretation?

9. "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".⁴ 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.⁵

⁴ Preface to D.R. Miers and A.C. Page, *Legislation* (1st edition, 1982).

⁵ *Ibid* at 177-178.

10. 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.⁶

11. The United Kingdom Law Commissions in their joint Report stressed the importance of rules of interpretation of legislation being workable rules of communication between the legislator and the legislative audience as a whole. This consideration is particularly important in any assessment of the value of the aids to interpretation extraneous to the statute itself.⁷

What are extrinsic aids to interpretation?

12. Briefly, they are as follows:⁸

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

These will be dealt with in more detail in Chapter 2.

Scope of report

Internal aids

13. The original Background paper did not deal with the internal aids to interpretation as, strictly speaking, they were outside the terms of reference. Internal aids include:

- (1) the title, short and long, of an Ordinance;

⁶ The Law Commissions, *The Interpretation of Statutes* (1969), (Law Com No 21), (Scot Law Com No 11), paragraph 4.

⁷ *Idem*.

⁸ Stair Memorial Encyclopaedia, *The Laws of Scotland*, Vol 1, paragraph 1143 *et al*.

⁹ Parliamentary debates are recorded in *Hansard*.

¹⁰ The documents that form the preparatory work of a treaty and include such matters as the proceedings of an international conference which produced the treaty.

- (2) the preamble;
- (3) the side note of a section;
- (4) headings;
- (5) provisos;
- (6) interpretations sections;
- (7) schedules;
- (8) punctuation.¹¹

14. However, section 15AB(2)(a) of the Australian Acts Interpretation Act 1901,¹² which provides for extrinsic aids to be used in interpretation, does include "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". The Commission concluded that this subsection should be included in proposed draft legislation,¹³ as users of ordinances do in fact use annotations, marginal notes, headings and similar internal aids. Otherwise the Commission did not deal with internal aids.¹⁴

External aids

15. Chapter 1 deals with the role of the courts and how they have developed rules of construction¹⁵ as aids to interpretation of statutes. It also discusses the constitutional theory of judicial interpretation. Chapter 2 goes into detail in describing extrinsic aids and how the courts have interpreted them.

16. Chapter 3 discusses the rationale used by the courts in relying on extrinsic aids. Chapter 4 deals with the rationale of the courts in excluding extrinsic aids. Chapter 5 analyses the important changes made by the House of Lords in *Pepper v Hart*¹⁶ in allowing the use of Parliamentary debates as aids. Chapter 6 deals with subsequent judicial developments in the United Kingdom and Hong Kong arising out of the judgment.

17. Chapter 7 focuses on options for reform of the law which were proposed prior to *Pepper v Hart*, and on whether that judgment addresses all these concerns. It undertakes a comparative analysis of the responses in other jurisdictions to extrinsic aids, with the exception of Australia. Chapter 8 reviews the Australian legislation and judicial interpretation of it.

18. Chapter 9 describes the legislative process and its deficiencies vis a vis the availability and accessibility of extrinsic aids.

¹¹ *Ibid* at paragraph 1134.

¹² Inserted by the Acts Interpretation Act 1984 (Commonwealth of Australia).

¹³ The main recommendation of the Commission is that there should be statutory provision for extrinsic aids similar to this Australian legislation.

¹⁴ It may be that section 18 of the Interpretation and General Clauses Ordinance (Cap 1), which deals with marginal notes and section headings needs to be amended consequentially.

¹⁵ The words "construction" and "interpretation" will be used interchangeably in the Report. In *Berry v British Transport Commission* [1961] 3 All ER 65 at 75, Devlin LJ stated "... 'construction', being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing".

¹⁶ [1992] 3 WLR 1032.

19. Chapter 10 deals with such collateral matters as the impact of the Bill of Rights on statutory interpretation, *stare decisis* and the China dimension.

20. Chapter 11 sets out options for reform in Hong Kong and the recommendations of the Commission.

21. Chapter 12 is an Executive Summary of the conclusions and recommendations of the Commission. This summary is available in Chinese and English and is the only part of the report which is bilingual.

Chapter 1

The Role of the Courts

Introduction

1.1 Donaldson J described the role of the courts in a colourful fashion thus:

"The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing".¹

Background : constitutional theory

1.2 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.²

1.3 On the other hand the courts, in the past at least, regarded statutes "as an interloper upon the rounded majesty of the common law"³ 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. This dynamic and balance is illustrated by the historical development by the Judiciary of the rules of construction of legislation. We now look at these rules in turn.

The "mischief" rule

1.4 The "mischief" rule was clearly expounded in *Heydon's Case*:⁴

¹ *Corocraft Ltd v Pan American Airways Inc.* [1968] 3 WLR 714 at 732.

² Miers and Page, "Legislation" (1982), 180.

³ Wade in Dicey, *Law of the Constitution*, (10th edition, 1959).

⁴ (1584) 3 Co. Rep. 7a.

"That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) what was the common law before the passing of the Act, (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; (4) 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 private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico".

1.5 Arguments based upon the mischief dealt with by an Act gradually gave way to those based upon the actual words used in it. This shift began following the emergence of the doctrine of the legislative supremacy of Parliament and was considerably hastened by the development of more exacting styles in the nineteenth century.⁵ The mischief rule is now seen as incorporated into a purposive rule of construction. In *Carter v Bradbeer*,⁶ Lord Diplock noted a trend "away from the purely literal towards the purposive construction of statutory provisions." Lord Simon, in *Stock v Frank Jones (Tipton) Ltd*,⁷ after referring to the Rule in *Heydon's* case, stated "Nowadays we speak of the 'purposive' or 'functional' construction of a statute."

1.6 In Hong Kong, unlike the United Kingdom, the mischief rule is incorporated into legislation. Section 19 of the Interpretation and General Clauses Ordinance (Cap 1) states:

"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".⁸

1.7 Mortimer J, in *Foo Ying executor to the estate of Law Choy-wan v Commissioner of Estate Duty*,⁹ stated, in following section 19, that where the meaning of the words is not plain, it is permissible to seek assistance from a consideration of the remedial purpose of the legislation and its context.¹⁰ The word "context" was defined in its widest sense, by Lord Simonds, in *Attorney -*

⁵ Miers and Page, *op cit*, at 185.

⁶ [1975] 1 WLR 1201, 1206-7.

⁷ [1978] 1 WLR 231, 236.

⁸ 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.

⁹ [1989] 2 HKLR 376, 380-1.

¹⁰ He also relied on *R v Herrod, ex p Leeds City Council* [1978] AC 403, 419G, where Lord Wilberforce had held that the meaning that was more "contextually apposite and also more reasonable" should be adopted, where there is a choice between two doubtful meanings.

General v Prince Ernest Augustus of Hanover,¹¹ to include "not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy".

The "literal" rule

1.8 This rule stated that the words of a statute must be given their ordinary meaning, no matter what the result. This also showed the attitude of the judiciary to their role vis a vis Parliament, as Tindal C.J. said in the *Sussex Peerage Claim*:¹²

"The only rule for the construction of Acts of Parliament, is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense."¹³ The words themselves alone do, in such cases, best declare the intention of the lawgiver".

1.9 Some of the Courts took an extreme interpretation of the literal rule, which had almost an "Alice in Wonderland" quality to it. Lord Esher M.R. in *R v The Judge of the City of London Court*¹⁴ stated "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity." This view was reinforced in *Vacher & Sons Ltd v London Society of Compositors*,¹⁵ where Lord Atkinson said:

"If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordship's House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous."

1.10 This sidesteps the issue of what the courts must do when the meaning is not plain and unambiguous. The literal rule is closely linked with the parole evidence rule, that excludes extrinsic evidence as to the meaning of written documents.

¹¹ [1957] AC 436, 461.

¹² (1844) 11 Cl & Fin 85, 143.

¹³ Applied in *Cheung Chun-man* [1957] HKLR 500, 503.

¹⁴ [1892] 1 QB 273 9 CA.

¹⁵ [1913] AC 107, 121-2.

The "golden" rule

1.11 The classical statement of the "golden" rule was stated by Lord Wensleydale in *Grey v Pearson*:¹⁶

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law ..., that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther".

Criticism of the rules

1.12 The United Kingdom Law Commissions commented in their report that:

*"There is a tendency in our systems, less evident in some recent decisions of the courts but still perceptible, to over emphasise the literal meaning of a provision (i.e. the meaning in the light of its immediate and obvious context) at the expense of the meaning to be derived from other possible contexts; the latter include the 'mischief' or general legislative purpose, as well as any international obligation of the United Kingdom, which underlie the provision".*¹⁷

1.13 They also stated that to place undue emphasis on the literal meaning of words is to "assume an unattainable perfection in draftsmanship".¹⁸ This was written in 1969 and in the light of more recent judicial developments,¹⁹ it seems that the courts have shifted somewhat from the literal approach. Zander²⁰ contends that:

"The main principles of statutory interpretation-the literal rule, the golden rule and the mischief rule-are all called rules, but this is plainly a misnomer. They are not rules in any ordinary sense of the word since they all point to different solutions to the same problem. Nor is there any indication, either in the so-called rules

¹⁶ (1857) 6 HLC 61, 106.

¹⁷ "The Interpretation of Statutes", (Law Com No 21) (Scot Law Com No 11), Report No 21, paragraph 80 (1969).

¹⁸ At paragraph 30.

¹⁹ *Pepper v Hart* [1992] 3 WLR 1032.

²⁰ *The Law Making Process* (2nd edition, 1985), 129.

or elsewhere, as to which to apply in any given situation. Each of them may be applied but need not be".

1.14 Zander, in his more recent book,²¹ criticised the golden rule for being silent as to how the court should proceed if it does find an unacceptable absurdity.

The present rule

1.15 Driedger²² formulates the modern interpretation of the rules of construction as follows:

- "(1) The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).*
- (2) The words of the individual provisions to be applied to the particular case under consideration are then read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.*
- (3) If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them."*

1.16 In interpreting the modern rules of construction Lord Simon of Glaisdale in *Maunsell v Olins*²³ drew a distinction between the different audiences that the legislation is aimed at:

"It is sometimes put that, in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfil the purpose of the statute: while in statutes dealing with technical matters, words

²¹ *The Law Making Process* (4th edition, 1994), 130.

²² Driedger, *The Construction of Statutes*, 81, quoted in Miers and Page, *op cit*, at 187.

²³ [1975] AC 373, 391.

which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art".

1.17 This analysis brings us on to the question whether the intention of Parliament can only be gleaned from the current rules of construction, which are a mixture of a literal and purposive interpretation,²⁴ or, whether the courts need the assistance of extrinsic aids to determine the intention of Parliament. This will be dealt with in chapter 2.

²⁴ Miers and Page, *op cit*, state at 187 that the preponderance of academic writers and some senior judges now argue that current judicial practice incorporates the literal and purposive interpretation and is better expressed as a series of questions: "What was the statute trying to do? Will the proposed interpretation give effect to that object? Is the interpretation ruled out by the language?"

Chapter 2

Extrinsic Aids and Judicial Interpretation

Introduction

"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."

The United Kingdom Law Commissions saw this as the context for looking at the purpose of extrinsic aids to statutory interpretation.¹

Purpose of extrinsic aids

2.1 The United Kingdom Law Commissions classified the sources of extrinsic aids by reference to the purpose for which they might be used in interpretation:²

- (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.

2.2 It should be said at this juncture that the courts held, in the pre-*Pepper v Hart*³ judgments, 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.⁴ In considering the admissibility of

¹ (Law Com No.21) (Scot Law Com No.11)(1969), at paragraph 46.

² *Idem*.

³ See *infra*.

⁴ 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.

extrinsic aids, the Commissions⁵ thought it necessary to consider how far the material admitted might be relevant to the interpretative task of the courts, how far it would afford them reliable guidance, and how far it would be sufficiently available to those to whom the statute is addressed.

2.3 It is within this context that we will now consider the categories of extrinsic aids, and then proceed to consider each one of them. This chapter will deal with the pre-*Pepper v Hart*⁶ law. Chapter 5 and 6 will deal, respectively, with that judgment, and with the impact of the judgment on the admissibility of other extrinsic aids, and subsequent developments and use of extrinsic aids.

Categories of extrinsic aids

2.4 The categories are summarised as follows:

- (1) The historical setting;
- (2) Parliamentary history and debates;
- (3) Official reports, including Law Reform Commission reports;
- (4) Explanatory memoranda issued by Government departments;
- (5) Textbooks and dictionaries;
- (6) International conventions;
- (7) *Travaux préparatoires*;⁷
- (8) Other statutes;
- (9) Conveyancing and administrative practice;
- (10) Uniform court decisions and usage;
- (11) Delegated legislation.⁸

We now examine each of these in turn.

(1) Historical setting

2.5 In *Thomson v Lord Clanmorris*⁹ Lord Lindley M.R. said:

"In construing any enactment, regard must be had not only to the words used but to the history of the Act and the reasons which led to it being passed. You must look at the mischief which had to be cured as well as to the cure provided".

2.6 For this purpose, recourse may be had to histories of the period or antiquarian researches.¹⁰ In *Edwards v Attorney General for Canada*¹¹ the

⁵ *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.

⁶ [1992] 3 WLR 1032. This judgment allowed the use of *Hansard* under certain circumstances.

⁷ The documents that form the preparatory work of a treaty and include such matters as the proceedings of an international conference which produced the treaty.

⁸ These are set out in *The Laws of Scotland, Stair Memorial Encyclopedia* Vol 12, paragraph 1143 *et al*, as adapted for Hong Kong.

⁹ [1900] 1 Ch. 718, 725.

Privy Council held that a woman was entitled to sit in the Canadian Senate by reference, *inter alia*,¹² to the historical position of women in public offices going back to Roman times.

2.7 In a more recent case, in *Schtraks v Government of Israel*¹³ Lord Reid in construing the phrase "an offence of a political character" in section 3(1) of the Extradition Act 1870 (c 52) said "In reading the Act of 1870 one is entitled to look through mid-Victorian spectacles. Many people then regarded insurgents against continental governments as heroes intolerably provoked by tyranny who ought to have asylum here although they might have destroyed life and property in the course of their struggles".

2.8 In *Tse Moon-sak v Tse Hung and others*,¹⁴ Hogan CJ took note of the historical setting of the laws dealing with the application of English laws to Hong Kong, including two Proclamations issued in 1841 before the Treaty of Nanking had been signed. Mills-Owen J thought it would be profitless to discuss the proclamations as they did not have legislative effect. The court also discussed the applicability of Chinese law and custom to Hong Kong.

2.9 In *Po Fun-chan, Peter v Wong Hong-yuen, Peter*,¹⁵ Barnett J decided that while English constitutional history might be relevant towards construing the relevant Ordinance,¹⁶ the court also had to consider the local background when interpreting Hong Kong laws. Such local background suggested that the Ordinance had a far greater affinity to the District Boards Ordinance (Cap 366), the Electoral Provisions Ordinance (Cap 367), and various enactments establishing tribunals.

2.10 In *R v Leung Kam Ho*¹⁷ the Court of Appeal refused to look at the antecedent history of the legislation as the meaning of the relevant provision was clear.¹⁸

(2) Parliamentary history and debates

2.11 As far back as 1861¹⁹ the court referred to a speech introducing a Bill in the House of Commons. It also made reference to a report of a commission. Bramwell LJ in *R v Bishop of Oxford*²⁰ stated that *Hansard* may be consulted.

¹⁰ *Read v Bishop of Lincoln* [1892] AC 644.

¹¹ [1930] AC 124.

¹² It also referred to the parliamentary debates.

¹³ [1964] AC 556 at 582, 583.

¹⁴ [1968] HKLR 159.

¹⁵ [1989] 2 HKLR 410, 414.

¹⁶ The Legislative Council (Electoral Provisions) Ordinance (Cap 381).

¹⁷ [1994] HKLD E48.

¹⁸ The Corrupt and Illegal Practices Ordinance (Cap 288), section 5(a).

¹⁹ *In re Mew and Thorne* [1861] 31 LJ BK 87.

²⁰ [1879] 4 QBD 525, 550.

2.12 However, this century the courts have retreated and objected to the use of *Hansard*. In *Escoigne Properties v Inland Revenue Commissioners* Lord Denning said:

*"In this country we do not refer to the legislative history of an enactment as they do in the United States. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people".*²¹

2.13 In *Davis v Johnson*,²² the House of Lords affirmed its "well established and salutary rule that *Hansard* can never be referred to by counsel in court and therefore can never be relied on by the court in construing a statute or for any other purpose." It disagreed with Lord Denning's views in the Court of Appeal below. "So long as this rule is maintained by Parliament it must be wrong for a judge to make any judicial use of proceedings in Parliament for the purpose of interpreting statutes."²³

2.14 In Hong Kong, the Court of Appeal in *R v Cheng Chung-wai*²⁴ rejected an attempt by counsel to have the court look at the statement made by the Attorney General, when first moving an Amendment Bill to the Societies Ordinance. Even though it allowed recourse to the Objects and Reasons²⁵ attached to the Bill, but only for ascertaining the mischief sought to be remedied, it did not assist the court much, as it "seems perfectly plain to me that the amendment was directed to strike at those who hold themselves out as belonging to triad societies". The court later²⁶ took judicial notice that, in Hong Kong, some members of triad societies see a way of purifying themselves by confessing their membership to a person in authority, thereby breaking their oath of secrecy. The court seemed to rely on this knowledge to avoid a strict literal approach, thus quashing the conviction.

2.15 Fuad, V.P. relied on *Davis v Johnson*²⁷ in stating that a judge is forbidden from referring to speeches made in the Legislative Council, as an aid to construction. The judge below had said that he was not using the Financial Secretary's speech as an aid to construction, but to demonstrate the purpose behind the legislation. This was not accepted by Fuad V.P., who stated:

²¹ [1958] AC 549 at 566.

²² [1979] AC 264.

²³ Both quotations are from the headnote. See further 329, 337, 340, 345 and 349.

²⁴ [1980] HKLR 593, 598. In *R v Tseng Ping-yee* [1969] HKLR 304, 320-1, the Court of Appeal had looked at the speech of the Attorney General when he moved the second reading of the Bill to amend the Law of Criminal Evidence in 1906. Having quoted from the speech, Blair-Kerr J. expressed the hope that he had not been influenced by the speech.

²⁵ In *Elson-Vernon Knitters Ltd v Sino-Indo-American Spinners Ltd* [1972] HKLR 468 the Court of Appeal held that a court may properly look at the Objects and Reasons for a Bill for the purpose of ascertaining the mischief which it was intended to remedy but not for the purpose of interpreting language used in the enactment which is clear and unambiguous. This case was also followed in a criminal case, *Attorney General v Chan Kei-lung* [1977] HKLR 312.

²⁶ At 600.

²⁷ [1979] AC 264.

*"I am aware that distinguished judges have confessed to taking an occasional, surreptitious look at Hansard, but in my view the better practice (having obeyed the rule clearly laid down and maintained by the House of Lords) is for judges not to make reference to speeches in the Legislative Council in their judgments for any purpose so that no misunderstanding can occur and no ground for complaint can arise".*²⁸

2.16 In a criminal case concerning the question whether Parliament had intended to exclude the general rule that *mens rea* is an essential element in every offence,²⁹ Lord Reid said:

"The rule is firmly established that we may not look at Hansard and in general I agree with it This is not a suitable case in which to reopen the matter but I am bound to say that 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".

2.17 In *Beswick v Beswick*³⁰ Lord Upjohn made an exception to the rule against reference to *Hansard* by referring to the proceedings of the Joint Committee of the two Houses of Parliament which dealt with consolidation Bills. He allowed it "not with a view to construing the Act, that is of course not permissible, but to see whether the weight of the presumption as to the effect of consolidation Acts (that is that they do not alter the law) is weakened by anything that took place in those proceedings".

2.18 There is no necessity to deal further in this chapter with the use of Parliamentary debates as an extrinsic aid, as the discussion has been mainly superseded by the judgment in *Pepper v Hart*,³¹ and subsequent judicial developments, which will be dealt with in chapter 5 and 6 respectively.

(3) Official Reports and Law Reform Commission Reports

2.19 The courts may be assisted, by looking at Law Reform Commission reports, in considering the mischief aimed at by subsequent legislation. As far back as 1862³² Lord Westbury referred to a report of a commission which had led to the legislation and to the speech of the member who introduced it in the Commons.

²⁸ At 622J.

²⁹ *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, at 279.

³⁰ [1968] AC 58 at 74.

³¹ [1992] 3 WLR 1032. It is useful at this juncture to set out the principle, as outlined in the headnote: "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".

³² *Re Mew & Thorne* (1862) 31 LJQB 201.

2.20 However, in a later case, *Assam Railways and Trading Co. Ltd v Inland Revenue Commissioners*³³ the House of Lords drew a distinction between the admissibility of reports as evidence of surrounding circumstances³⁴ and as direct evidence of Parliamentary intent. Lord Wright reiterated that "the intention of the legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate".

2.21 In *Black-Clawson Ltd v Papierwerke Waldhof-Aschaffenberg AG*³⁵ the arguments for and against the retention of the exclusionary rules were set out in some detail.³⁶ The House of Lords had to deal with the construction of section 1(1) of the *Foreign Judgments (Reciprocal Enforcement) Act 1933*. That Act was the outcome of a report of the Greer Committee. The report contained a draft Bill which was substantially adopted in the Act.

2.22 Lord Reid stated that to find the mischief that the Act was intended to remedy, in addition to reading the Act, the court may look at the facts presumed to be known to Parliament when the Bill was before Parliament. The court may also consider whether there is disclosed some unsatisfactory state of affairs which Parliament can properly be supposed to have intended to remedy by the Act. Lord Diplock went further³⁷ in saying that where words in an Act were not clear and unambiguous in themselves, the court, for the purpose of resolving an ambiguity, may have regard to authoritative statements that were matters of public knowledge at the time the Act was passed, as to what were regarded as deficiencies in that branch of the existing law with which the Act deals.³⁸

2.23 In order to ascertain the intention of Parliament, the Law Lords did look at the report, but from different perspectives. Lord Reid, Lord Wilberforce, and Lord Diplock agreed that they were entitled to look at the report but only to see the statement of the mischief aimed at, and of the state of the law at that time, in the report. But they were not entitled to take into account the committee's recommendations or its commentary on the draft Bill, or the draft Bill itself.³⁹

2.24 Lord Wilberforce and Lord Diplock made clear that it was not proper to use the report of a committee or commission, or any official notes on a clause of a draft Bill, for a direct statement of what a proposed enactment is to mean or what the committee or commission thought it means.⁴⁰

³³ [1935] AC 445.

³⁴ Lord Wright explained the *Eastman* case [1898] AC 571, by saying that Lord Halsbury had there referred to the Royal Commission report as "extraneous matter to show what were the surrounding circumstances with reference to which the words were used", and not to ascertain the intention of the words used in the Act.

³⁵ [1975] AC 591, 614.

³⁶ This will be dealt with in more detail in Chapter 3.

³⁷ *Op cit* at 638 F-G.

³⁸ He went on to give official reports as an example of such statements.

³⁹ At 614 D-F, 629 C-D, 638 F-H. This seems to be the law in Scotland. See *Greater Glasgow H.B. v Bate Clark & Paul (O.H.)* [1992] SLT 35, 39.

⁴⁰ At 629D, 637D.

2.25 Cross concludes that the distinction between the admissibility of official reports as evidence of surrounding circumstances, and its inadmissibility as direct evidence of parliamentary intent has survived the *Black-Clawson* case, but only just.⁴¹ Ormrod J, in *Firman v Ellis*,⁴² set out a helpful set of stages that should be gone through when deciding on the construction of an official report. "First, one has to construe the report, and then, if the Act appears to depart from the recommendations in the report, to decide whether Parliament intended to act on or to depart from the recommendations."⁴³

2.26 In *Ex parte Factortame Ltd.*⁴⁴ the House of Lords looked at a Law Commission report⁴⁵ not only for the purpose of ascertaining the mischief, but also for the purpose of drawing an inference as to Parliamentary intention from the fact that Parliament had not expressly implemented one of the Law Commission's recommendations. Lord Bridge interpreted Order 53, r.1(2) of the Rules of the Supreme Court, and section 31(2) of the Supreme Court Act 1981 as not providing a power to grant an interim injunction against the Crown in a judicial review. Lord Bridge relied on the recommendations contained in the report and on a clause in the draft Bill attached to the report, to justify his overruling of a judgment which had held that there was such a power. He stated:⁴⁶

"If Parliament had intended to confer upon the court jurisdiction to grant interim injunctions against the Crown, it is inconceivable, in the light of the Law Commission's recommendations in paragraph 51 of its Report, that this would not have been done in express terms, either in the form of the proposed clause 3(2) of the ... draft Bill, or by an enactment to some similar effect. There is no escape from the conclusion that this recommendation was never intended to be implemented".

2.27 A more recent judgment focused on the purpose of looking at an official report. In *Comdel Ltd v Siporex S.A.* (No. 2)⁴⁷ Lord Bridge agreed that a report:⁴⁸

"Of this kind is invaluable as an aid to construction, but it is one thing to use it to resolve a real ambiguity⁴⁹ in the statutory language and quite another to use it to cut down the meaning of the language that Parliament has used in implementing the

⁴¹ *Statutory Interpretation* (1976), at 137.

⁴² [1978] 2 All ER 851, at 864.

⁴³ It is submitted that if the criteria laid down in *Pepper v Hart* [1992] 3 WLR 1032 are complied with, then *Hansard* may assist with the second stage.

⁴⁴ [1990] 2 AC 85.

⁴⁵ Law Commission Report on Remedies in Administrative Law (Law Com No 73), (1976: Cmnd 6407).

⁴⁶ At 149G

⁴⁷ [1991] 1 AC 148.

⁴⁸ Report of the Committee on the Law of Arbitration (1927: Cmnd 2817).

⁴⁹ Ambiguity was used here, in the sense of whether the language should be given its natural and ordinary meaning, or whether there was something in the policy of the statute that meant it should be given a technical meaning.

report's recommendations when the ordinary meaning of that language is plain".

2.28 The Judiciary have sometimes encouraged counsel to look at Law Reform Commission reports. In *Aswan Engineering v Lupdine Ltd*⁵⁰ the Court of Appeal invited counsel to look at the Law Commission report on Exemption Clauses in Contracts,⁵¹ and their Working Paper on Sale and Supply of Goods.⁵² The opposing counsel objected. Lloyd J could see no "conceivable reason why we should not have been referred to the Law Commission papers, and good reasons why we should". Later on he reiterated that:

"In my judgment it is not only legitimate but desirable to refer to Law Commission reports on which legislation has been based".

2.29 Other Judges have expressed frustration when the Law Commission reports have not been implemented. In *Moran v Lloyd's*⁵³ the Master of the Rolls, Sir John Donaldson quoted from the report of the Commercial Court Committee on Arbitration,⁵⁴ which had stated that the word "misconduct" could give a misleading impression of the complaint made against an arbitrator. He expressed regret that Parliament had not given effect to the recommendation in the Arbitration Act 1979.

2.30 ***Weight to be given to an official report*** Viscount Dilhorne in the *Black-Clawson* judgment⁵⁵ distinguished between reports which merely contained recommendations, and reports where a draft Bill was attached. In the former case, little weight should be attached to them as it may not follow that Parliament had accepted them. In the latter case, the court could compare the draft Bill with the Act, and "if there is no difference or material difference in their language then surely it is legitimate to conclude ... that Parliament had accepted the recommendations of the committee and had intended to implement it".⁵⁶ Viscount Dilhorne also agreed that the observations of the committee on the draft Bill, by way of commentary, may be a valuable aid to construction.⁵⁷

2.31 The House of Lords in *R v Allen*⁵⁸ criticised the Court of Appeal's refusal to look at the appropriate Report of the Criminal Law Revision Committee.⁵⁹

⁵⁰ [1987] 1 WLR 1, at 14 E, F-G.

⁵¹ 1969, No 24.

⁵² 1983, No 85.

⁵³ [1983] 1 QB 542, at 548 G-H, 549C.

⁵⁴ 1978; Cmnd 7284)

⁵⁵ *Op cit*, at 622H-623A.

⁵⁶ In *R v Gomez* [1993] 1 All ER 1, at 24, Lord Lowry relied on "the more adventurous" views of Viscount Dilhorne as justifying him in looking at the recommendations of the Criminal Law Committee report, "Theft and Related Offences" (1966: Cmnd 2977).

⁵⁷ *Op cit* at 623E.

⁵⁸ [1985] 1 AC 1029.

⁵⁹ 13th Report, "Section 16 of the Theft Act" 1968 (1977: Cmnd 6733). Further, see "Judicial Recourse to Law Reform Bodies' Reports in the Interpretation of Criminal Enactments", [1988] Stat LR 102.

2.32 Bennion argues that the weight to be given to a committee report depends on the standing and authority of the committee members and the degree to which it appears Parliament followed their proposals.⁶⁰ Presumably, this would apply not only to Law Reform Commission Committees, but also to any official committee. This raises the question as to whether a Law Reform Commission Report, prepared by the Secretariat would have less standing than a report prepared by a committee.

2.33 **Scottish reports** In an Outer House decision, *Walker v Walker*,⁶¹ Lord Morton of Shuna observed that Parliament should amend section 8(1) of the Family Law (Scotland) Act 1985, as it did not clearly implement the recommendations of the Scottish Law Commission.

2.34 Professor Maher⁶² in his article concludes that reports of the Scottish Law Commission are used fairly often, but that this can be by way of a direct guide to interpretation of the statute, rather than a strictly traditional approach that a report can only be looked at to discover the mischief which the statute was decided to remedy.

2.35 In *Keith v Texaco*,⁶³ the case of *Black-Clawson* was followed. The tribunal looked at a report of the Scottish Law Commission⁶⁴ as an aid to discovering what was the mischief which the legislation was intended by Parliament to remedy.

2.36 **Hong Kong reports** The Arbitration Ordinance (Cap 341)⁶⁵ provides, in its Sixth Schedule, that one specific report of the Law Reform Commission⁶⁶ may be used as an aid to interpretation. The Commission had itself recommended this inclusion. In *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co. Ltd*,⁶⁷ Kaplan J noted that the Ordinance came about as a result of recommendations from the Commission, though he did not outline their recommendations. He referred to the Sixth Schedule to assist him in interpreting the Model Law. He also noted that section 2(3) of the Ordinance exhorted judges interpreting the Model Law to have regard to its international origins.⁶⁸

2.37 In a more recent case, *Katran Shipping Co. Ltd v Kenven Transportation Ltd*,⁶⁹ Kaplan J relied on the same Law Reform Commission Report, *inter alia*, to decide that article 9 of the Model Law was wide enough to include a Mareva injunction.

⁶⁰ Bennion, *Statutory Interpretation, a Code*, (2nd edition, 1992) Part XIV, section 216.

⁶¹ [1990] SLT 229.

⁶² "Statutory Interpretation & Scottish Law Commission Reports", [1992] SLT 277.

⁶³ [1977] SLT 16, (a Land Tribunal Case).

⁶⁴ On Conveyancing Legislation and Practice (1966).

⁶⁵ The Arbitration (Amendment) (No. 2) Ordinance 1989 incorporated the Model Law on International Commercial Arbitration into the Arbitration Ordinance (Cap 341).

⁶⁶ Report of the Law Reform Commission of Hong Kong on the Adoption of the UNICTRAL Model Law, Topic 17, (1985).

⁶⁷ [1992] 1 HKLR 40, HC.

⁶⁸ At 44.

⁶⁹ (1992) Cons L No. 7 of 1992, 29 June 1992. unreported

2.38 **White Papers** In *Duke v Reliance Systems Ltd*,⁷⁰ the House of Lords looked at a White Paper⁷¹ in a case concerning the construction of a statute vis a vis legislation passed by the European Economic Community. The quotation used from the White Paper outlined proposed legislative changes in a Bill which would later be introduced. Lord Templeman justified recourse to it as "If the Government had intended to sweep away the widespread practice of differential retirement ages, the 1974 White Paper would not have given a contrary assurance...". No reference to the *Black-Clawson* case was made.

2.39 In *AG Reference (No. 1 of 1988)*⁷² Lord Lane, in the Court of Appeal, referred to the authority of the *Black-Clawson* case⁷³ as justification for the use of a White Paper as an extrinsic aid.⁷⁴ He also referred to proposals for change in the White Paper.⁷⁵ On appeal, Lord Lowry accepted that the majority view in *Black-Clawson* was that such a proposal could not be used as a guide to the meaning of the statutory provision. However, it confirmed the mischief that was intended to be dealt with.⁷⁶

(4) Explanatory memoranda

2.40 An explanatory memorandum is a document which summarises the subject matter of a Bill. It is prepared primarily for the information of members of Parliament, though it is available to the public for sale, with the Bill. However, it does not accompany an Act or Ordinance. There can also be explanatory material prepared by a Government Department, after a Bill is enacted, such as a circular, or pamphlet.

2.41 Lord Denning, in *Escoigne Properties Ltd. v I.L.C.*⁷⁷ confirmed the principle, that the courts do not refer to the explanatory memorandum. In *Inglis v British Airport Authority*⁷⁸ the tribunal refused to use a departmental memorandum to construe the Lands Compensation (Scotland) Act 1973 (Cap 56). The tribunal said the memorandum "cannot provide a gloss on the actual words used by Parliament nor can it be used by a judicial tribunal as an aid to construing the wording of a statute or as a guide to the intentions of Parliament". However, this was an explanatory memorandum subsequently issued by the department, and not one which had been before the legislature.

2.42 There are also explanatory memoranda, consisting of Notes on Clauses, prepared by civil servants, for the use of the Minister, who is steering

⁷⁰ [1988] 2 WLR 359.

⁷¹ "Equality of Women" (Cmnd 5724).

⁷² [1989] 1 AC 971.

⁷³ [1975] AC 591, 638, Lord Diplock.

⁷⁴ This was the White Paper on "The Conduct of Company Directors" (1977:Cmnd 7037).

⁷⁵ *Supra* at 981.

⁷⁶ *Ibid* at 992.

⁷⁷ [1958] AC 549.

⁷⁸ [1978] SLT 30 (Lands Tr). See *The Laws of Scotland, Stair Memorial Encyclopedia* 1992, paragraph 1150.

the Bill through its various stages.⁷⁹ These are not for public use. Further, Bennion⁸⁰ refers to a textual memorandum, where a Bill contains textual amendments to an Act. This reprints the affected provision in full, incorporating the amendments.⁸¹ In *Alcan v Commissioner of Inland Revenue*,⁸² Tompkins J refused to regard a Treasury paper, addressed to the Minister for Finance, dealing with outstanding policy issues of an Income Tax Bill, as a proper extrinsic aid for ascertaining the statutory intention. An additional reason was that the document was not intended for public use.⁸³

2.43 In *Ealing London Borough Council v Race Relations Board*,⁸⁴ Lord Simon rejected reference to what he called the legislative history of a statute, including drafts of Bills, heads of instructions to the draftsman, departmental papers and minutes of executive committees. However, he was prepared to allow access to explanatory memoranda accompanying a complicated measure, such as those explaining statutory instruments.

2.44 In *In Re Shang Kiang-Yuen, A Patient*⁸⁵ Blair-Kerr J stated that he had looked at the "Objects and Reasons" of the relevant Bill,⁸⁶ since he had reached his decision. He noted that the court should not "take account of anything said in the Objects and Reasons annexed to a Bill in order to assist it in deciding what the legislature intended."⁸⁷ He commented that the legislation had not given effect to the intention of the draftsman, as set out in the Objects and Reasons. In *Fung v First Pacific Bank Ltd*⁸⁸ the Court of Appeal criticised Godfrey J for referring to speeches made in the Legislative Council as an aid to construction. However, no criticism was made of the reference by the judge to the Explanatory Memorandum of the Banking (Amendment) Bill 1983.⁸⁹

2.45 In *Wicks v Firth*⁹⁰ the House of Lords noted a press release which had been quoted in the case stated. The Inland Revenue had made a concession in the press release that "they would still treat as exempt, scholarships awarded from a fund open to all, to scholars who happened to be the children of employees of the firm by which the fund was financed". The revenue were now claiming that liability did arise. Lord Bridge went on to say:-

⁷⁹ In Hong Kong, there are no Notes on Clauses, but there are Legislative Council briefs for members, prepared by the policy Secretary in charge of the Bill. See further in Chapter 9.

⁸⁰ Bennion, *Statutory Interpretation, a Code*, (2nd edition, 1992) section 219, 454.

⁸¹ Bennion refers to the "Textual Memorandum" on the Furnished Lettings (Rent Allowances) Bill 1972 :Cmnd 5242).

⁸² [1993] 3 NZLR 495, at 506.

⁸³ The judge disagreed with Bennion's statement as being over broad and not supported by any authority. Bennion, *op cit* at 454, had stated that explanatory materials are of relevance when the Bill has become an Act.

⁸⁴ [1972] AC 342, at 361. This statement was used in *Elson-Vernon Knitters Ltd v Sino-Indo-American Spinners Ltd* [1972] HKLR 468, to justify recourse to the Objects and Reasons of a Bill.

⁸⁵ [1968] HKLR 192, at 200-1.

⁸⁶ These are, in effect, an explanatory memorandum and the name has recently been changed to reflect that fact.

⁸⁷ *Supra* at 201.

⁸⁸ [1989] 2 HKLR 614. No reference to the earlier decisions of *Elson-Vernon*, *op cit*, or *R v Cheng Chung-wai* [1980] HKLR 614 were made in this judgment.

⁸⁹ See *Matheson PFC Ltd v Jansen* [1994] HKLD G56, where the explanatory memorandum was relied on, but reference was also made to *Pepper v Hart*.

⁹⁰ [1983] 2 AC 214.

*"This is not a decisive consideration, but in choosing between competing constructions of a taxing provision, it is legitimate I think, to incline against a construction which the revenue are unwilling to apply in its full rigour, but feel they must mitigate by way of extra-statutory concession, recognising, presumably, that in some cases, their construction would operate to produce a result which Parliament can hardly have intended."*⁹¹

2.46 In *Yung Tak Lam v Patten & Others*,⁹² the applicant alleged that representations had been made to the public that submissions could be made by them to government on the constitutional reforms package. He claimed that his submissions were not included in a compendium or supplement. Press releases and newspaper reports were admitted in evidence. The judgment does not contain any reference to any case law in support of this use, though it can be argued that such documents were essential to the applicant's claim. Chan J stated that it was at least arguable that an enforceable contract came into existence when the public announcements stated that public submissions would be published to the public and to the Legislative Council.

(5) Textbooks and dictionaries

2.47 Textbooks may be used as an aid to construction of a statute. However the court "would never hesitate to disagree with a statement in the textbook, however authoritative, or however long it had stood, if it thought it right to do so".⁹³ The court have sometimes used textbooks as a way of getting around the restriction or looking at Law Reform Commission reports, or even *Hansard*.⁹⁴

2.48 Dictionaries "are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instructions to these books".⁹⁵

2.49 However, dictionaries are for consultation "in the absence of any judicial guidance or authority".⁹⁶ In a tax case, *C.O.R. v Asia Television Ltd*,⁹⁷ the High Court in interpreting the relevant words of the revenue statute, looked at three different English dictionaries.

⁹¹ At 231.

⁹² [1994] HKLD E35.

⁹³ *Bastin v Davies* [1950] 2 KB 579. See *Stair Memorial Encyclopedia*, *op cit*, at paragraph 1151.
⁹⁴ However, Lord Denning in *Letang v Cooper* [1965] 1 QB 232, at 240, criticized the text-writers as being in error, as they had been influenced by the recommendations of the Tucker Committee's Report on the Limitation of Actions.

⁹⁵ *R v Peters* [1886] 16 QBD 636, at 641, per Lord Coleridge.

⁹⁶ *Kerr v Kennedy* [1942] 1 KB 409, at 413, Asquith J. See further Maxwell *The Interpretation of Statutes*, (12th edition, 1976) 55-56.

⁹⁷ Hong Kong Tax Cases, vol 2, (1986), 198.

2.50 In *Fothergill v Monarch Airlines*,⁹⁸ a case concerning an international convention, the House of Lords, *per curiam*, said that there was no reason why a judge should not use his own knowledge of the language nor why he should not consult a dictionary. "Other evidence, including expert evidence, other dictionaries, other reference books, text-books, articles and decided cases may be called by the parties to supplement his resources if they think fit."⁹⁹

2.51 In *Re State of Norway's Application*¹⁰⁰ the court found that the work of academic writers was useful, including a selection of comparative law material. It also took account of written opinions of Norwegian legal experts. Lord Mackay¹⁰¹ commentated that "this case illustrates the readiness with which the courts nowadays are prepared to look at the work of academic writers, even though not yet technically authoritative by reason of death."

2.52 **Chinese customary law** The Full Court in *In Re Tse Lai-Chiu Deceased*,¹⁰² held that "for the purpose of ascertaining the content of Chinese law or custom, the courts may resort to authoritative textbooks and treatises, in aid of the long-established practice in Hong Kong of taking evidence of such law or custom".¹⁰³ In *Case No D107/89*,¹⁰⁴ the Board of Review rejected the narrow construction proposed by the Inland Revenue. It was clear that the legislature intended to benefit a taxpayer by including in the definition of "child" a specific mention of children of concubines who were recognised by the family. The Board referred to the position under Chinese law and custom.

(6) International conventions or treaties

2.53 Bennion¹⁰⁵ states that an international treaty may have three different kinds of status: a domestic Act may directly enact the treaty, or indirectly may do so, or the treaty may remain as only an international obligation. Lord Wilberforce in *Buchanan & Co. v Babco Ltd*¹⁰⁶ described the interpretation of a treaty imported into domestic law by indirect enactment as "unconstrained by technical rules of English law or by English legal precedent, but on broad principles of general acceptance"¹⁰⁷ In *Salomon v Commissioners of Customs & Excise*¹⁰⁸ the Court of Appeal held that where

⁹⁸ [1980] 3 WLR 209. In *Abnett v British Airways plc*, The Times, June 22, 1995, the Scottish Inner House made reference to the minutes of the Warsaw Conference of 1922, by relying on the authority of *Fothergill*. This assisted them in adopting a purposive construction in order to meet the general intention of the Convention, as revealed in the minutes.

⁹⁹ As taken from the headnote. See 215-216, 227, 231, 234, 240-1.

¹⁰⁰ [1989] 2 WLR 458.

¹⁰¹ "Finishers, Refiners and Polishers: The Judicial Role in the Interpretation of Statutes", [1989] Stat LR 151, 161.

¹⁰² [1969] HKLR 159.

¹⁰³ The headnote.

¹⁰⁴ IRBRD, Vol 6, 400, and [1992] HKLY 1015.

¹⁰⁵ *Statutory Interpretation, a Code* (2nd edition, 1992), section 221.

¹⁰⁶ [1978] AC 141, at 152.

¹⁰⁷ At 152. Lord Diplock in *Fothergill v Monarch Airlines* [1980] 3 WLR 209, at 223, agreed that the language of the international convention should be interpreted in the way suggested by Lord Wilberforce.

¹⁰⁸ [1967] 2 QB 116.

there was cogent extrinsic evidence that an enactment was intended to implement the government's obligations under a convention, then the court may look at the convention in elucidating the Act, although the Act nowhere makes mention of the treaty. However, reference can only be made to the convention to resolve ambiguities, or obscurities of language, where the terms of the legislation are not clear. If the terms are not clear, but are reasonably capable of more than one meaning, then the construction which is consonant with the treaty obligations is to be preferred. This is in accordance with the *prima facie* presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations.¹⁰⁹

2.54 Diplock LJ stated that *Ellerman Lines Ltd v Murray*¹¹⁰ was only authority for the proposition that if the legislation is clear, then it must be given effect to, whether or not it carries out the treaty obligations.¹¹¹ He did not agree that that judgment was authority for the proposition that "the terms of an international convention cannot be consulted to resolve ambiguities or obscurities in a statute unless the statute itself contains either in the enacting part or in the preamble an express reference to the international convention which it is the purpose of the statute to implement".¹¹²

2.55 Diplock LJ stated that he would apply the rules of construction by first construing the words used in the section and the Schedule on their own, before turning to the convention to seek confirmation or contradiction of the meaning which he thought they bore.

2.56 In *Post Office v Estuary Radio Ltd*.¹¹³ the Court of Appeal agreed with the *ratio decidendi* of the *Saloman* case. However, it held that if the words of the domestic legislation are narrower, or wider, than the convention which it implements, then the words of the domestic legislation must prevail, and it is those words which must be construed.

2.57 Despite the authority of *Salomon v Commissioner of Customs & Excise*, and the remarks of Diplock LJ, as referred to above, there still exists the authority of the House of Lords in *Ellerman Lines v Murray*.¹¹⁴ Rensen¹¹⁵

¹⁰⁹ At 143. In *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, Lord Diplock confirmed that statutes are to be construed as intended to carry out international obligations, where the words are reasonably capable of bearing such a meaning, even if such an obligation is one assumed by the United Kingdom under an ordinary international treaty, which is not directly applicable.

¹¹⁰ [1931] AC 126.

¹¹¹ At 144. Also see "The Interpretation of Statutes", (Law Com No 21), (Scot Law Com No 11). Paragraphs 12-15, 74-76.

¹¹² *Op cit*, at 144.

¹¹³ [1968] 2 QB 74.

¹¹⁴ See also *Warwick Film Productions v Eisinger* [1969] 1 Ch 508 where Plowman J refused to look at the relevant Article of the Brussels Convention 1948, because the relevant subsection of the Copyright Act 1956 was unambiguous. However, Bennion, *op cit*, at section 221, suggests that decisions such as these in *Ellerman* and *Warwick* can no longer be relied on. He states that the true rule is that the court should arrive at an informed interpretation. He relied on Lord Denning's views in the *Salomon* Case, where Lord Denning said: "I think we are entitled to look at it, because it is an instrument which is binding in international law; and we ought always to interpret our statutes so as to be in conformity with international law". (at *op cit* 141)

argued that international conventions are now being treated by the courts in the same way as they treat *travaux préparatoires*, that is, as mere aids to interpretation. Rensen relied on Lord Ackner in the *Antonis P. Lemos* case, where he said "The Convention is a treaty and may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law".¹¹⁶

2.58 In *Owners of cargo lately laden on board the ship "Riau" v The owners of "Djatianom" and Others*,¹¹⁷ Power J accepted the correctness of the statement of Lord Diplock in the *"Eschersheim"*¹¹⁸ where he said:

"As the Act was passed to enable H.M. Government to give effect to the obligations in international law ... the rule of statutory construction laid down in Saloman v Customs and Excise Commissioners, ... and Post Office v Estuary Radio Ltd., is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the convention, the statutory language should be construed in the same sense as that of the convention, if the words of the statute are reasonably capable of bearing that meaning".

In the event Power J did not refer to the convention as the statutory provision was clear.

2.59 In *Winfat Enterprises (HK) Co Ltd v Attorney General*,¹¹⁹ the Court of Appeal referred to the judgment in *Saloman*, but held that it was not applicable as the Plaintiff had not established ambiguity in the Peking Convention 1898. As the words "peace, order and good government"¹²⁰ were not ambiguous or uncertain in extent, it was not permissible to look to the Convention of Peking to define their ambit.

2.60 In *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*,¹²¹ the House of Lords decided that the official version of the Convention in a foreign language can be taken into account, even though the English language version is the enacted text. Lord Wilberforce rejected the view that the foreign language version could only be looked at if the English version was ambiguous.¹²² In an earlier case, *Corocraft Ltd v Pan American Airways Inc*,¹²³ the Court of Appeal had decided that where a treaty had been incorrectly translated into English, the court could look at the official version and should give effect to that rather than the translation.

¹¹⁵ "British Statutory Interpretation in the light of Community and other International Obligations", 15 Stat. LR 186, 200. (1994)

¹¹⁶ *Op cit* at 761 D-E.

¹¹⁷ [1982] HKLR 427, at 429.

¹¹⁸ [1976] 2 Lloyd's L.R. 1, at 6.

¹¹⁹ [1984] HKLR 32.

¹²⁰ The power of the Governor to make laws for the "peace ... government".

¹²¹ [1978] AC 141.

¹²² At 152. This may have implications in connection with the interpretation of Constitutional and other documents from the P.R.C. post-1997.

¹²³ [1969] 1 QB 616. The court rejected a literal construction, which would have led to absurdity.

2.61 In *Fothergill v Monarch Airlines*,¹²⁴ the House of Lords stated that a purposive construction should be given to an international convention. They looked at dictionaries, legal text-books, articles in legal journals, and (per Lord Scarman) the decisions of foreign courts and the *travaux préparatoires*. They also looked at the French text of the convention. They were divided as to when it was appropriate to do so. Lord Wilberforce and Lord Scarman thought that consultation of the French text was obligatory. However, Lord Fraser thought that it was only appropriate where the English text was ambiguous, or where there was an inconsistency between the texts.

2.62 In *AG v Yau Kwok-lam, Johnny*¹²⁵ the Court of Appeal held that since there was no evidence that in the ivory trade the relevant words bore a technical meaning, the court would accept a "common sense" construction of the words. Hunter J, dissenting, stated that the court should adopt a purposive construction so as to give effect to the relevant Convention:¹²⁶ "either we adopt a literal construction which emasculates an international convention, or we adopt a purposive construction which supports and gives effect to it."¹²⁷ He criticised the majority of the court for not following the principles of *Buchanan & Co v Babco Ltd*,¹²⁸ in adopting a purposive interpretation, as the legislation was introduced to give effect to an international convention.

2.63 The Court of Appeal, in *Hill & Delamain (HK) Ltd v Manohar Gangaram Ahuia*,¹²⁹ decided that, in considering the amended Warsaw Convention, "the court is having to give meaning to words which, in other countries, may be expressed in a language other than English; these words should therefore not be construed in our courts restrictively."

2.64 The United Kingdom Law Commissions saw a conflict between the *Ellerman* decision and the *Saloman* decision, and they hoped that the House of Lords would clarify the extent to which an international convention could be looked at.¹³⁰ Despite what Bennion and the Law Commissions say, the judgments of the courts do not refer to any inherent conflict between the two decisions. *Ellerman* is rarely referred to. The decision can be limited to saying that where a statute is clear and unambiguous, then an international convention to which it refers cannot change that clear meaning. Cross¹³¹ states that the lesson to be learnt from *Ellerman* is "that there should be a special rule concerning statutes which are expressed, or even commonly known, to be implementations of treaties." He concluded that *Ellerman* should be overruled by the House of Lords or reversed by statute.

¹²⁴ [1980] 3 WLR 209.

¹²⁵ [1988] 2 HKLR 394.

¹²⁶ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.

¹²⁷ The majority of the judges felt bound by the inadequate scope of the legislation. It did not enact the whole convention nor did it deal with the situation existing in Hong Kong where ivory could be legally imported, legally possessed, legally worked and legally exported. Silke, V-P followed the House of Lords case of *Inland Revenue Commissioners v Collco Dalings Ltd* [1962] AC 1 which was in line with the authority of the *Ellemere* case.

¹²⁸ [1978] AC 141, at 152.

¹²⁹ [1994] 1 HKLR 353, at 362.

¹³⁰ At paragraph 14 *infra*.

¹³¹ *Statutory Interpretation* (1976) at 140-1.

2.65 The reality is that the courts have adopted a purposive interpretation of treaties and this has given them sufficient scope for saying that the domestic legislation is ambiguous.¹³² Indeed, Lord Wilberforce in the *Babco* case said that the House of Lord's refusal to look at the Labour convention in *Ellerman* was "atypical and in my opinion should no longer be followed".¹³³ Since the purposive construction was endorsed by the House of Lords in *Fothergill*, this can be seen as a departure from the rule in *Ellerman*. Despite the controversy, it did not prevent the Law Commissions from including treaties in their draft clauses of extrinsic aids.¹³⁴

2.66 There is a consistency in the Hong Kong cases of not consulting the treaty or convention unless there is ambiguity in the domestic legislation.

2.67 **Evidence concerning international cases** The courts have adopted a strict view in relation to the proof of foreign materials. In *Li Jin-fei and Others v Director of Immigration*,¹³⁵ Mayo J held that the applicants had failed to prove that they were stateless, as defined by the Convention on Stateless Persons, and to prove that fact in accordance with the law of the People's Republic of China.¹³⁶ The Judge accepted the criticism of counsel for the respondent of the evidence produced by the applicants, including an English language version of the Nationality Law of the PRC which had not been proved by an expert.¹³⁷ The courts needed to exercise considerable caution in attempting to interpret the provisions contained in the law of another jurisdiction. However, in *Madam Lee Bun and Another v Director of Immigration*¹³⁸ the court accepted the explanation of the attitude of the People's Republic of China towards extradition to or from Hong Kong, which seems to have been contained in a "supplementary affidavit", which the judge below ordered should not be published. The court commented that they had been told that the Chinese Extradition Ordinance had not been used since 1935.

2.68 In *The Queen v Director of Immigration and the Refugee Status Review Board, ex parte Do Giau and Others*¹³⁹ the High Court accepted evidence of the document known as the "General Statement of Understanding between the Hong Kong Government and the UNHCR, concerning asylum seekers from Vietnam", and placed the document as an Annexure to the judgment. The court also accepted as a guide the UNHCR Handbook on procedures and criteria for determining refugee status. The court also admitted evidence of "country conditions" in relation to Vietnam from a Vetting Section of the Immigration Department. The applicants had applied to introduce expert

¹³² The decision in *AG v Yau Kwok-lam*, *supra*, seems to have followed the principle in *Ellerman*, though that decision was not directly referred to.

¹³³ *Op cit*, at 153.

¹³⁴ See further the "Interpretation of Statutes", (Law Com No 21) (Scot Law Com No 11) Paragraphs 14-15, 74-76. The relevant draft clause, in Appendix A, 1(1)(c) states "any relevant treaty ... which is referred to in the Act or of which copies had been presented to Parliament ... before that time, whether or not the United Kingdom was bound by it at that time".

¹³⁵ [1993] 2 HKLR 256, 264-5.

¹³⁶ This latter point was in reliance on *Stoeck v Public Trustee* [1921] 2 Ch 67.

¹³⁷ Section 59 of the Evidence Ordinance (Cap 8) relates to evidence of foreign law.

¹³⁸ [1990] 2 HKLR 466.

¹³⁹ [1992] 1 HKLR 287.

evidence of conditions in Vietnam, in the form of written testimony from a member of the Institute of East Asian Studies, and extracts from reports published by Amnesty International and by the International League of Human Rights. The High Court refused to accept the submissions and adjourned the matter so that it could be tested before the Court of Appeal. The Court of Appeal rejected this evidence, *inter alia*, on the basis that it was fresh evidence, which could not be admitted in a judicial review.

(7) Travaux préparatoires¹⁴⁰

2.69 Lord Diplock, in the *Black-Clawson* case,¹⁴¹ said that the English courts could make cautious use of *travaux préparatoires* to resolve an ambiguity in a treaty to which effect is given by the Act in question. However, the leading case dealing with the use of *travaux préparatoires* is *Fothergill v Monarch Airlines*.¹⁴² In that case, Lord Wilberforce said their use should be cautious but:

"there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible,¹⁴³ and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention".¹⁴⁴

2.70 Lord Scarman took the view that they should be admissible, not only when there is an ambiguity, but also where a literal construction appears to conflict with the purpose of the convention. He also recommended that it would be useful if the conference leading to a convention could identify, perhaps even in the convention, documents to which reference may be made in its interpretation.

2.71 The decision to allow reference to *travaux préparatoires* was made easier by the fact that international courts and tribunals do refer to them as aids to interpretation of treaties, and this practice has been incorporated into the Vienna Convention on the Law of Treaties.¹⁴⁵ This Convention can be regarded as applying to Hong Kong.¹⁴⁶ Lord Diplock referred to Articles 31 and

¹⁴⁰ The documents that form the preparatory work of a treaty and include such matters as the proceedings of an international conference which produced the treaty.

¹⁴¹ [1975] AC 591, at 640G.

¹⁴² [1980] 3 WLR 209.

¹⁴³ These *travaux préparatoires* were contained in the minutes of the Hague Conference of 1955, available for sale in Her Majesty's Stationery Office.

¹⁴⁴ At 220A. It should be noted that he also referred to the texts of five jurists.

¹⁴⁵ For the text of Article 31 and 32 of the Vienna Convention on the Law of Treaties, see chapter 10.56 and 10.57. Section 15AB of the Acts Interpretation Act 1901 (Cth), which incorporates extrinsic aids to statutory interpretation was modelled on Article 31 and 32.

¹⁴⁶ It was ratified by the United Kingdom in 1991. It was not specified that it did not apply to Hong Kong.

32 of the Vienna Convention on the Law of Treaties. He saw the Convention as doing no more than codifying already-existing public international law.¹⁴⁷

2.72 In *Gatoil International Inc. v Arkwright-Boston Manufacturers Mutual Insurance*, Lord Scarman expressly approved of Lord Wilberforce's view that *travaux préparatoires* provided a "reinforcement" to the interpretation of the relevant Act.¹⁴⁸ In *Gatoil* Lord Wilberforce applied the two criteria he had set out in *Fothergill v Monarch Airlines Ltd.*¹⁴⁹ In *The Antonis P. Lemos*,¹⁵⁰ Lord Brandon accepted the proposition that, since the relevant Act was designed to give effect to an international convention, a broad and liberal construction should be given to the Act.

2.73 In the Irish Supreme Court case of *Bourke v Attorney General*,¹⁵¹ the *travaux préparatoires* for Article 3 of the European Convention on Extradition were regarded as permissible sources of information for the interpretation of the Extradition Act 1965.

2.74 In *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co. Ltd*¹⁵² reference was made to the Sixth Schedule of the Arbitration Ordinance (Cap 341). The Ordinance had incorporated the UNCITRAL Model Law on International Commercial Arbitration in its Fifth Schedule. Section 2(3) of the Ordinance provides that:

"In interpreting and applying the provisions of the UNCITRAL Model Law,¹⁵³ regard shall be had to its international origin and to the need for uniformity in its interpretation, and regard may be had to the documents specified in the Sixth Schedule".

This Schedule lists the report of the Secretary-General, which is a Commentary on the Draft Text of the Model Law, the report of the 18th session of UNCITRAL and the report of the Law Reform Commission of Hong Kong on the Adoption of the UNCITRAL Model Law.¹⁵⁴ In *Katran Shipping Co. Ltd v Kenven Transportation Ltd*¹⁵⁵ Kaplan J relied, *inter alia*, on a textbook which included reference to the *travaux préparatoires* of the Model Law.¹⁵⁶

(8) Other statutes

2.75 **Earlier statutes** A rule was laid down by Lord Mansfield in *R v Loxdale* that:

¹⁴⁷ At 224. See further, GG Lawrie "Interpreting the Interpretation Provisions of the Vienna Convention" (1972) 2 HKLJ 272.

¹⁴⁸ [1985] AC 255.

¹⁴⁹ See paragraph 4.28 *infra*.

¹⁵⁰ [1985] 1 AC 711, at 725.

¹⁵¹ [1972] IR 36.

¹⁵² [1992] 1 HKLR 40.

¹⁵³ UNCITRAL stand for United Nations Commission on International Trade Law.

¹⁵⁴ Topic No. 17 (September 1987).

¹⁵⁵ (1992), Cons L No. 7 of 1992, 29 June 1992, unreported.

¹⁵⁶ Aron Broche, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990).

"Where there are different statutes in pari materia,¹⁵⁷ though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other".¹⁵⁸

2.76 It is proper to refer to earlier Acts *in pari materia* only where there is ambiguity.¹⁵⁹ However, the courts can interpret the rule strictly. In *Powell v Cleland*¹⁶⁰ Evershed LJ refused to regard the Rent Restriction Acts as *in pari materia* with the real property legislation of 1925.

2.77 **Consolidation Acts** These are Acts which bring together in one Act the statutory provisions relating to a particular topic without any changes in the law and are not subject to amendment in their passage through Parliament.

2.78 In *I.R.C. v Joiner*¹⁶¹ Lord Diplock stated that:

"it is only where the language of the consolidation Act itself is ambiguous that it is legitimate to have recourse to the repealed enactments to see if their meaning is clearer, and, if it is, to resolve the ambiguity in the consolidation Act by ascribing to its language whichever of the alternative meanings would not effect a change in the previously existing law. What cannot ever be legitimate is to have recourse to the repealed enactments to make obscure and ambiguous that which is clear in the consolidation Act".

2.79 This principle was confirmed in *Farrell v Alexander*.¹⁶² This is summarised in the headnote: "when the words of a consolidation Act are clear, the court in construing it should treat it as standing on its own feet and it is not necessary to examine its legislative antecedents".

2.80 Lord Simon of Glaisdale indicated that there might be one other rare situation where the court can construe a consolidation Act by reference to a consolidated enactment. "This is where the purpose of a statutory word or phrase can only be grasped by examination of the social context in which it was first used".¹⁶³

2.81 **Modifications and re-enactments**¹⁶⁴ Lord Buckmaster in *Barras v Aberdeen Steam Trawling and Fishing Co.*¹⁶⁵ stated that "where a word of doubtful meaning has received a clear judicial interpretation, the

¹⁵⁷ That which deals with the same person, thing or class as the one being dealt with.

¹⁵⁸ *R v Loxdale* [1758] 1 Burr 445, at 447.

¹⁵⁹ *R v Titterton* [1895] 2 QB 61 at 67, DC, per Lord Russell of Killowen.

¹⁶⁰ [1948] 1 KB 262, at 273.

¹⁶¹ [1975] 1 WLR 1701, at 1715.

¹⁶² [1977] AC 59.

¹⁶³ *George Hensher Ltd v Restawile Upholstery (Lancs.) Ltd.* [1976] AC 64.

¹⁶⁴ This heading is from *The Laws of Scotland, Stair Memorial Encyclopedia*, paragraph 1159.

¹⁶⁵ [1933] AC 402, at 411.

subsequent statute, which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it". However, Lord Macmillan was of the opinion that the re-enactment of a provision previously judicially interpreted raises no more than a presumption that Parliament intended that the language so used should be given the same meaning as that judicially attributed to it.¹⁶⁶

2.82 In *Farrell v Alexander*,¹⁶⁷ Lord Simon of Glaisdale seemed to cast doubt on the "*Barras*" doctrine. He said "If therefore the object of statutory interpretation were to ascertain what Parliament meant to say, the *Barras* doctrine would indeed be potent and primary. But the object of statutory interpretation is rather to ascertain the meaning of what Parliament has said". He concluded:

"To pre-empt a court of construction from performing independently its own constitutional duty of examining the validity of a previous interpretation, the intention of Parliament to endorse the previous judicial decision would have to be expressed or clearly implied. Mere repetition of language which has been the subject of previous judicial interpretation is entirely neutral in this respect".

2.83 In *Reg. v Chard*,¹⁶⁸ the House of Lords decided that the speeches in the *Barras* case should not be treated as laying down an inflexible rule of construction to the effect that, where once certain words in a statute have received a judicial construction in one of the superior courts, and the legislature has repeated them without alteration in a subsequent statute, the legislature must be taken to have used them according to the meaning which a court has given to them. Lords Scarman, Roskill and Templeman regarded it as a presumption at the most.

2.84 **Later statutes** In *Kirkness v John Hudson & Co.*¹⁶⁹ the House of Lords decided that, except as a parliamentary exposition,¹⁷⁰ subsequent Acts are not to be relied on as an aid to the construction of prior unambiguous Acts. A later statute may not be referred to in order to interpret the clear terms of an earlier Act, which the later Act does not amend, even although both Acts are to be construed as one, unless the later Act expressly interprets the earlier Act: but if the earlier Act is ambiguous, the later Act may throw light on it, as where a particular construction of the earlier Act will render the later incorporated Act ineffectual.¹⁷¹

2.85 However, in *Richardson Greenshields of Canada (Pacific) Ltd v Chow Paul*¹⁷² Bokhary J, *per curiam*, stated that a later statute may be resorted

¹⁶⁶ At 353.

¹⁶⁷ *Op cit*, at 90-91.

¹⁶⁸ [1983] 3 WLR 835.

¹⁶⁹ [1955] AC 696, HL.

¹⁷⁰ An Act passed for the express purpose of explaining previous Acts.

¹⁷¹ Craies *Statute Law*, (6th edition, 1963) at 146.

¹⁷² [1989] 1 HKC 261.

to in order to interpret the earlier one when two conditions are fulfilled: firstly, both statutes must be on the same subject and secondly, the earlier statute to be construed must be fairly and equally open to diverse meanings.¹⁷³ Thus, it would have been in order to examine the Commodities Trading Ordinance (Cap 250) in interpreting the Securities Ordinance (Cap 333).

2.86 In *Matheson PFC Limited v Jansen*¹⁷⁴ Penlington J relied on clear authority¹⁷⁵ that, in the case of ambiguity in the earlier legislation, regard may be had to the way a statute has been subsequently amended.

(9) Conveyancing and administrative practice

2.87 "The uniform opinion and practice of eminent conveyancers has always had great regard paid to it by all courts of justice".¹⁷⁶ Mills-Owen J, in *In Re Tse Lai-Chiu Deceased*,¹⁷⁷ stated that the practice of conveyancers and of the legal profession was that Chinese testators dying domiciled in Hong Kong were treated as having full testamentary disposition.

2.88 Administrative practice does not, however, have the same weight.¹⁷⁸ The views of government departments as to the practical interpretation of a statute are not admissible as an aid. The Court of Appeal in *London County Council v Central Land Board*¹⁷⁹ criticised the judge below for allowing counsel to read practice notes provided by the respondent for the guidance of its staff in the administration of the Town and Country Planning Act 1947. However, J Fleming Wallace states that this does not seem to apply to income tax legislation.¹⁸⁰ He referred to Lord Macnaghten's judgment in *Income Tax Special Purposes Comrs v Pemsel*.¹⁸¹

2.89 On the other hand, Bennion¹⁸² stated that official statements by the government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the meaning of its provisions. However, the cases that he relies on are only tax cases. In *Wicks v Firth (Inspector of Taxes)*¹⁸³ the House of Lords had regard to a press release issued by the Inland Revenue in relation to the tax treatment of scholarships awarded by employers to children of employees. It is submitted that the court should give more weight to documents published by government

¹⁷³ This was in reliance on *Re MacManaway* [1951] AC161(PC).

¹⁷⁴ (1994) CA, No 72 of 1994, 26 July 1994.

¹⁷⁵ *Ormond Investment Ltd v Betts* [1928] AC 143, at 156, and *Cafe Brandy Syndicate v IRC* [1921] 2 KB 403, at 414.

¹⁷⁶ *Basset v Basset* (1744) 3 Atk. 203, per Lord Hardwicke L.C. at 208.

¹⁷⁷ [1969] HKLR 159, at 199.

¹⁷⁸ See Maxwell, *The Interpretation of Statutes* (12th edition, 1976), at 57.

¹⁷⁹ [1958] 3 All ER 676.

¹⁸⁰ The author of the section on Statutory Interpretation in *The Laws of Scotland, Stair Memorial Encyclopaedia*, vol 12, paragraph 1162.

¹⁸¹ [1981] AC 531 at 591, HL.

¹⁸² *Statutory Interpretation, a Code*, (2nd edition, 1992), section 232.

¹⁸³ [1983] 2 AC 214. This case is dealt with in more detail under "Explanatory Memoranda", *supra*.

departments as guides to their practices after a Bill is enacted than to documents like press releases issued when a Bill is introduced or enacted.

2.90 Lord Wilberforce in the House of Lords held that although a departmental circular "has no legal status ... it acquired vitality and strength when, through the years, it passed ... into planning practice and textbooks" and was acted on in planning decisions.¹⁸⁴

2.91 Commercial usage has been allowed as an aid to construction. Lord Denning in *United Dominions Trust, Ltd. v Kirkwood*¹⁸⁵ said "In such a matter as this, when Parliament has given no guidance, we cannot do better than look at the reputation of the concern amongst intelligent men of commerce".

(10) Uniform court decisions and usage¹⁸⁶

2.92 In the *Marquis of Tweeddale Case*¹⁸⁷ it was decided that if the meaning of a statute is ambiguous, and a certain interpretation has been uniformly put upon it, and transactions, such as dealings in property and the making of contracts, have taken place on the faith of that interpretation, the court will not adopt a different interpretation upon it which would materially affect those transactions.

2.93 In a later case, Lord Buckmaster reiterated the principle, when he said "the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless your Lordships could say positively that it was wrong and productive of inconvenience".¹⁸⁸

(11) Delegated legislation¹⁸⁹

2.94 Bennion takes the view that delegated legislation made under an Act may be taken into account as persuasive authority on the meaning of its provisions.¹⁹⁰

2.95 More recently, in *Pickstone v Freemans plc*¹⁹¹ reference was made to a Government statement in *Hansard* and to the debates in both

¹⁸⁴ *Coleshill & District Investment Co Ltd v Minister of Housing & Local Government* [1969] 1 WLR 746 at 765, per Lord Wilberforce (HL).

¹⁸⁵ [1966] 2 QB 431, at 454.

¹⁸⁶ This heading is from *The Laws of Scotland, Stair Memorial Encyclopedia*, in paragraph 1163.

¹⁸⁷ (1793) 1 Anst 143.

¹⁸⁸ *Bourne v Keane* [1919] AC 815 at 874, HL.

¹⁸⁹ In the Interpretation and General Clauses Ordinance (Cap 1) the term "subsidiary legislation" is used. It is defined in section 3 as "any regulation ... or other instrument made under or by virtue of any Ordinance ...". Section 31 provides that expressions used in subsidiary legislation shall have the same construction as the Ordinance.

¹⁹⁰ At section 233. See further *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 1 WLR 903.

¹⁹¹ [1988] 2 All ER 803.

Houses of Parliament to consider the Parliamentary intention in approving regulations amending anti-discrimination legislation. The reference was on the basis that the regulations could not be amended by either House and that they were intended to bring United Kingdom law into line with European Economic Community obligations, as determined by the European Court of Justice. An earlier attempt to implement the obligations had been unsuccessful. Significantly, Lord Oliver relied on extrinsic aids even though the regulations were, on his view, unambiguous on their face.¹⁹²

2.96 Lord Lowry's judgment in *Hanlon v Law Society*¹⁹³ is a useful summary of the law on the construction of subordinate legislation. He stated:

"A study of the cases and of the leading textbooks ..., appears to me to warrant the formulation of the following propositions. (1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous. (2) Regulations made under the Act provide a parliamentary or administrative contemporanea expositio¹⁹⁴ of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.¹⁹⁵ (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation. (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former.¹⁹⁶ (5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modify.¹⁹⁷ (6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act."

2.97 *Hanlon v The Law Society* was followed in *BACTA v Westminster City Council*,¹⁹⁸ in that the House of Lords held that the meaning of the term "cinematograph exhibition" as defined in section 1(3) of the Cinematograph (Amendment) Act 1982 should be arrived at by reference to the Cinematograph (Safety) Regulations 1955.

¹⁹² At 817.

¹⁹³ [1980] 2 All ER 199, at 218-9.

¹⁹⁴ This is a rule of construction for ancient statutes, where the court looks at how the provisions were understood at the time when they were passed.

¹⁹⁵ See Mellish LJ in *Re Wier, ex parte Wier* (1871) LR 6 Ch App 875 at 879, which Lord Lowry said had gone further than he would like. See also *Stephens v Cuckfield Rural District Council* [1960] 2 All ER 716, at 718.

¹⁹⁶ See *Neil v Glacier Metal Co Ltd* [1963] 3 All ER 477.

¹⁹⁷ See *Britt v Buckinghamshire County Council* [1963] 2 All ER 175, at 177, 179, 181-182.

¹⁹⁸ [1988] 1 All ER 740, at 745.

2.98 The Privy Council referred to this judgment in *Elvira Vergara and another v Attorney General*.¹⁹⁹ Subordinate legislation could be used to construe any ambiguous provision in the parent Ordinance. These remarks were *obiter*, but no doubt would be regarded as highly persuasive.

Conclusion

2.99 It can be seen that there is a wide range of extrinsic aids. The extent and use of these aids has been variously considered by the courts. This chapter has dealt with the pre-*Pepper v Hart* judgments. We consider in the next two chapters the rationale of the courts in excluding, or allowing, recourse to extrinsic aids. In chapter 5 we analyse the decision in *Pepper v Hart*, which is concerned primarily with the use of *Hansard* as an aid to statutory interpretation, before examining developments in the use of extrinsic aids (not only *Hansard*) since *Pepper v Hart* in chapter 6.

¹⁹⁹ [1989] 1 HKLR 233, at 241.

Chapter 3

The Rationale of the Courts in Excluding Extrinsic Aids

Introduction

3.1 It is important to isolate the rationale of the courts in excluding extrinsic aids to assist in formulating recommendations for changes in the rules governing the use of such aids. Only some of the judgments clearly set out their rationale for exclusion. These judgments have tended to focus on the more common extrinsic aids, such as official reports, or reiterating the exclusion of *Hansard*. This chapter will only deal with pre-*Pepper v Hart*¹ judgments. Chapter 6 will deal with judicial developments post-*Pepper v Hart*.

3.2 Lord Diplock in the *Black-Clawson* case, explained the link between the rules of construction which have been developed over the centuries by the courts, 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 to identify 'the mischief and defect for which the common law did not provide', for this would have been stated in the preamble. It was a rule of construction of the actual words appearing in the statute and nothing else. 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. To speak of mischief and of remedy is to describe the obverse and the reverse of a single coin. The former is that part of the existing law that is changed by the plain words of the Act; the latter is the change that these words made in it."*²

3.3 Most of the case law concerning the admissibility of extrinsic aids has arisen from the use of official reports. In *Eastman Photographic Materials Co. Ltd. v Comptroller-General of Patents, Designs, and Trade Marks*³ Lord Halsbury L.C. cited from an official report, which referred not only to the existing

¹ [1992] 3 WLR 1032.

² *Black-Clawson Ltd v Papierwerke AG* [1975] AC 591, at 638.

³ [1898] AC 571, 575. The Court of Appeal in *Elson-Vernon Knitters Ltd v Sino-Indo-American Spinners Ltd* [1972] HKLR 468, 475 relied on Lord Halsbury's rationale.

law but also to what the commissioners thought the law ought to be. Lord Halsbury justified this by saying:

"My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission."

3.4 The United Kingdom Law Commissions saw the *Eastman* case as falling into the category of an aid to ascertain the mischief at which the statute was aimed. The House of Lords did not follow Lord Halsbury's observation in *Assam Railways and Trading Co. v Commissioners of Inland Revenue*.⁴ They refused to look at the recommendations of a royal commission which had preceded an Act, and which counsel sought to cite as evidence of the intention of Parliament. Lord Wright stated that Lord Halsbury had not referred to the report directly, to ascertain the intention of the words used in the Act, but as extraneous matter to show the surrounding circumstances with reference to which the words were used. However, after a period of time in which courts were prohibited from looking at such reports⁵ the courts changed the rule to allow official reports to be looked at in certain circumstances.⁶

3.5 Samuels interpreted the case law as follows:

"Those favouring a narrow or literal approach to interpretation tend to wish to exclude extraneous material. Those favouring a wide or liberal or mischief or purposive approach to interpretation tend to wish to admit extraneous material".⁷

Constitutional balance between parliament and the courts

3.6 One of the reasons given by Lord Wilberforce in the *Black-Clawson* case⁸ for refusing to take an official report into account was because of constitutional principles:

"... 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

⁴ [1935] AC 445, at 458-9.

⁵ See *Salkeld v Johnson* (1848) 2 Exch. 256, at 273.

⁶ See the *Black-Clawson* case, *op cit*.

⁷ Samuels, *The Interpretation of Statutes*, [1980] Stat LR 86, at 99.

⁸ *Op cit* at 629-630.

a reflecting mirror of what some other interpretation agency might say".⁹

Or, as Lord Diplock put it: "It is for the court and no one else to decide what words in a statute mean".¹⁰

Parliamentary intention

3.7 The tension between Parliament and the courts is often made manifest in how the courts construe the intention of Parliament. As Lord Reid, in the *Black-Clawson* case, said: "We often say that 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."¹¹ He also argued that if the courts were to take evidence of Parliament's intention into account, then they would have to reverse their practice with regard to consulting *Hansard*.¹² If the courts could not look at expressions of intention by Parliament, then *a fortiori* they should not look at such expressions by royal commissions or committees.¹³ In contrast, Viscount Dilhorne took the view that it did not follow that the court could refer to *Hansard* just because it looked at the whole of an official report.¹⁴

3.8 Lord Donaldson, in the House of Lords debate on the Interpretation Bill 1980,¹⁵ expressed concern that "looking at what was said in Parliament" would mean that there would be a real danger that the courts would give effect to the intention, not of Parliament, but of the executive.

3.9 Lord Diplock defended the role of the courts in *Fothergill v Monarch Airlines Ltd.*¹⁶ when he said:

"The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament'; but what this metaphor, though convenient, omits to take into account is that 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

⁹ See Burrowes "An update on statutory interpretation", NZLJ (March 1989) 94, at 97, who states that on policy grounds the court may exclude extrinsic aids because then, they, not the law makers have final control over what the Act means.

¹⁰ *Op cit* at 637D.

¹¹ *Ibid* at 613.

¹² *Ibid* at 614G.

¹³ *Ibid* at 615.

¹⁴ *Ibid* at 623F.

¹⁵ 503 H.L. Debs, col 288. This was Lord Scarman's Bill which tried to implement the Draft Clauses contained in the United Kingdom Law Commission's Report, "The Interpretation of Statutes" (Law Com No. 21) (Scot Law Com No. 11) 1969.

¹⁶ [1981] AC 251, at 279.

whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state".

3.10 Lord Simon, in refusing to look at the legislative history, stated in *Ealing LBC v Race Relations Board*¹⁷ that:

"In the absence of 'preparatory works' ... the courts must ascertain the legislative intention principally by examining (1) the social background; (2) a conspectus of all relevant law; (3) the long title of the statute and, where possible, the preamble; (4) the actual words used; (5) other statutory provisions which illuminate the meaning of the actual words used"

Parliamentary privilege

3.11 One further rationale for the exclusionary rule is the Parliamentary privilege provided by article 9 of the Bill of Rights 1688.¹⁸ This is despite the resolution of the House of Commons in 1980 that:

*"This House, while re-affirming the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to parliamentary papers be discontinued".*¹⁹

Miers commented that this resolution has not led to the use of *Hansard*, for while it "modifies the procedures by which reference may be made to *Hansard* in judicial proceedings, it does not alter the purposes for which such reference may be sought".²⁰ Dunn L J in *R v Secretary for Trade, ex parte Anderson Strathclyde*,²¹ concluded that the 1980 Resolution had no effect on the purposes for which *Hansard* may be cited in court and it may not be cited to support a ground for relief in proceedings for judicial review.²²

3.12 This was the reason why the court in *Church of Scientology of California v Johnson-Smith*²³ refused to allow the plaintiff to give evidence of what the defendant had said in Parliament. The Attorney General argued in

¹⁷ [1972] AC 342, at 361.

¹⁸ This provides "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

¹⁹ 31 October 1980, H. C. Debs Vol 991, cols 879-916.

²⁰ "Citing *Hansard* as an aid to Interpretation", [1983] Stat LR 98, at 104.

²¹ [1983] 2 All ER 233, at 239.

²² Lord Browne-Wilkinson, in *Pepper v Hart* [1992] 3 WLR 1032, at 1060-1, noted that the Crown, at 237G-H, had not objected to the use of parliamentary materials. He concluded, in the light of the Attorney General's concession and the decision in *Ex parte Brind*, [1991] 1 AC 696, at 741F, that the *Anderson Strathclyde* judgment was wrongly decided.

²³ [1972] 1 QB 522.

Pepper v Hart that to allow use of *Hansard* would be in breach of article 9 of the Bill of Rights 1688 as it would question the freedom of speech in debates in Parliament.²⁴ He also argued that²⁵ for the court to use Parliamentary material in construing legislation would be to confuse the respective roles of Parliament as the maker of law and the courts as the interpreter. This contention was rejected by the majority of the House of Lords.

3.13 In Hong Kong, there is a provision in section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382), which is similar to article 9 of the Bill of Rights 1688. This provides:

"There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council."

The reported cases²⁶ which have excluded *Hansard* or allowed the use of explanatory memorandum do not refer to parliamentary privilege.

Judicial Bill of Rights argument

3.14 In Australia, despite legislation allowing for the use of extrinsic aids,²⁷ the courts have taken the view that there is an unwritten Bill of Rights of values which are incorporated into statutory interpretation.²⁸ This is illustrated by the case of *Re Bolton: Ex p Beane*²⁹ where the court refused to use the second reading speech of a Minister, which would result in derogating from the rights or freedom of an individual.

3.15 One of the justifications for excluding extrinsic aids is the presumption which holds that certain Acts (for example, tax Acts, Acts relating to property and penal Acts) must be strictly construed in favour of the individual.³⁰

The need for legal certainty

3.16 Legislation should be clear, and the legal consequences of the provisions of the legislation need to be certain, to do justice between the citizen and the executive. The practical application of constitutional principles requires that "a citizen, before committing himself to any course of action, should be

²⁴ [1992] 3 WLR 1032, at 1046 and 1061. However, the Attorney General accepted that it was for the courts to determine the legal meaning and effect of article 9.

²⁵ At 1032, 1061. See further Chapter 5.

²⁶ See chapter 2.

²⁷ For example, section 15AB of the Acts Interpretation Act 1901 (Cth). See chapter 8 further.

²⁸ Mr Justice Bryson, "Statutory Interpretation - an Australian Judicial Perspective" (1992) SLR 187, at 206. See chapters 8 and 11. See further J F Burrows, "An update on statutory interpretation" 1989 NZLR 94, at 95.

²⁹ [1987] 162 CLR 514.

³⁰ However, see under "taxing statutes", in chapter 6.

able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates".³¹

3.17 Lord Diplock in *Fothergill v Monarch Airlines*³² argued that:

*"If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation".*³³

3.18 The needs of the citizen are reflected in the fact that there is only one authoritative source of law to be interpreted: the text of the statute.³⁴ Or, as Lord Diplock in *Fothergill v Monarch Airlines*³⁵ put it:

"Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible".

Practical aspects

3.19 It is useful to be reminded here about the criteria set out by the United Kingdom Law Commissions:³⁶

"In considering the admissibility of Parliamentary proceedings, it is necessary to consider how far the material ... might be relevant ..., how far it would afford [the courts] reliable guidance,

³¹ The *Black-Clawson* case, *supra*, Lord Diplock at 638E.

³² [1980] 3 WLR 209, at 221.

³³ However, Lord Diplock concluded, that where the text of an international convention was ambiguous, an English Court should have regard to any material which the delegates to the conference had thought would be available, to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament, giving effect to international conventions, they might well be under a constitutional obligation to do so (see 224F-G).

³⁴ Miers, "Citing *Hansard* as an aid to Interpretation" [1983] Stat LR 98, at 105.

³⁵ *Op cit* at 221F-G.

³⁶ "The Interpretation of Statutes", (Law Com. No. 21) (Scot. Law Com. No. 11)(1969) at paragraph 53.

and how far it would be sufficiently available to those to whom the statute is addressed".

Most of the objections to the admissibility of extrinsic aids have been on practical grounds. In the *Black-Clawson* case,³⁷ Lord Wilberforce³⁸ objected to interpreting two documents instead of one, that is, a Bill and its commentary prepared by a committee.

3.20 In *Beswick v Beswick*, Lord Reid said:

"For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard,³⁹ and it would often be impracticable for counsel to get access to at least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court".⁴⁰

3.21 Viscount Dilhorne, in *Davis v Johnson*⁴¹ also took a practical objection to the use of *Hansard*:

"If it was permissible to refer to Hansard, in every case concerning the construction of a statute counsel might regard it as necessary to search through the Hansards of all the proceedings in each House to see if in the course of them anything relevant to the construction had been said. If it was thought that a particular Hansard had anything relevant in it and the attention of the court was drawn to it, the court might also think it desirable to look at the other Hansards. The result might be that attention was devoted to the interpretation of ministerial and other statements in Parliament at the expense of consideration of the language in which Parliament had thought to express its intention".

3.22 Lord Bledisloe, in the debate on Lord Scarman's Interpretation Bill,⁴² warned about lengthier trials ensuing if counsel cited debates in argument, and then judges had to consider these texts closely. However, it is surprising that the focus of objection by the judiciary, on practical grounds, has been the extra time for counsel, and the difficulties with access to the material.

³⁷ [1975] AC 591.

³⁸ At 629E.

³⁹ Lord Simon, in the *Black-Clawson* case stated that, by limiting the material available for forensic scrutiny, society enjoys the advantages of economy in forensic manpower and time. He pointed to the disappointing experience of the United States in looking at legislative proceedings. (at 645)

⁴⁰ [1968] AC 58, at 74A.

⁴¹ [1979] AC 264, at 337.

⁴² He was speaking for the Bar and the Law Society - H.L. Debs, vol 418, cols 1341-44.

There has not been criticism that the use of *Hansard* might lead to lengthier trials, thus clogging up already overcrowded court lists.

Lack of availability

3.23 The United Kingdom Law Commissions' report noted the heavy burden which might be placed on the citizen or the practitioner if parliamentary materials were not readily available.⁴³ It relied on a quotation from Justice Jackson of the United States⁴⁴ where he said "... Only the lawyers of the capital or the most prosperous offices in the large cities can have all the legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices".⁴⁵

3.24 Lord Fraser in *Fothergill v Monarch Airlines*⁴⁶ refused to take judicial notice of some of the *travaux préparatoires* that were put to the court, on the basis that they were not reasonably accessible to private citizens, or even to lawyers who do not happen to specialise in air transport law.⁴⁷ This was also the justification used by Lord Wilberforce in *Farrell v Alexander*⁴⁸ when he stated that consolidation Acts should be interpreted, if reasonably possible, without recourse to the previous legislation. He used the example of the Rent Act 1968 which had to be understood or explained to great numbers of citizens.

3.25 In the *Black-Clawson* case Lord Reid said:

*"An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind".*⁴⁹

Unreliability of extrinsic aids

3.26 ***Hansard*** Lord Diplock, in *Fothergill v Monarch Airlines*,⁵⁰ criticised the parliamentary process, without setting out his reasons for doing so: "The reasons why the nature of the parliamentary process at Westminster

⁴³ Paragraph. 60, *supra*.

⁴⁴ (1948) 34 ABA Journal 535, at 537-8. This objection, made in 1948, must be seen in the present day context of the increasing use of information technology by law drafters, and the availability of *Hansard* on CD-ROM.

⁴⁵ This problem was dealt with by Lord Browne-Wilkinson in *Pepper v Hart* [1992] 3 WLR 1032, at 1058-9.

⁴⁶ [1980] 3 WLR 209, at 229D-F.

⁴⁷ He suggested, in agreement with the lower court judge, that the statute should expressly provide that any report by an official rapporteur may be referred to as an aid to its interpretation. (at 230A).

⁴⁸ [1977] AC 59, at 73.

⁴⁹ [1975] AC 591, at 614A.

⁵⁰ [1980] 3 WLR 209, at 222G.

would make this an unreliable and inappropriate guide to the interpretation of a statute have been often stated by this House and need no repeating". One of the clearest objections to the unreliability of *Hansard* was put succinctly by Lord Scarman in *Davis v Johnson*.⁵¹

*"such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility, the essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of Parliamentary and ministerial utterances can confuse by its very size".*⁵²

3.27 Lord Reid in the *Black-Clawson* case⁵³ emphasised the unreliability of relying on what a promoter of a Bill says, as representing the intention of Parliament. He expressed his concern as follows:

"One might take the views of the promoters of a Bill as an indication of the intention of Parliament but any view the promoters may have had about questions which later come before the court will not often appear in Hansard and often those questions have never occurred to the promoters. At best we might get material from which a more or less dubious inference might be drawn as to what the promoters intended or would have intended if they had thought about the matter, and it would, I think, generally be dangerous to attach weight to what some other members of either House may have said".

3.28 Lord Simon in *Ealing LBC v Race Relations Board*,⁵⁴ criticised the use of legislative history in other jurisdictions as being open to abuse and waste:

"an individual legislator may indicate his assent on an assumption that the legislation means so-and-so, and the courts may have no way of knowing how far his assumption is shared by his colleagues, even those present."

3.29 The fact that it is possible to refer to an official report of a committee does not justify referring to *Hansard* to see what the Minister in charge of a Bill has said it was intended to do.⁵⁵ Viscount Dilhorne explained his view as follows:

⁵¹ [1979] AC 264, at 349-50. The judgement in that case confirmed the rule that *Hansard* can never be referred to by counsel in court and cannot be relied on by the court in construing a statute.

⁵² This was relied on in *Reg v Cheng Chung-wai* [1980] HKLR 593, at 596-7 and also in *Robert H.P. Fung v First Pacific Bank Ltd.* [1989] 2 HKLR 614. The reason given in the latter case was to avoid misunderstandings and so no ground for complaint could arise. (at 622J).

⁵³ [1975] AC 591, at 613-615.

⁵⁴ [1972] AC 342, at 361.

⁵⁵ Viscount Dilhorne in the *Black-Clawson* case [1975] AC 591, at 623.

"what is said by a Minister in introducing a Bill in one House is no sure guide as to the intention of the enactment, for changes of intention may occur during its passage".

3.30 **Official reports** Lord Scarman's justification for not looking at the recommendations of official reports was that "one cannot always be sure, without reference to proceedings in Parliament which is prohibited, that Parliament has assessed the mischief or understood the law in the same ways as the reporting body".⁵⁶ Lord Salmon, in the same case, warned that such reports are sometimes uncertain guides, as they do not always reveal the full mischief which the Act is intended to remedy.⁵⁷

3.31 Lord Denning in *Letang v Cooper*⁵⁸ justified his objections on the basis that Parliament may, and often does, decide to do something different to cure the mischief.

Conclusion

3.32 Lord Simon,⁵⁹ in the *Black-Clawson* case, said that in statutory construction the court is not solely concerned with what the citizens, through their parliamentary representatives meant to say; it is also concerned with the reasonable expectation of those who may be affected by it.

3.33 This encapsulates the dilemma of whether the use of extrinsic aids assists or hinders the interests of the citizen in knowing what the law is. The needs of the citizen have to be balanced with the needs of Parliament and the courts. It is a fine line to tread between them. The reasons given by the courts for exclusion of extrinsic aids should be borne in mind when considering to what extent the law should be changed in this area.

⁵⁶ *Davis v Johnson* [1979] AC 264, at 350. However, Viscount Dilhorne in the *Black-Clawson* case, *op cit*, suggested that it was artificial to draw a line between reading the report but not the recommendations. To him, it was a question of what weight was to be given to the recommendations.

⁵⁷ At 345D.

⁵⁸ [1965] 1 QB 232, at 240. This was also the justification in *Assam Railways and Trading Co. Ltd v Inland Revenue Commissioners* [1935] AC 445.

⁵⁹ *Ibid* at 645.

Chapter 4

Rationale of the Courts in Allowing Extrinsic Aids

4.1 The cases that will be dealt with in this Chapter pre-date the judgment in *Pepper v Hart*.¹ It is useful to look at the rationale given by the courts in allowing the use of such aids, in order to see how the House of Lords reached the decision in *Pepper v Hart* to allow the use of *Hansard*. The United Kingdom's Law Commissions report² set out the purposes of looking at such aids as (1) to see the general legal and factual situation forming the background to the enactment, (2) to see the "mischief", that is, the state of affairs within that legal or factual situation which it is the purpose of the legislature to remedy and (3) to look for information which might deal with the nature and scope of the remedy. There is no difficulty with the judiciary looking at the first heading. The material under the second and third heading has been more problematic.

4.2 Lord Scarman outlined the criteria for looking at extrinsic aids to an international convention as being justified where there is ambiguity or doubt, or if a literal construction appears to conflict with the purposes of the legislation.³ Those criteria are equally applicable to legislation, if the courts accept a purposive construction. This chapter looks at the rationale adopted by the courts in allowing the use of extrinsic aids, such as official reports and parliamentary materials.

Official reports

4.3 Most of the discussion as to whether extrinsic aids should be allowed by the courts have taken place in the context of official reports of bodies like the Law Reform Commission. In *Crouch v McMillan*⁴ Lord Simon of Glaisdale, dissenting, declined to look at a report of a departmental committee. However, he did raise some interesting issues as follows:

"But the issue is generally posed as if the choice lay between the adduction of all relevant extra-statutory material (including reports of debates in Parliament) in every case, on the one hand, and the adduction of no such material in any case, on the other. The choice, however, need not necessarily be so stark: there

¹ [1992] 3 WLR 1032.

² "Statutory Interpretation", (Law Com No 21) (Scot Law Com No 11) (1969) paragraph 47.

³ *Fothergill v Monarch Airlines* [1980] 3 WLR 209, at 235.

⁴ [1972] 1 WLR 1102, at 1119.

might be some material only, and then in only certain specific circumstances, in respect of which present rigidities might be relaxed; and the sanction of costs might be available were courts burdened with material that was less than decisive. Perhaps the matter could be reconsidered on some such lines".

4.4 The seminal case on the rules governing the use of extrinsic aids is *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg A-G*⁵. The court held that it was entitled to have regard to statements of the mischief aimed at,⁶ contained in an official report, but it was not entitled to take into account the report's recommendations, nor its comments on the draft Bill contained in the report. Thus, the court was restricted to finding out the mischief which the Act was intended to cure, but not to looking at the remedy.

4.5 Viscount Dilhorne criticised the distinction drawn between looking at reports but not looking at their recommendations. He described it as artificial and serving no useful purpose.⁷ Instead, he proposed that the test should be what weight should be attached to the recommendations. Where there was no difference, or material difference, between the draft Bill contained in the report and the Act, then it was legitimate to conclude that Parliament had accepted the recommendations and had intended to implement them.

4.6 Lord Simon supported using the commentary by an official committee on its draft Bill, as an extrinsic aid, where Parliament had incorporated the Bill into legislation. Parliament had legislated on the basis and faith of such expert opinion. He went on to say:

*"A public report to Parliament is an important part of the matrix of a statute founded on it. Where Parliament is legislating in the light of a public report I can see no reason why a court of construction should deny itself any part of that light and insist on groping for a meaning in darkness or half-light".*⁸

4.7 Lord Simon saw an official report as being "the most potent aid" to ascertaining the legislative objective of a subsequent Act. It assisted the court to place itself in the position of the legislators. It could only ascertain the meaning of the words used if it was in possession of the knowledge possessed by the promulgators of the Bill.⁹

4.8 Lord Diplock justified the use of such reports as knowledge of their contents may be taken to be shared by those whose conduct the statute

⁵ [1975] AC 591. Hereinafter called the *Black-Clawson* case.

⁶ 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 the draft Bill, their notes on the clauses of the Bill and the draft conventions annexed to the report (at 623).

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

⁸ At 651G-H.

⁹ At 646F-G.

regulates and would influence their understanding of the meaning of ambiguous enacting words.¹⁰

4.9 In *Tottenham Hotspur Co Ltd v Princegrove*,¹¹ Lawson J noted the difference between the relevant section in the Act, and the recommendation and clause in the draft Bill attached to the Law Commission Report. This was to "help one to discover what is the reason and significance..."¹²

4.10 The principle in the *Black-Clawson* case was followed in *Davis v Johnson*.¹³ However, Lord Diplock after restating that principle, went on to say:

*"... this does not mean, of course, that one must shut one's eyes to the recommendations, for a suggestion as to a remedy may throw light on what the mischief itself is thought to be; but it does not follow that Parliament when it legislates to remedy the mischief has adopted in their entirety, or indeed, at all, the remedies recommended in the report".*¹⁴

4.11 Lord Scarman, in the same case,¹⁵ despite pointing out the difficulties of the reliability of extrinsic aids, stated that:

"It may be that, since membership of the European Communities has introduced ... a new style of legislation,¹⁶ Parliament will consider doing likewise in statutes where it would be appropriate, e.g. those based on a report by the Law Commission, a Royal Commission, a departmental committee, or other law reform body".

4.12 In *Factortame Ltd and Others v Secretary of State for Transport*¹⁷ the House of Lords looked at one of the recommendations of a Law Commission report,¹⁸ and a clause in a draft Bill contained in the report. This was so as to draw an inference that Parliament had not intended to implement the Commission's recommendations. If it had intended to do so, it would have expressly included that draft clause or an enactment to some similar effect.

4.13 In *Owens Bank Ltd v Bracco*¹⁹ Lord Bridge looked at the recommendations of the Summer Report²⁰ to assist in construing the relevant

¹⁰ At 638H.

¹¹ [1974] 1 All ER 17, at 22.

¹² At 22.

¹³ [1979] AC 264.

¹⁴ At 330B.

¹⁵ At 350.

¹⁶ He referred to the recital or preamble which identifies the aids that can be referred to.

¹⁷ [1990] 2 AC 85.

¹⁸ The Report on Remedies in Administrative Law, (Law Com No 73) (1976: Cmnd 6407).

¹⁹ [1992] 2 AC 443, at 488.

²⁰ This was the Report of the Committee Appointed by the Lord Chancellor to Consider the Conduct of Legal Proceedings between Parties in this Country and Parties Abroad and the Enforcement of Judgments and Awards (1919:Cmnd 251).

section of the Administration of Justice Act 1920. No justification was given for this inspection.

4.14 In *R v Gomez*²¹ Lord Lowry quoted various recommendations of a report of the Criminal Law Revision Committee. He justified this on the basis that Parliament had implemented the committee's thinking by enacting the draft Bill attached to the report. His reading of the report confirmed that there was nothing to contradict his interpretation of the relevant word in issue. He was "much impressed by the more adventurous but very logical pronouncements of Viscount Dilhorne and Lord Simon of Glaisdale" in the *Black-Clawson* case.²² Lord Lowry also encouraged counsel to make submissions based on academic discussions.²³

4.15 **Relevance** An official report whose recommendations are contained in a draft Bill, which is then enacted without alteration, is clearly one of the most relevant extrinsic aids. As Viscount Dilhorne in the *Black-Clawson* case stated:

*"it is legitimate to have regard to the whole of the committee's report, including the terms of the draft Bill attached to it, to the committee's notes on its clauses and to the draft conventions annexed to the report, for they constitute a most valuable guide to the intention of Parliament".*²⁴

4.16 In *Fothergill v Monarch Airlines* Lord Scarman stressed that "Mere marginal relevance will not suffice: the aid (or aids) must have weight as well". He suggested that an agreed conference minute of the understanding, upon the basis of which, the draft of an article of a convention was accepted, may have great value. In contrast, "Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful."²⁵

4.17 In *Re Tse Lai-chiu, deceased*²⁶ in a dispute concerning the validity of a will, the High Court decided that, for the purpose of ascertaining the content of Chinese law or custom, the courts may resort to authoritative textbooks and treatises in aid of the long-established practice in Hong Kong of taking evidence on such law or custom. This did not supplant the court's right to inform itself by other means. This case was relied on in *Fan Kam Ching v Yau Shiu Hing*.²⁷ Deputy Judge Lo stated that, as no evidence had been adduced as to the requisite elements of a Chinese customary marriage, from authoritative textbooks, journals, or experts, the court had to work out the constituents for itself. In the circumstances, there was insufficient evidence to say whether the ceremony that did take place, was in accordance with the customs prevailing at the time of the marriage in 1958.

²¹ [1993] 1 All ER 1, at 18-23.

²² See [1975] AC 591, at 623.

²³ At 34 D-E.

²⁴ [1975] AC 591, at 623G.

²⁵ [1980] 3 WLR 209, at 235.

²⁶ [1969] HKLR 159.

²⁷ [1985] HKLY 521.

Parliamentary materials

4.18 In *Pickstone v Freemans Plc*²⁸ the House of Lords referred to the minister's speech in *Hansard*, to ascertain the intention of Parliament. This was justified on the basis that the draft regulations could not be amended when presented to Parliament.²⁹

4.19 **Purposive construction** The trend towards a purposive construction has given an impetus to the courts to use extrinsic aids to resolve questions of ambiguity in the legislation. In some jurisdictions this has been assisted by a statutory provision for a purposive construction. In New Zealand and Australia, for instance, the courts have justified recourse to extrinsic aids by reference to such provisions.³⁰

4.20 In Hong Kong, section 19 of the Interpretation and General Clauses Ordinance (Cap 1) provides that every 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."³¹ In *Haldane v Haldane*³² the Privy Council held that this type of provision enacted the "mischief" rule contained in *Heydon's case*.³³

4.21 In *Elson-Vernon Knitters Ltd v Sino-Indo-American Ltd*,³⁴ Huggins J relied on a dictum by Lord Simon in *Ealing L.B.C. v Race Relations Board*³⁵ to justify looking at the Objects and Reasons of a Bill. That dictum stated "All this is not ... to say that an explanatory memorandum accompanying a complicated measure, ... might not often be useful both in apprising legislators of the details for which they are assuming responsibility and in assisting the courts in their task of interpretation".³⁶ Huggins J indicated that a court could look at the Objects and Reasons for the purpose of ascertaining the mischief that it was intended to remedy, but not for the purpose of deciding whether the language used has supplied a remedy, or, if it has, the extent of that remedy. Blair-Kerr J reminded the court that if the language of the enactment was clear then history could not alter the plain meaning of such language.³⁷

²⁸ [1989] AC 66.

²⁹ At 807B. Reference was also made to the European Communities Act 1972. Indeed, Lord Oliver stated, at 817G, that "a statute which is passed in order to give effect to the United Kingdom's obligations under the EEC Treaty falls into a special category".

³⁰ 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.

³¹ Ordinance No 31 of 1966.

³² [1977] AC 673, at 689.

³³ (1584) 3 Co Rep 7a. In *Kong Kam-piu and another v The Queen* [1973] HKLR 120, Leonard J took the view that section 19 was the same as the mischief rule.

³⁴ [1972] HKLR 468.

³⁵ [1972] 2 WLR 71, at 82.

³⁶ At 82H.

³⁷ At 476. Presumably he was referring to the Objects and Reasons.

4.22 In *R v Cheng Chung-wai*³⁸ the Court of Appeal refused to look at pronouncements in the Legislative Council. They justified not looking at the Objects and Reasons attached to the Bill, except for the purpose of ascertaining the mischief sought to be remedied, on the basis that this was in keeping with the statutory requirement of section 19.³⁹ In *Robert H.P. Fung v First Pacific Ltd*,⁴⁰ the Court of Appeal refused to uphold the trial judge's reliance on *Hansard*, which he had used "not as an aid to construction but merely to demonstrate the purpose behind the statutory provisions".⁴¹ The court did not refer to the earlier judgments allowing recourse to the Objects and Reasons. Instead they took a different route, in reliance on section 19. They decided that to prevent an absurd result, which would defeat the plain intention of the legislature, they could read words into a statute where they were necessarily implied by the wording already in the statute.⁴²

4.23 Wesley Smith⁴³ has noted that the courts have only occasionally referred to section 19. The word "fair" has been construed as referring not to the result of interpretation but to the interpretation itself⁴⁴ "so that, if the words fairly mean something which may operate unfairly, nevertheless that meaning is to be adopted provided it accords with the 'true intent, meaning, and spirit' of the provision."⁴⁵ Wesley Smith indicates that perhaps it is the purposive approach which is to be used in the search for "true intent, meaning and spirit."⁴⁶ He concludes that it is doubtful whether section 19 has deterred "any Hong Kong judge from interpreting ordinances as he pleased. In the vast majority of cases it can safely be ignored."

4.24 Since Wesley Smith's article was written in 1982, there has been an increasing trend towards a purposive construction, whether or not section 19 has been relied on to justify such a construction. There are few cases where the courts have referred to section 19 but those in which they have display a pragmatic approach to carry out the legislative intention.⁴⁷

4.25 **Material already used** Some judges have indirectly allowed the use of *Hansard* by quoting from textbooks, which have included direct extracts or at least explanations of the views of the sponsoring Member. Lord

³⁸ [1980] HKLR 593, at 598.

³⁹ Per Addison J at 598. No reference was made to the *Elson-Vernon* judgment.

⁴⁰ [1989] 2 HKLR 614.

⁴¹ At 622, per Fuad V.P.

⁴² They referred to Bennion, *Statutory Interpretation* (1984), at 337, and *Jones v Wrotham Park Estates* [1980] AC 74, at 105-6.

⁴³ "Literal or Liberal? The Notorious Section 19" (1982) 12 HKLJ 203.

⁴⁴ *Mirchandani and Others* [1977] HKLR 523, at 530.

⁴⁵ *Union Motors Ltd v Motor Spirits Authority* [1964] NZLR 146, at 150.

⁴⁶ However, in *R v Peter Klauser & Anor* [1968] HKLR 201, the Full Court gave the relevant words their plain and ordinary meaning, and interpreted section 19 as requiring a fair and reasonable construction having regard to the objects of the legislation. The court relied on *Qzuora v The Queen* [1953] AC 327 at 335, where Lord Tucker said "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning". The court did not seem to see any conflict between the golden rule and the purposive rule.

⁴⁷ For example, in *Chan Chun Wai v Commissioner of Estate Duty* (1987) 3 HKTC 152, McDougall J held that, in applying section 19, the legislature could not have intended that property of the first deceased could only pass to the second deceased when the administration of the first deceased's estate was complete.

Denning in *R v Local Commissioner for Administration*⁴⁸ relied on a public address to the Society of Public Teachers of Law where the Ombudsman had quoted the relevant passages of *Hansard*. He also referred to Professor Wade's quotation from *Hansard* in his textbook on *Administrative Law*.

4.26 In *Hadmor Productions Ltd v Hamilton*,⁴⁹ Lord Denning admitted that he had conducted his own research into *Hansard* which had assisted him in his conclusion. In the House of Lords, counsel criticised what had happened, and indicated that there were other passages to which he would have wished to draw the court's attention had he known that Lord Denning was looking at *Hansard*.⁵⁰ In *H.P. Fung v First Pacific Bank Ltd.*,⁵¹ Fuad V.P. stated that he was aware that distinguished judges had confessed to taking an occasional, surreptitious look at *Hansard*.

4.27 In *McIntyre v Armitage Shanks Ltd.*⁵² Lord Hailsham stated that:

"the examination of such reports can be legitimate for two reasons; (i) because they can be incorporated into counsel's argument as an accurate statement of the state of the law at a given date (I myself have used them for this purpose), and (ii) because they may assist in considering the mischief aimed at by consequent legislation".

4.28 **Accessibility** In the case of *Fothergill v Monarch Airlines*⁵³ Lord Wilberforce agreed with the use of *travaux préparatoires* but only on condition that the material was public and accessible.⁵⁴ The other judgments which have allowed the use of extrinsic aids have not justified doing so on the grounds that they are accessible. The focus has been on how they assist the court to ascertain parliamentary intention.

4.29 However, in *Pepper v Hart*⁵⁵ Lord Griffiths did not think that consulting *Hansard* would increase the cost of litigation greatly. He stressed that modern technology greatly facilitates retrieval of *Hansard*. Lord Browne-Wilkinson stated that it was possible to obtain parliamentary materials, but the problem was one of expense and effort, not one of availability.

4.30 **Parliamentary debates may give clear answer** In *Daymond v Plymouth Council*,⁵⁶ Lord Kilbrandon called for other more satisfactory ways of arriving at the meaning of an Act than by prolonged linguistic and semantic analysis:

⁴⁸ [1979] QB 287, at 311.

⁴⁹ [1983] 1 AC 191.

⁵⁰ Lord Brown-Wilkinson, in *Pepper v Hart* [1992] 3 WLR 1032, at 1057-8, criticised the use of *Hansard* by judges in this indirect way, which was denied to the parties.

⁵¹ [1989] 2 HKLR 614, at 622J.

⁵² [1979] SLT 112, at 117.

⁵³ [1980] 3 WLR 209, at 219-220. See Bates "A Treaty and its Texts in the Courts" [1981] Stat LR 99.

⁵⁴ He also indicated that the material should clearly point to a definite legislative intention. He relied on his dictum in *Gatoil International v Arkwright-Boston Manufacturers* [1985] AC 255.

⁵⁵ *Op cit* at 1040. Lord Browne-Wilkinson at 1058.

⁵⁶ [1976] AC 609.

*"It is not merely a crude question whether Hansard should be quotable in judicial proceedings: there are several other expedients which have been discussed and recommended. ... Until [these other ways] are adopted, interpretation may be a hit-or-miss affair, and often very expensive."*⁵⁷

4.31 In *R v Warner*⁵⁸ 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". In *R v Home Secretary, Ex p. Brind*,⁵⁹ the Crown invited the House of Lords to look at *Hansard*, to show that the Home Secretary had acted correctly. Indeed, Lord Ackner quoted a statement made by the Home Secretary, which he had made to both Houses of Parliament, in which he set out his reasons for issuing directives banning the media from broadcasting interviews with terrorists. The result of the debates in both Houses was also quoted by Lord Acker. No justification for quoting from *Hansard* was made by the applicants, who were represented by Anthony Lester, the counsel for the applicants in *Pepper v Hart*.

4.32 In *Pepper v Hart*,⁶⁰ Lord Browne-Wilkinson referred to *R v Secretary of State for the Home Department, Ex parte Brind*,⁶¹ when he stated that *Hansard* had frequently been referred to, with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner.

4.33 **No interference in constitutional balance** It has been argued that the use of *Hansard* breaches article 9 of the Bill of Rights 1688, in that it amounts to questioning or impeaching the proceedings in Parliament.⁶² Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) is a similar provision.⁶³ Even though the judgment in *Pepper v Hart* now allows for the use of *Hansard* in certain circumstances, Lord Browne-Wilkinson recommended that judges should be astute to ensure that counsel do not impugn or criticise the minister's statements or his reasoning.⁶⁴

4.34 The recent judgment of *Prebble v Television New Zealand Ltd*⁶⁵ confirmed that there was no objection to the use of *Hansard* to prove what was done or said in Parliament as a matter of history. The House of Lords clarified the parameters of parliamentary privilege by holding that parties to litigation, by

⁵⁷ At 652. He referred to Lord Simon in *The Black-Clawson case*, *op cit*, and the United Kingdom Law Commissions report, *op cit*.

⁵⁸ [1969] 2 AC 256, at 279, per Lord Reid, dissenting.

⁵⁹ [1991] 1 AC 696, at 741F, 749D and 755B.

⁶⁰ *Op cit* at 1060.

⁶¹ *Op cit*.

⁶² See discussion in *Pepper v Hart*, *op cit*, where this argument was rejected. See further *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 and *R v Secretary of State for Trade, Ex parte Anderson Strathclyde Plc*. [1983] 2 All ER 233. Lord Browne-Wilkinson suggested that the latter judgement was wrongly decided on the point about article 9.

⁶³ See paragraph 3.13, *supra*.

⁶⁴ *Supra* at 1061B.

⁶⁵ *The Times*, 13 July 1994.

whomsoever commenced, could not bring into question anything said or done in Parliament, by suggesting, whether by direct evidence, cross-examination, inference or submission, that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lay entirely within the jurisdiction of Parliament, subject to any statutory exception.

Conclusion

4.35 We have seen in this chapter the somewhat inconsistent evolution of the principles concerning the admissibility of extrinsic aids. It seemed a natural evolution for the House of Lords to proceed to hold in *Pepper v Hart* 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*. The rationale given by the courts for allowing the use of aids assists us in making recommendations as to whether the criteria in *Pepper v Hart* are sufficient to cover the use of *Hansard* and other aids, or whether legislation should set out criteria for the use of all extrinsic aids.

Chapter 5

Analysis of *Pepper v Hart*

Introduction

5.1 This chapter analyses the recent developments by the House of Lords in extrinsic aids to statutory interpretation which are contained in the judgment of *Pepper v Hart*.¹ It is important to analyse the various grounds raised in this case in detail, so that we can see to what extent the judgment has made an impact on the criteria for the admissibility of all extrinsic aids. The principle set out by the court in *Pepper v Hart* is outlined in the headnote as follows:

"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".

5.2 Chapter 6 will deal with the judicial developments since *Pepper v Hart*. It will also focus on whether *Pepper v Hart*, in allowing the use of *Hansard* as an extrinsic aid to statutory interpretation, has struck the right balance between the legislature and the courts on the one hand, and the executive and the citizen on the other hand.

The facts of *Pepper v Hart*

5.3 The underlying subject matter of the case was a series of tax appeals by schoolmasters on the correct basis for valuing benefits in kind, whereby they paid a reduced fee for their children attending their school. It was common ground that the education of the children was a taxable benefit under section 61(1) of the Finance Act 1976. The crux of the case was what amount was to be treated as "the cash equivalent of the benefit". This depended on the interpretation of section 63(1) and (2) of that Act.² The taxpayers claimed

¹ [1992] 3 WLR 1032.

² "(1) The cash equivalent of any benefit chargeable to tax under section 61 above is an amount equal to the cost of the benefit, less so much, (if any) of it as is made good by the employee to those providing the benefit. (2) Subject to the following subsections, the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and

that the only expense was the marginal cost to the school of providing food, laundry, stationery etc. which was covered by the concessionary fee paid by them anyway. The Revenue claimed that the expense was the provision of education, which was exactly the same as the expense of the other children whose parents were not schoolmasters at the school. Therefore, the expense was a proportionate cost of running the whole school.

5.4 The case was argued before the House of Lords without reference to *Hansard*. However, it came to the attention of the Court that:

"an examination of the proceedings in Parliament in 1976 which lead to the enactment of section 61 and 63 might give a clear indication which of the two rival contentions represented the intention of Parliament in using the statutory words".³

5.5 The Law Lords then invited the parties to consider whether they wanted to present further argument on the question of whether it was appropriate to depart from previous authority and, if so, what guidance such material could provide for the purposes of the appeal. The taxpayers took up the offer.

Parliamentary privilege

5.6 The Attorney General submitted that the use of *Hansard* would breach the privileges of the Houses of Parliament under article 9 of the Bill of Rights 1688, though he accepted that it was a matter for the courts to decide on the effect of article 9. He referred to a letter from the Clerk to the House of Commons, which suggested that reference to *Hansard* would be in breach of the privileges of the House⁴ and would go beyond the resolution of the House of Commons on 31 October 1980.⁵

5.7 The majority of the Appellate Committee rejected the Attorney General's submission.⁶ Lord Browne-Wilkinson noted that there had been no application by the Attorney General to adjourn the case to enable the House of Commons to consider its position.⁷ He asserted the supremacy of the courts to decide whether a privilege existed and to decide whether such privilege has been infringed. He stressed⁸ that the Law Lords were:

(here and in those subsections) includes a proper proportion of any expense relating partly to the benefit and partly to other matters."

³ Lord Browne-Wilkinson at 1045G.

⁴ This provides "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

⁵ The resolution was in the following terms "That this House, while re-affirming the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings, to the Official Report of Debates and to the published Reports and evidence of Committees, in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued".

⁶ Lord Browne-Wilkinson at 1059G, at 1065G-1067.

⁷ At 1066C-D.

⁸ At 1067B-C.

"motivated by a desire to carry out the intentions of Parliament in enacting legislation and have no intention or desire to question the processes by which such legislation was enacted or of criticising anything said by anyone in Parliament in the course of enacting it. The purpose is to give effect to, not thwart, the intentions of Parliament".

Constitutional balance between parliament and the courts

5.8 The Attorney General also argued that the use of *Hansard* would "confuse the respective roles of Parliament as the maker of law and the courts as the interpreter".⁹ Lord Browne-Wilkinson rejected this argument.¹⁰ It was for the courts to interpret the words which Parliament had enacted, so as to give effect to that purpose. He noted that the courts look at white papers and official reports, not to determine their meaning, but because it assisted the court to make its own determination. Parliamentary materials were but one more source.

Parliamentary history of the Finance Act 1976

5.9 Lord Browne-Wilkinson did not simply embark on an examination of the parliamentary debates which led to the Finance Act 1976. He took note of the fact that in the Finance Act 1948, as re-enacted in the Income and Corporation Taxes Act 1970, employment by a school was expressly excluded from the charge on a benefit in kind. He also noted the practice of the revenue, from 1948 to 1975, of not seeking to extract tax on the basis of the average cost to the employer of providing in-house benefits.¹¹

5.10 He then moved on to consider a clause in the Finance Bill 1975, which was similar to section 63(2) of the Finance Act 1976.¹² He quoted from *Hansard*, where the Financial Secretary indicated the basis for the railwaymen's concessionary benefits remaining non taxable.¹³

5.11 The Finance Bill 1976 introduced a change in the taxation of in-house benefits. Clause 54(4)¹⁴ provided that the cost of a benefit to an employee should be the cost which the public had to pay for the service or facility. As a result of strong representations from the airline and railway

⁹ At 1061C.

¹⁰ At 1061C-D. Lord Griffiths agreed with Lord Browne-Wilkinson, save on the construction of the Act, without recourse to *Hansard*. See 1040E-F. Lord Oliver of Aylmerton also agreed with it, at 1042D and 1043G.

¹¹ Indeed, the revenue had tried to change the basis of the charge, from the marginal cost to the average cost to the employer with airline employees enjoying concessionary travel, in the 1960's. They lost before the tax commissioners and had not appealed.

¹² *Op cit* at 1047.

¹³ This was because "the railways will run in precisely the same way whether the railwaymen use this facility or not, so there is no extra charge to the Railways Board itself" (*Hansard* Column 666) at 1048A.

¹⁴ This eventually became section 63 of the 1976 Act.

employees, the Financial Secretary announced the withdrawal of clause 54(4). The press release, quoted by Lord Browne-Wilkinson, indicated that the effect of the withdrawal would be to continue the present basis of taxation, i.e. the cost to the employer of providing the service.

5.12 Ironically, the Financial Secretary answered a question from a member of Parliament on the situation of children of staff at fee paying schools, to the effect that the taxable benefit would be very small.¹⁵

5.13 The revenue had no answer to the anomalies which arose when the cost of providing a loss-making facility meant that the average cost basis resulted in the taxpayer being treated as receiving a sum, by way of benefit, greater than the cost of buying that benefit on the open market.¹⁶

5.14 Lord Browne-Wilkinson proceeded to hold that section 63 of the Finance Act was ambiguous.¹⁷ The "expense incurred in or in connection with" the provision of in-house benefits may be, either the marginal cost caused by the provision of the benefit in question, as argued by the taxpayers, or a proportion of the total cost incurred in providing the service, both for the public and for the employee ("the average cost"), as argued by the revenue. Therefore, if reference to *Hansard* was permissible, the taxpayers appeal would be allowed.

Parliamentary materials

5.15 The issues that the court had to decide on the question of the admissibility of *Hansard* are summarised in the following questions put by Lord Browne-Wilkinson:¹⁸

- "(1) *Should the existing rule prohibiting any reference to Hansard in construing legislation be relaxed, and if so, to what extent?*
- (2) *If so, does this case fall within the category of cases where reference to Parliamentary proceedings should be permitted?*
- (3) *If reference to Parliamentary proceedings is permissible, what is the true construction of the statutory provisions?*
- (4) *If reference to Parliamentary proceedings is not permissible, what is the true construction of the statutory provisions?*

¹⁵ At 1051G.

¹⁶ This is because the revenue said that the cost of the benefit is a proportion of the total cost of providing the services.

¹⁷ At 1061G. He also said that there was an ambiguity or obscurity (at 1062F).

¹⁸ At 1046H - 1047A-B.

- (5) *If the outcome of this case depends upon whether or not reference is made to Hansard, how should the matter proceed in the face of the warnings of the Attorney General that such references might constitute a breach of parliamentary privilege?"*

Reliance on the ministerial statement

5.16 The issue here was whether the intention expressed by the Financial Secretary could be said to represent the intention of Parliament as a whole. Lord Browne-Wilkinson decided that it could. The Committee on the Bill:

*"was repeatedly asking for guidance as to the effect of the legislation once clause 54(4) was abandoned. That Parliament relied on the Ministerial statements is shown by the fact that the matter was never raised again after discussions in Committee, that amendments were consequentially withdrawn and that no relevant amendment was made which could affect the correctness of the minister's statement."*¹⁹

What is the impact of taking *Hansard* into account, in construing section 63?

5.17 It was clear that if the parliamentary debates were taken into account, it was the clear intention of Parliament, in particular the Financial Secretary, to assess in-house benefits on the marginal cost to the employer, and not on the average cost. Therefore, the taxpayer would win the appeal. If the debates were not taken into account, then the earlier conclusion reached by at least two Law Lords which agreed with the revenue, should stand.²⁰ Lord Browne-Wilkinson expressed his frustration thus:

*"If I could detect from the statute any statutory purpose or intention pointing to one construction rather than the other, I would certainly adopt it. But the statute yields no hint".*²¹

5.18 Lord Bridge went even further:

"I should find it very difficult in conscience, to reach a conclusion adverse to the appellants, on the basis of a technical rule of construction, requiring me to ignore the very material which in this case indicates unequivocally which of the two possible

¹⁹ At 1063F.

²⁰ This was based on a literal construction.

²¹ At 1065E.

interpretations of section 63(2) of the Act of 1976 was intended by Parliament".²²

Rationale for allowing parliamentary materials as extrinsic aids

5.19 Lord Browne-Wilkinson set out his rationale in the following principles:²³

- (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.²⁴
- (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 judgments that they have looked at *Hansard* to seek the intention of Parliament.²⁵

²² At 1039G.

²³ At 1056-1061.

²⁴ 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).

²⁵ 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

Rationale for objecting to *Hansard*

5.20 Lord Browne-Wilkinson set out the arguments against the use of *Hansard*, based on the objections of the Attorney General, as follows:²⁶

- (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.²⁷
- (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.

5.21 However, Lord Browne-Wilkinson did not address the other submissions of the Attorney General, which were as follows:²⁸

- (1) It may be unwise to attach importance to ministerial statements which are made to satisfy political requirements.
- (2) There may need to be changes in Parliamentary procedure to ensure that ministerial statements are sufficiently detailed to deal with the context in which they are made.

Response

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

²⁶ protested that if he had known at the time he could have addressed the court on other passages of it (at 233). Lord Browne-Wilkinson set out the arguments of the Attorney General at 1055G. He then responded to these arguments at 1058B - 1059D.

²⁷ 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).

²⁸ At 1055G and H respectively.

- (1) It is possible to obtain Parliamentary materials. No one suggests that Statutory Instruments²⁹ should not be referred to, and they are not available in an indexed form for a year after they are passed.
- (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.³⁰
- (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,³¹ 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.³²

Rules of construction

5.23 All the judges, who supported the admissibility of *Hansard* agreed that the rationale for so doing stemmed from a purposive approach to construction rather than the old literal rule.³³

Conclusion

5.24 It can be seen that the judgment in *Pepper v Hart* is a significant relaxation of the rules concerning the admissibility of extrinsic aids, specifically *Hansard*. We will see how significant that impact is by looking at the subsequent developments in the next chapter. The criticisms made of the judgment will also be dealt with, in chapter 6.

²⁹ 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).

³⁰ 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.

³¹ See headnote which summarises the criteria.

³² 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.

³³ See Lord Griffiths at 1040D.

Chapter 6

Judicial Developments since *Pepper v Hart*

Introduction

6.1 This chapter will focus on the judicial developments since *Pepper v Hart*,¹ both in the use of the criteria for admitting *Hansard* and in the use of other extrinsic aids. It will also deal with the academic comments and criticisms of the judgment. This will lay the basis for considering whether the criteria for admissibility are sufficient or not.

6.2 There have been more cases than were anticipated by the commentators.² In contrast, in 1982, an analysis of 34 cases on various areas of law (employment, land, family, criminal and housing) showed that references to *Hansard* would not generally have clarified the legal text.³ The courts have sometimes invited counsel to look at *Hansard* even where counsel did not find it supportive of their arguments. In *R v London Borough of Wandsworth ex parte*⁴ *Hawthorne* Deputy Judge Blom Cooper stated that it was the duty of the court to satisfy itself that the examination of Parliamentary material was legitimate, in accordance with the criteria, whatever the attitude of counsel. Yet, in *R v Dorset County Council Ex parte Rolls and anor*,⁵ the court invited the parties to look at *Hansard* to gain assistance in interpreting the word "gypsies" in section 16 of the Caravan Sites Act 1968. Counsel declined on the basis that it would lead to an adjournment, and the Council were anxious to repossess the land. The court proceeded to adopt a purposive construction of the word, without the assistance of *Hansard*.

6.3 In 1993, the House of Lords reinforced the limits of *Pepper v Hart* when they issued a Practice Direction that "supporting documents, including extracts from *Hansard*, will only be accepted in exceptional circumstances".⁶ A further Practice Direction covering the Supreme Court, the Crown and County Courts was issued in 1994.⁷

¹ [1992] 3 WLR 1032.

² St J. Bates, "Judicial application of *Pepper v Hart*", Journal of the Law Society of Scotland, (July 1993) 251, estimates that there were 17 judgments in the six months after the judgment. A LEXIS search, in April 1994, discovered 64 judgments in which *Pepper v Hart* was referred to.

³ Vera Sachs, "Towards Discovering Parliamentary intent" [1982] Stat.LR 143, at 157.

⁴ LEXIS, QBD, 21 January 1994.

⁵ LEXIS, QBD, 27 January 1994, Laws J.

⁶ [1993] 1 WLR 303. In contrast the Australian High Court required its counsel to notify the court and the other parties 48 hours in advance of the *Hansard* documents it was intending to rely on.

⁷ See "Practice Direction: (Hansard: Citation)" [1995] 1 WLR 192.

Parliamentary intention and the rule in *Pepper v Hart*

6.4 The House of Lords in *Pepper v Hart* held that:

*"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."*⁸

The developments under each of these limbs will be considered in turn.

6.5 The courts operate on a number of presumptions as to the intention of Parliament, including a presumption that Parliament cannot have intended to oust the jurisdiction of the courts. The use of *Hansard* may affect the role of the courts if it discloses that Parliament did not intend such principles to operate.⁹

6.6 Judges are obliged to ascertain the intention of Parliament when construing legislation. Prior to *Pepper v Hart*, the "parliamentary intention" was judicially determined from the enacted text.¹⁰ Bates expressed concern that the effect of *Pepper v Hart* would be that certain categories of statements on the effect of the Bill, by one of a narrowly defined group of parliamentarians, could be assumed (if not later withdrawn or varied) to be an expression of parliamentary intention. Thus, in some cases parliamentary intention will also be assumed from parliamentary inaction.

6.7 The Court of Appeal, in *NAP Holdings v Whittles*¹¹ rejected the submission that *Pepper v Hart* authorised the court to be guided by the supposed beliefs of Parliament. Nolan LJ stated that the decision merely authorised the court, in certain defined circumstances, to have regard to what had actually been said in the course of Parliamentary debate. Neither party suggested that those circumstances existed in the instant case. Therefore, the task of the court was to have regard to the intention of Parliament as expressed in the language which Parliament had enacted.

6.8 One objection to the use of the criteria in *Pepper v Hart* is that there is a philosophical difficulty with the concept of legislative "intention" in the Hong Kong context. Findlay J queried the applicability of *Pepper v Hart* in *Ngan Chor Ying v Year Trend Development Ltd.*¹²

⁸ [1992] 3 WLR 1033B-C.

⁹ D. Oliver, "*Pepper v Hart*", Public Law 5, at 12-13 (1993).

¹⁰ T. St. J. Bates, "Parliamentary Materials and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*", [1993] 14 Stat LR 46, at 47-8.

¹¹ [1993] STC 592, at 602.

¹² [1995] 1 HKC 605. Lord Mackey had stated in *Pepper v Hart* [1992] 3 WLR 1032 at 1038E, that the parliamentary processes of those countries that had relaxed the rule were different "in

*"I am not sure how applicable this decision is to a legislature that has no majority party to ensure the passage of legislation. Where a majority party exists, one can be reasonably sure that what is said by a minister or other promoter of a bill represents the intention of the majority of the legislature. In Hong Kong, statements in the Legislative Council cannot be said to be clearly representative of the intention of the majority of the council."*¹³

However, this view has not been taken by other High Court judges or the Court of Appeal. Rogers J in *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd*¹⁴ inferred the parliamentary intention of an amendment to the Patents Ordinance (Cap 42) from an explanation given by a person, whose status was not clarified, at the resumption debate on the second reading of the Bill.

6.9 The English Court of Appeal focused on the policy of the Criminal Justice Act 1991, which was ascertainable from the Act itself, to give an amending section a rectifying construction so as to avoid an inconsistency.¹⁵ The court said that if the statute had been ambiguous or obscure the court would have resorted to the guidelines in *Pepper v Hart* to seek the true meaning. Instead, Sedley J agreed with the editors of *Halsbury's Statutes*¹⁶ that there had been an error of draftsmanship.

(1) First limb of the rule

(i) Legislation

6.10 In *Griffin v Craig-Harvey*¹⁷ Vinelott J did not think there was any ambiguity or obscurity in section 101(5) of the Capital Taxes Act 1979. If there had been ambiguity, it was removed by a statement made by the Financial Secretary in the debate on the original clause which was contained in the Finance Bill 1965. The irony was that part of the Minister's statement was inaccurate, though the intention of the legislature on the point in issue was clear. It was the Crown who sought to rely on *Hansard*.

6.11 There is some controversy as to the true meaning of the word "ambiguous" in the construction of statutes. Bates posited a question:¹⁸ "... to take a more extreme case, where a legislative text suggests meanings X or Y, will the relaxed exclusionary rule admit parliamentary material, which clearly suggests a parliamentary intention of another distinct meaning Z?" He also

quite material respects" from the United Kingdom. However, Findlay J made no reference to Lord Mackey's statement on this point.

¹³ *Ibid* at 610.

¹⁴ [1995] 1 HKC 729

¹⁵ *R v Moore* [1995] 4 All ER 843.

¹⁶ Volume 12, (4th edition, 1994 reissue) at 579.

¹⁷ [1993] STC 54 (Ch D).

¹⁸ *Op cit* at 50.

expressed concern as to whether the courts will regard a legislative text as still remaining ambiguous or obscure for the purposes of the rule, when it has already been judicially interpreted.¹⁹

6.12 In *Sheppard v Commissioners of Inland Revenue* (No 2)²⁰ a taxpayer sought to use *Hansard* to show that a dividend is not "a transaction in securities".²¹ The High Court rejected this argument on the basis that it did not meet the criteria in *Pepper v Hart*, in that the legislation was not ambiguous. The court also held that it could not rely on *Hansard* because the point at issue was already covered by a pre-*Pepper v Hart* decision. The Court seemed to have made its decision on the basis that the Attorney General's statement in Parliament was not clear and it did not cover the specific fact situation that was in issue. Aldous J took the view that the Law Lords in *Pepper v Hart* must have had in mind the type of ambiguity that Lord Diplock had referred to.²² He phrased the criteria in a slightly different way to the Law Lords in *Pepper v Hart*. Aldous J continued:

"Assuming that ambiguity of the type referred to by Lord Diplock exists, Hansard can be consulted; but it can be relevant only if it is clear that (1) the minister had the particular issue in mind, (2) the minister had made the statement as to the government's intention relating to that issue, (3) the statement was clear and unambiguous, and (4) the intention of Parliament was set out in the statement".

6.13 Deputy Judge Blom Cooper explained Aldous J's comments on the basis that *Pepper v Hart* envisaged alternative, equally plausible, meanings which could be given judicially to the legislation.²³ In *R v London Borough of Wandsworth ex parte Hawthorne* he said²⁴:

"There may be said to be a logical flaw in the reasoning that equates 'ambiguity' with the choice between alternative conclusions that, by definition, are not ambiguous but are rival interpretations of clear wording. The true ratio decidendi ... is that resort to Hansard is allowable only if there is 'pre-existing ambiguity'. I interpret this to cover, not merely ambiguities in the language used, when viewed in its context, but also when the relevant provision conflicts with the understood meaning under

¹⁹ Thus, *Hansard* may indicate an alternative construction to the construction adopted by the court, prior to *Pepper v Hart*. It is submitted that this is a question of what weight the courts want to give the parliamentary material, which can only be decided on a case by case basis.

²⁰ [1993] STC 240 (Ch D).

²¹ This case is analysed in R. Bramwell. "As the One-eyed King saw it", *Taxation*, 6 May 1993, 120-122.

²² Aldous J defined ambiguity, in the terms of Lord Diplock in *IRC v Joiner* [1975] STC 657, as "The only question of construction ... is whether those limits are wide enough to include, within their ambit, the particular factual situation which it has found to have existed. Since there are only two possible answers to this, any difficulty in determining which is the right answer may be referred to ... as arising from an 'ambiguity' in the statute". It is in this sense that 'ambiguity' and 'ambiguous' ... are widely used in ... construction of statutes."

²³ At 10.

²⁴ *R v London Borough of Wandsworth ex parte Hawthorne*, LEXIS, 21 February 1994, QBD.

the Parliamentary process, as well as conflicting with other provisions in the same legislation. I trust that this approach does not represent any departure from the limited exception to the exclusionary rules laid down in Pepper v Hart".

6.14 Beldam J, in *Botross v London Borough of Fulham*²⁵, took the view that: "ambiguity is not simply confined to the use of a word or words which can have more than one meaning. It may be found ... in the use of separate words or phrases pointing to different interpretations of the provision as a whole."

6.15 The Judiciary seem to be adopting a strict interpretation of the criteria in *Pepper v Hart*. In *Welby and anor v Casswell*, Popplewell J²⁶ expressed grave doubts as to whether the conditions set out in *Pepper v Hart* had been fulfilled. However, since no objection was made to his looking at the Standing Committee Debate on an amendment,²⁷ he did extract relevant portions of the speech of the Parliamentary Secretary. He concluded that Parliament "had not condescended to deal with a number of problems that were likely to arise". Thus, he limited himself to construing what appeared to him to be clear on the face of the Act.

6.16 In *R v Archbishop of Canterbury and anor, ex parte Williams*,²⁸ Sir Thomas Bingham, MR, did not accept that the threshold test in *Pepper v Hart* had been met. The language was not ambiguous or obscure.²⁹ The absurdity had to be inherent within the construction of the subsection itself. He went on to say that it was theoretically possible that the powers conferred on the Church of England could be misused so as to procure an absurd result, but that was not an absurdity inherent within the construction of the subsection.³⁰ Even if the threshold conditions were met, the court did not read what the Archbishop said in the same way as counsel.

6.17 The courts have rejected reference to *Pepper v Hart* to justify a restrictive interpretation of their jurisdiction. In *McDonald and anor v Graham*,³¹ the Court of Appeal agreed with the purposive interpretation of the judge at first instance, and rejected reference to *Pepper v Hart*. In any event, the statutory provisions³² were not ambiguous or obscure, nor did *Hansard* indicate that Parliament intended the meaning to be so limited.

6.18 The courts seem generally to refer to the passages in *Hansard* before deciding whether they are admissible within the criteria of *Pepper v Hart*. In *Wren and ors v Eastbourne Borough Council and UK Waste Control Ltd*, a

²⁵ (1995) 16 Cr. App. R.622, at 629.

²⁶ LEXIS, QBD, 8 March 1994, at 12-13.

²⁷ This was to the Agriculture (Miscellaneous Provisions) Act 1976.

²⁸ LEXIS, 1 March 1994, CA.

²⁹ The legislation was the Church of England Assembly (Powers) Act 1919, and counsel sought to rely on what an Archbishop had said in Parliament in 1919. The case was an attempt to stop the ordination of women priests.

³⁰ It would seem that the Master of the Rolls saw this as being what Lord Brown Wilkinson had in mind, in *Pepper v Hart*.

³¹ LEXIS, 16 December 1993, CA.

³² Section 287 of the Copyright Designs and Patent Act 1988.

decision of the Employment Appeals Tribunal,³³ the court read the relevant passages without accepting that the submission based on *Hansard* had any validity. They accepted Lord Oliver's warning³⁴ in *Pepper v Hart* about the dangers of ingenuity suggesting ambiguity where in fact there was none. They exercised their discretion against the admission of *Hansard*.

6.19 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*,³⁵ 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,³⁶ Lord Oliver³⁷ and Lord Brown-Wilkinson.³⁸

6.20 *Hansard* was of assistance, and met all the criteria, with regard to section 206 of the Income and Corporation Taxes Act 1970 in *Walters (Inspector of Taxes) v Tickner*.³⁹ The Court of Appeal held that, despite the obscurity and ambiguity of the language in that section, the intention of Parliament was clear in the statement of the minister and a law officer, on the Bill. However, the section could not override another section which was clear, as section 206 might still be ambiguous and obscure despite the assistance of *Hansard*.

6.21 In *L v C*⁴⁰ Barnett J resolved an apparent conflict between the Guardianship of Minors Ordinance (Cap. 13) and the Affiliation Proceedings Ordinance (Cap. 183) by examining the recommendations of the Hong Kong Law Reform Commission Report on Illegitimacy,⁴¹ the second reading speech of the Attorney General, and a members report of the meetings held by the Legislative Council's Ad Hoc Group on the Parent and Child Bill. No reference was made to *Pepper v Hart* or the criteria laid down therein, except to say that the legislative history would be looked at to ascertain the legislative intention.

6.22 Leonard J clarified the purpose of Article 21 of the UNCITRAL Model Law by reference to its legislative history⁴² in *Fustar Chemicals Ltd v Sinochem Liaoning Hong Kong Ltd*.⁴³ In another arbitration case, *Attorney General v Shimuzu Corp (No 2)*,⁴⁴ Seagroatt J relied on the purpose of the Arbitration (Amendment) Bill 1984 as outlined by the Attorney General to the Legislative Council when moving its second reading.

³³ [1993] IRLR 425.

³⁴ *Op cit*, at 1042-3.

³⁵ [1995] 2 HKC 201(CA).

³⁶ [1995] 3 WLR 1032, at 1039H.

³⁷ *Ibid* at 1042H.

³⁸ *Ibid* at 1056B.

³⁹ [1993] STC 624, CA.

⁴⁰ Unrep, 1993 MP No 4167, 9 May 1994, High Court.

⁴¹ Topic No. 28 (1991).

⁴² This was contained in Holtzmann & Neuhaus "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" (1989).

⁴³ [1996] 2 HKC 407.

⁴⁴ [1996] 3 HKC 175.

6.23 In Hong Kong, in *Attorney General v Pham Si Dung*,⁴⁵ the High Court decided that there was an ambiguity. It relied on the second reading speech of the Secretary for Security (in amending the Immigration Ordinance) that the Attorney General did not have the power to seek to detain defence witnesses. The court also referred to the purposive construction required by section 19 of the Interpretation and General Clauses Ordinance.

6.24 The Hong Kong Court of Appeal used the long title of the Building Management Ordinance (Cap 344) to adopt a purposive construction of the relevant section.⁴⁶ The object of the legislation was also confirmed by the second reading speech of the Attorney General when introducing the legislation in the Legislative Council.

6.25 Tunkel suggested that it remained to be seen whether the courts will feel able to look in *Hansard* for the mischief which prompted the legislation, if the legislative words are otherwise unambiguous, meaningful and practicable, yet go beyond or fall short of remedying the ministerially expressed mischief.⁴⁷

(ii) *Official reports*

6.26 In the *Black-Clawson* case,⁴⁸ reference was allowed to Law Reform Commission reports or official reports only to identify the mischief but not to look at their recommendations. Since *Pepper v Hart*, *Hansard* has been used to look at such recommendations.⁴⁹ In *Stubbings v Webb*⁵⁰ *Hansard* showed that the purpose of the relevant legislation was, with one change, to give effect to the Tucker Committee Report on Limitation of Actions. More specifically, the recommendation on personal injury was not intended to apply to an action for trespass to the person. Therefore *Hansard* was used negatively to limit a right claimed. In *Mullan v Anderson*⁵¹ the Scottish Court of Session made reference to the recommendations of the Grant Committee Report on the Sheriff Court,⁵² being the origin of the legislation in issue.⁵³ Counsel in the case referred the court to the parliamentary debates on the Bill enacting the provision in question. Lord Justice Clerk Ross found "nothing in that debate which assists in the matter of construction which has now arisen."⁵⁴ Lord Penrose, in contrast, declined to refer to the debates for two reasons: firstly, that there was no ambiguity which was not capable of resolution on the language of the provision itself, and, secondly, that the debates did not provide "the clear guidance on the point in issue which would be required before one

⁴⁵ (1993) High Court No. MP 3111 of 1993, 6 September 1993, Deputy Judge Yeung.

⁴⁶ *The Incorporated Owners of Block F1-F7 Pearl Island Holiday Flats v The Incorporated Owners of Pearl Island Garden & Another*, [1996] HKLD G 122.

⁴⁷ "Research after *Pepper v Hart*", 90 Gazette, 12 May 1993, 17, 19.

⁴⁸ [1975] AC 591.

⁴⁹ Lord Browne-Wilkinson, *op cit*, at 1057B said that the distinction between looking at the mischief and looking for the intention in using words was technical and inappropriate.

⁵⁰ [1993] 2 WLR 120. See comment by Nasir in "Interpretation and Intention" Hong Kong Lawyer, July 1996, 14.

⁵¹ (1993) SLT 835, at 839.

⁵² (1967: Cmnd 3248)

⁵³ Law Reform (Miscellaneous Provisions) Act 1980.

⁵⁴ *Ibid*, at 839.

could rely on *Pepper v Hart* for authority to use such sources as aids to construction in this case."⁵⁵

6.27 In *Westdeutsche Landesbank Girozentrale v Islington L.B.C.*,⁵⁶ the court elicited the intention of the Limitation Act 1939, in referring to "simple contract" as including quasi-contract, from *Hansard*. The court accepted that the provision could be said to be ambiguous or obscure or potentially to lead to absurdity.⁵⁷ The Solicitor General had made clear in Parliament that the purpose of the Bill was to give effect to the recommendations of the Law Revision Committee in their Fifth Interim Report.⁵⁸

6.28 In *Boyster v Thomson*⁵⁹ the House of Lords refused to accept a restricted construction of section 14 of the Sale of Goods Act 1979 which would mean that the Law Commissions had substantially failed to achieve the result that they had intended in the recommendations of their report.⁶⁰

6.29 In *Laing v Keeper of the Registers of Scotland and anor*,⁶¹ the Court of Session looked at the reports and recommendations of two committees,⁶² and to the legislative history of the Act.⁶³ The Court inspected the draft Bill contained in the Henry Committee report, despite its many differences from the subsequent Act. However, neither of the reports addressed directly the problem which was in issue in the proceedings. The court then embarked on a detailed analysis of the parliamentary history of the Act, including reference to a Law Commission Working Paper (No 45). Reliance was placed on *Reg v Secretary of State for Transport, ex parte Factortame Ltd.*⁶⁴ This was authority for the proposition that account could be taken of a recommendation in a report by the Law Commission, in the form of a clause in a draft Bill, for the purpose of drawing the inference that this recommendation was never intended to be implemented by Parliament.⁶⁵

6.30 Though not made explicit, the court appeared to rely on the "absurdity" part of the first limb of the test in *Pepper v Hart*. The court referred to a clear statement of the Minister. A statement from the Lord Advocate, in the First Scottish Standing Committee, was also referred to in order to identify the purpose of amendments. However, the court refused to speculate as to why the draftsman had not included a particular clause from the draft Bill, which was in the report, in the Bill before the House. The court could only conclude that its absence implied that this recommendation was never intended to be

⁵⁵ *Ibid*, at 850.

⁵⁶ 91 LGR 323, at 383 (1993) (QBD).

⁵⁷ At 383.

⁵⁸ (1936). The Commission had made such recommendation at paragraph. 37.

⁵⁹ *The Times*, June 16 1995.

⁶⁰ "Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893" (1969, Law Com No 24, Scot Law Com No.12.)

⁶¹ LEXIS, 5 November 1993, Court of Session, Inner House. Now reported as *Short's Trustee v-Keeper of the Registers of Scotland*, [1994] SLT 65.

⁶² The Reid Committee Report on Registration of Title to land, (1963:Cmd 2032), and the Henry Committee, (1969:Cmd 4137).

⁶³ The court also looked at opinions in conveyancing literature, and to the Registration of Title Practice Book.

⁶⁴ [1990] 2 AC 85, Lord Bridge at 149G.

⁶⁵ *Op cit*, at 3 and 13 of LEXIS.

implemented.⁶⁶ After detailed analysis, the court concluded that the materials, though of limited assistance, showed a consistent pattern in favour of the position adopted by the Keeper of the Registers of Scotland.

6.31 On appeal to the House of Lords, Lord Keith seemed to clarify the parliamentary intention from references to the two committee reports already referred to in the court below.⁶⁷ The sections were "in some respects extremely obscure and difficult to understand".

6.32 Litton VP in *Leung On & Anor v Chan Pui Ki*⁶⁸ noted a Royal Commission Report⁶⁹ and the recommendations of the English Law Commission.⁷⁰ Waung J in *Re Fung Hing Cheung Kenneth*⁷¹ referred to the recommendation of the Australian Clyne Committee Report on Bankruptcy, (1962), to express regret that law reform had not yet been made in this area in Hong Kong.

6.33 A restrictive approach to the admissibility of official reports was taken in *Joint (Inspector of Taxes) v Bracken Developments Ltd.*⁷² The respondent had referred to the recommendation of the Keith Committee Report,⁷³ as assisting in the interpretation of section 109 of the Taxes Management Act 1970. He had also referred to a published consultative document by the Board of Inland Revenue, in response to the recommendations of the Keith Committee, which proposed a new subsection. Vinelott J stated:

*"In my judgment, the recommendations of the Keith Committee and the responses of the Board of Inland Revenue are not admissible as evidence of the intention of Parliament in enacting s. 109 or its predecessor and cannot be relied on as evidence, conclusive or otherwise, of the pre-existing state of the law. They are not part of 'the matrix of a statute' founded on the report,⁷⁴ and cannot be resorted to under the principles recently stated in *Pepper v Hart* ... as evidence of the intention of Parliament in passing the predecessor of s. 109".⁷⁵*

6.34 He concluded, that even if they could be admitted under one or other of those principles, they would not advance the taxpayer's case.

⁶⁶ This was applying Lord Bridge's approach in the *Factortame* case.

⁶⁷ *Short's Trustee v Keeper of the Registers of Scotland and Another*, *The Times*, December 26 1995.

⁶⁸ [1996] 2 HKC 565(CA).

⁶⁹ Royal Commission on Civil Liability and Compensation for Personal Injury: (Cmnd 7054: March 1978), at paragraph 648.

⁷⁰ Only referred to as Report No. 224, September 1994.

⁷¹ [1995] 3 HKC 136.

⁷² [1994] STC 300 (Ch. D).

⁷³ This was the Committee on Enforcement Powers of the Revenue Departments (Cmnd 8822) (no year was given.)

⁷⁴ See the observations of Lord Simon in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, at 646.

⁷⁵ *Ibid* at 314.

6.35 The Scottish Outer House, in *Interatlantic Namibia (Pty) Ltd v Okeanski Ribolov Ltd*,⁷⁶ preferred the interpretation given by the Master of the Rolls in *The Banco*⁷⁷ to the interpretation of the law in a Discussion Paper of the Scottish Law Commission.⁷⁸

6.36 The Court of Appeal, in *R v Jefferson*,⁷⁹ stated that they were fortified in their conclusion by the preparatory material for the Public Order Act 1986, which they would be entitled to look at if there was ambiguity. These were the Law Commission report, which contained a draft Bill,⁸⁰ and a White Paper.⁸¹ Both of these clearly envisaged the same intention, that the new statutory offences could be committed by aiders and abettors. The court referred to these documents even though there was no ambiguity, and the report and the White Paper were in the context of a different offence. They saw the comments as being of equal application to other proposed offences.

6.37 The Court of Appeal in *Re Conso Electronics (Far East) Ltd (In Liquidation)*⁸² referred to the recommendation of an English official report, which had been implemented in Hong Kong, but not in England, in order to resolve a controversy on interpretation.⁸³ Rogers J, in *Securities and Futures Commission v MKI Ltd*,⁸⁴ assumed that a recommendation in the same report had not been implemented as the draftsman had thought that it was unnecessary. No reference to parliamentary debates was made, the court opting to rely on the legislative history, the context and the whole of the relevant ordinances.

6.38 In *R v Linekar*,⁸⁵ the Court of Appeal accepted the statement of the law in a Criminal Law Revision Committee Working Paper as being accurate. They also looked at one of its recommendations.⁸⁶ In *R v Gilfoyle*⁸⁷ the Court of Appeal expressed the hope that the Law Commission Consultation Paper on "*Evidence in Criminal Proceedings: Hearsay and Related Topics*" would clarify the law.⁸⁸ However, in *Arab Monetary Fund v Hashim and Others (No 9)*,⁸⁹ the court rejected reliance on statements in two Working Papers of the Law Commission as no authority had been cited for the propositions made.

⁷⁶ *The Times*, 2 June 1995, Outer House.

⁷⁷ [1971] 1 Ll L Rep 49, at 52.

⁷⁸ "Diligence on the Dependence and Admiralty Arrestments", No. 84, at paragraph. 3.61.

⁷⁹ [1994] 1 All ER 270, at 281.

⁸⁰ Offences relating to Public Order (Law Com No 123) 1983.

⁸¹ Review of Public Order Law (1985: Cmnd 9510).

⁸² [1995] 2 HKC 327.

⁸³ The English Company Law Committee, (The Jenkins Committee), (1962: Cmnd 1749).

⁸⁴ [1995] 2 HKC 79.

⁸⁵ *The Times*, 26 October 1994, CA.

⁸⁶ Working Paper on Sexual Offences, (1980), paragraph 20-25.

⁸⁷ *The Times*, October 31, 1995.

⁸⁸ (No. 138: 1995)

⁸⁹ *The Times* 11 October 1994 High Court.

(iii) *Other extrinsic aids*

6.39 In *AIB Finance Ltd v Bank of Scotland and anor*,⁹⁰ the court was invited to look at various textbooks⁹¹ in which it was argued that the relevant section was intended to apply to negative pledges. The Lord Justice Clerk accepted that the textbooks did so refer, but appeared to do little more than paraphrase the language used in the relevant section.

6.40 In *C & E Comrs v Kingfisher*⁹² the court was asked to look at the White Paper on Value Added Tax⁹³ which preceded the Value Added Tax Act 1983, if it had any doubt on the meaning of section 29. Popplewill J had no doubt as to the meaning of the legislation, having adopted a purposive interpretation. Even if he had, the White Paper did not seem to be of more than marginal assistance. In *R v Secretary of State for Trade and Industry, ex parte Duddridge and others*,⁹⁴ the court accepted the policy expressed in the White Paper. It did not follow the principles laid down in article 13 of the European Community Treaty.

6.41 Kaplan J, in *Cannonway Consultants Ltd v Kenworth Engineering Ltd*,⁹⁵ referred to a Green Paper⁹⁶ and the recommendations of a White Paper.⁹⁷

6.42 *Pepper v Hart* does not give guidance as to the relationship between *Hansard* and other extrinsic aids, nor does it give guidance on the relative weight to be attached to the different types of aids.⁹⁸ Indeed, parliamentary materials compare unfavourably with pre-parliamentary publications such as Law Reform Commission reports.⁹⁹ In *Hamilton v Fife Health Board*¹⁰⁰ the court's attention was drawn to a Scottish Law Commission report, and its draft Bill. At issue was the question of liability for ante-natal injuries. The Bill which had been enacted had derived directly from the Law Commission report, which contained no mention of ante-natal injuries. The court dismissed reference to *Hansard*, on the basis that it did not show that Parliament had any intention to legislate on ante-natal injuries, despite the fact that a separate Law Commission report on ante-natal injury had subsequently been presented to Parliament.¹⁰¹

⁹⁰ [1993] SCLR 851, Court of Session, Inner House. See further under the paragraph on subsequent legislation.

⁹¹ Palmer's *Company Law*, Halliday, *Conveyancing Law and Practice in Scotland*, McDonald's *Conveyancing Manual*, Gloag and Henderson's *Introduction to the Law of Scotland*, and *Stair Memorial Encyclopaedia*. Lord McCluskey referred to the fact that these were living authors.

⁹² [1993] STC 63.

⁹³ Cmnd 4929 (no year was given).

⁹⁴ *The Independent*, 4 October 1994 (QBD).

⁹⁵ [1995] 1 HKC 179.

⁹⁶ "Contingency Fees", (1989: Cmnd 571).

⁹⁷ "Legal Services: A Framework for the Future" (1989: Cmnd 740).

⁹⁸ Bates, "Parliamentary Materials and Statutory Construction", (1993) Stat LR 46, at 48.

⁹⁹ N. Walker, "Discovering the Intention of Parliament", (1993) SLT (News) 121, at 122.

¹⁰⁰ (1993) SLT 624; LEXIS Transcript, 23 March 1993.

¹⁰¹ Zander, *The Law Making Process* (4th edition, 1994), comments that here *Hansard* was used to advance a negative interpretation, though Lord Brown-Wilkinson's formula was supposed to be restricted to statements that positively resolved an ambiguity (at 154).

6.43 In *Barratt Scotland v Keith*,¹⁰² the Inner House of the Court of Session doubted whether it was legitimate to have regard to memoranda and reports of the Scottish Law Commission, which preceded legislation, unless the language of the statute concerned was ambiguous, or there was doubt about the construction to be placed upon the statutory language. No reference was made to *Pepper v Hart* or the *Black-Clawson* case, though it should be noted that decisions of the House of Lords on English cases are not binding on Scotland.

(2) Second limb of the rule

(i) Parliamentary materials

6.44 The second limb of Lord Browne-Wilkinson's test provides that the Parliamentary material relied upon consists of one or more statements by a Minister, or other promoter of the Bill, together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect.¹⁰³

6.45 Lord Browne-Wilkinson did not envisage that statements other than statements of the Minister or other promoter of the Bill would be admitted.¹⁰⁴ This passage was referred to in *Hong Kong Racing Pigeon Association Limited v Attorney General*.¹⁰⁵ Nazareth J proceeded to look at the legislative history to see if it disclosed "statements that are both authoritative, and that bear directly or sufficiently upon the 'issue'".¹⁰⁶

6.46 Bates posits a question on the scope of the materials as follows:

*"Could a relevant statement by the Chancellor of the Exchequer in the Budget Speech, be admissible, for establishing parliamentary intention in the construction of a provision of a Finance Act in the absence of a clear ministerial statement during the passage of the Bill?"*¹⁰⁷

6.47 It is interesting that the judgment in *Pepper v Hart* does not limit the parliamentary materials to the second reading speech of the promoter of the Bill. In subsequent cases, the House of Lords have referred to minister's speeches when tabling amendments, or replying to amendments tabled by

¹⁰² [1993] SCLR 120.

¹⁰³ D Miers, "Taxing Perks and Interpreting Statutes: *Pepper v Hart*", (1993) 56 MLR 695, at 707, argues that such material would include the notes on clauses that are prepared for ministers and attached to the Bill. The Report of the *Hansard* Society Commission on the Legislative Process (1992) proposed that the notes on clauses could be turned into notes on sections, to be published with the Act.

¹⁰⁴ [1993] 3 WLR 1056B.

¹⁰⁵ [1995] 2 HKC 201(CA).

¹⁰⁶ *Ibid* at 207E.

¹⁰⁷ Bates, (1993) 14 Stat LR 46, at 51.

members.¹⁰⁸ The courts have also made reference to the occasional speech by a member, albeit distinguished members.¹⁰⁹

6.48 In *Melluish v B.M.I (No.3) Ltd.*¹¹⁰ Lord Browne-Wilkinson stressed that "the relaxed rule introduced by *Pepper v Hart* ..., if properly used, can be a valuable aid to construction when Parliament has directly considered the point in issue and passed the legislation on the basis of the ministerial statement." However "it provides no assistance to a court and is capable of giving rise to much expense and delay if attempts are made to widen the category of materials that can be looked at ..." ¹¹¹

6.49 He went on to warn that "Judges should be astute to check such misuse of the new rule by making appropriate orders as to costs wasted ... I would advise your Lordships to disallow any costs incurred by the revenue in the improper attempt to introduce this irrelevant parliamentary material". ¹¹²

6.50 The materials sought to be introduced by the revenue "were not directed to the specific statutory provision or to the problem raised by the legislation but to another provision and another problem. The revenue sought to derive from the ministerial statements on that other provision and other problem guidance on the point" at issue. ¹¹³

6.51 Clarke J, in *Three Rivers DC v Bank of England (No 2)*,¹¹⁴ held that:

*"Where the court is seeking to construe a statute purposively and consistently with any relevant European legislation, or the object of the legislation under consideration is to introduce into English law the provisions of an international convention or European directive, it is of particular importance to ascertain the true purpose of the statute, and in those circumstances the court may adopt a more flexible approach to the admissibility of parliamentary materials than that established for the construction of a particular provision of purely domestic legislation."*¹¹⁵

6.52 Clarke J regarded the *Melluish* case and *Pepper v Hart* as only relating to the statutory construction of domestic legislation. Instead, he relied on *Pickstone v Freemans plc*¹¹⁶ for authority to look at parliamentary materials.

¹⁰⁸ In *Chief Adjudication v Foster* [1993] 2 WLR 292, at 304-305, and in *R v Warwickshire CC Ex p. Johnson* [1993] 2 WLR 1, at 7. Also in *Massmould Holdings v Payne* [1993] STC 62, at 74.

¹⁰⁹ In *R v Warwickshire CC, Ex p. Johnson*, *ibid*, Lord Morton of Shuna was quoted, (at 7), after having moved an amendment at the report stage of the Consumer Protection Bill 1987, and so was Lord Denning in response. In contrast, in *Massmould Holdings v Payne*, *ibid*, Vinelott J quoted an unnamed member (though the report says that his observation now appears to be incorrect).

¹¹⁰ [1995] 3 WLR 631.

¹¹¹ *Ibid* at 645 F-G.

¹¹² *Ibid* at 645 G-H.

¹¹³ *Ibid* at 645 E.

¹¹⁴ [1996] 2 All ER 363.

¹¹⁵ This is taken from the headnote.

¹¹⁶ [1989] 2 AC 66. See further in chapter 4.18.

Despite the objection by the respondent to the admissibility of the ministerial statements, he had no objection to reference to the original proposed draft Directive, the opinion of the Economic and Social Committee and to the subsequent amendments to the recitals in the directive. The court agreed with their admissibility.¹¹⁷ The court was entitled to admit parliamentary materials, not only to help it construe a particular statutory provision whose meaning was ambiguous or unclear, but also where the purpose or object as a whole, rather than any particular provision, was in issue.¹¹⁸

6.53 Keith J allowed counsel in *Re Chung Tu Quan & Ors*¹¹⁹ to address him on the speech of the Chairman of the Ad Hoc Committee scrutinising the Bill which became the Immigration (Amendment) Ordinance 1991, on the resumed second reading. However, Keith J did not rely on the speech as the amendments to the legislation "speak for themselves".¹²⁰ In *L v C*¹²¹ Barnett J referred, *inter alia*, to a member's report of the meetings of the Legislative Council's Ad Hoc Group on the particular Bill before him. Godfrey JA in *The Incorporated Owners of Block F1-F7 Pearl Island Holiday Flats v The Incorporated Owners of Pearl Garden*¹²² referred to the object of the relevant legislation, as stated by the Attorney General in his second reading speech in the Legislative Council, to assist him in a purposive construction.

6.54 It could be argued that the second limb incorporates permission to use Parliamentary materials as contextual material, that is, to assist in understanding Parliamentary statements that establish Parliamentary intent. The judgment in *Pepper v Hart* itself allowed the use of a press release, though this was issued at the same time as a statement by the Minister in Parliament.¹²³ Bates has warned that it is sometimes difficult to determine whether a statement in Parliament is being considered as a statement of intention, or as contextual material.¹²⁴ Bates has also said that it is arguable that where a parliamentary statement, to establish parliamentary intention, incorporates by reference other material, that material may also be admitted on a contextual basis. Even where it is not so incorporated, reference can be made to it for contextual or confirmatory purposes. This was the basis for the reference to the press release in the judgment.¹²⁵

6.55 The implication of the second limb of the test was that there would be reference to positive statements of Ministers. However, in *Hamilton v Fife Health Board*,¹²⁶ submissions were made that a certain construction of the

¹¹⁷ He referred to *R v International Stock Exchange of the UK and the Republic of Ireland, ex p Else (1982) Ltd* [1993] 1 All ER 420, where the court had asked for these materials.

¹¹⁸ At 364.

¹¹⁹ [1995] 1 HKC 566, at 574.

¹²⁰ At 574.

¹²¹ Unrep, 1993 MP No. 4167, 9 May 1994, High Court.

¹²² [1996] HKLD G122.

¹²³ This was announcing the withdrawal of the controversial clause 54(4). The press release pointed out the effect of the withdrawal. See 1050G.

¹²⁴ "Judicial Application of *Pepper v Hart*", Journal of the Law Society of Scotland, July 1993, 251, 253.

¹²⁵ 14 Stat LR 46, at 52 (1993).

¹²⁶ (1993) SLT 624.

legislation should be accepted on the basis that there had been no reference in *Hansard* that Parliament had intended to legislate on ante-natal injuries at all.

6.56 In a recent *New Zealand* case, *Alcan v Commissioner of Inland Revenue*,¹²⁷ the High Court agreed that *Hansard* could be looked at to resolve an ambiguity, and it referred to *Pepper v Hart*.¹²⁸ The court refused to look at a Treasury paper, which was a report by a departmental officer to a Minister commenting on provisions in a Bill. It did not come within the category of material that the Court could look at for the purpose of ascertaining the statutory intention.¹²⁹ The Paper was for internal use, and this was another ground for exclusion.

6.57 Little guidance has been given as to whether *Pepper v Hart* can be used to interpret statutory instruments. In *R v Secretary of State for the Home Department, ex p Okello*,¹³⁰ Laws J declined to decide whether the conditions under which a court may examine Parliamentary materials to construe a main statute are different to these in relation to the construction of a statutory instrument. This was despite the statement of Lord Browne-Wilkinson in *Pepper v Hart* that it was permissible to have regard to *Hansard* to construe a statutory instrument.¹³¹

6.58 In *Brady v Barbour*¹³² "the court accepted that the matter was of sufficient obscurity to allow resort to the Minutes of Evidence heard by the Select Committee on the Salmon Fisheries of the United Kingdom which sat in 1824 and 1825."¹³³ A similar report of 1836 also gave assistance. The mischief and precise scope of the provision was identified from these reports. *Hansard* was of no assistance as no records of the debate from the 1868 statute was available. Keith J referred to a Memorandum to a Select Committee on Offices or Places of Profit under the Crown (1941) in *Mutual Luck Investment Ltd v Attorney General*.¹³⁴

6.59 The Court of Appeal relied on published guidelines of the Secretary of State for the Environment in *Regina v Secretary of State for the Environment, Ex parte South Northampton District Council and Anor*.¹³⁵ It had been published as a reply to the Fifth Report from the Environment Committee of the House of Commons Session 1985-86.

¹²⁷ [1993] 3 NZLR 495 HC.

¹²⁸ However, see *CIR v Alcan New Zealand Ltd* [1994] 3 NZLR 439 which deals with the appeal. This will be dealt with under the paragraph on taxing statutes, *infra*.

¹²⁹ *Pepper v Hart* was not referred to in order to justify this exclusion.

¹³⁰ LEXIS, 14 January 1994, QBD.

¹³¹ He referred to *Pickstone v Freemans Plc* [1988] 1 AC 66 as authority for this statement.

¹³² Unrep. 13 January 1995. See Macleod "The Unseasonable Salmon", *Journal of the Law Society of Scotland*, (March 1995), 106.

¹³³ *Ibid* at 107.

¹³⁴ (1996) 6 HKPLR 1.

¹³⁵ *The Times*, 9 March 1995.

(ii) *Weight to be attached to Hansard*

6.60 Bates¹³⁶ has submitted that the second and third limb¹³⁷ of the rule in *Pepper v Hart* go to weight and have no place in a rule regarding admissibility of parliamentary material.

6.61 Even though *Pepper v Hart* did not give guidance on the weight to be attached to, say, the second reading speech of a Minister, as distinct from explanatory memoranda or *Hansard* vis a vis other extrinsic aids, other jurisdictions offer guidance on weight. The practice in Australia seems to support the second reading speech as being the most important material, though there have been judgments where quotes from other members of Parliament have been used.¹³⁸

6.62 In *Commissioner of Police v Curran*¹³⁹ Wilcox J said that "if the purpose of a reference to a parliamentary debate is to determine ... the intention ... assistance is not likely to be gained outside the speech of the responsible Minister or other informed proponent of that draft". Even the second reading speech has to be put in context. In *R v Bolton; Ex parte Beane*¹⁴⁰ the Court stated "But this [Minister's speech] of itself, while deserving serious consideration, cannot be determinative; it is available as an aid ... The words of a Minister must not be substituted for the text of the law. Particularly so when the intention ... is restrictive of the liberty of the individual".

6.63 Walker¹⁴¹ has argued that *Pepper v Hart* does not inform citizens or their advisers when the primary sources alone (the statute), may be relied upon, or what weight to attach to the secondary sources (such as the parliamentary history).

(3) Third limb of the rule

6.64 The emphasis in *Pepper v Hart* is on a clear statement by the Minister.¹⁴² This, in some ways, is a recognition that the practical realities of Parliamentary life can be poor attendance by Members, a lack of understanding of complex technical legislation, and the fact that "the cut and thrust of debate ... are not always conducive to a clear and unbiased explanation of the meaning of the statutory language."¹⁴³ However, the courts

¹³⁶ *Op cit*, in the Statute Law Review.

¹³⁷ (i) the statements must be clear and (ii) may be supported by other materials.

¹³⁸ See chapter 8.

¹³⁹ (1984) 55 ALR 697.

¹⁴⁰ [1987] 162 CLR 513.

¹⁴¹ "Discovering the Intention of Parliament", (1993) SLT (News) 121, at 124.

¹⁴² The British Attorney General, Sir Nicholas Lyell, in "*Pepper v Hart*, the Government response", 15 Stat LR 1, 2, (1994) stated that the Financial Secretary's statement quoted in *Pepper v Hart*, was describing the effects of pre-existing legislation, as interpreted in practice by the revenue, rather than setting out the government's express policy intentions with regard to new wording.

¹⁴³ Lord Scarman in *Davis v Johnson* [1979] AC 264, at 349-50.

have not been consistent on the requirements for a clear Ministerial statement.¹⁴⁴

6.65 The purpose of looking at the statement must be borne in mind. Bates¹⁴⁵ has submitted that to be admissible as an aid to construction, as opposed to determining the mischief, a statement must be a clear expression of the legislative intention. Further, the admissible statements must be clear in that they express the intention of Parliament as a whole.¹⁴⁶

6.66 One aspect which could be subsumed under the heading of "clarity" is the need to ensure that the statement relied on was not subsequently changed or withdrawn. In *R v Warwickshire C.C. Ex p. Johnson*,¹⁴⁷ Lord Roskill mentioned the assurance of counsel that there was no further reference to the relevant issue other than what is referred to later in the judgment.

6.67 Bates has posited a further question:¹⁴⁸

"would it be appropriate to attribute, as an expression of parliamentary intention, a ministerial assurance¹⁴⁹ on the effect of a provision, which was given and accepted in the Lords, when considering a Bill, which had already been passed by the Commons"?

6.68 In *R v London Borough of Wandsworth ex parte Hawthorne*,¹⁵⁰ despite quoting extensively from the parliamentary materials, the court concluded that "The result of the travel through the thickets of Parliamentary debates ... is inconclusive". The Deputy Judge stated that although there were pointers to the selection of two or more interpretations of statutory language, this did not amount to the criteria in *Pepper v Hart*, where the ministerial statement was clear and conclusively resolved the ambiguity. He may well have been influenced by the fact that there was no ministerial statement on the legislation.¹⁵¹

6.69 Earlier on in his judgment¹⁵² he had indicated that he had found *Hansard* to be helpful and not a hindrance to ascertaining the true construction of the statutory language. He acknowledged that he had been influenced by

¹⁴⁴ T.J. Bates, in "Judicial Application of *Pepper v Hart*", *Journal of the Law Society of Scotland*, (July 1993), 251, has pointed this out at 253. He relied on *Stubbing v Webb* [1993] 2 WLR 120 and *Massmould Holdings Ltd v Payne* [1993] STC 62. Further, he commented in his article in the Stat LR, *op cit*, at 52-55.

¹⁴⁵ Stat LR, *ibid*, 52.

¹⁴⁶ Lord Browne-Wilkinson at 1063.

¹⁴⁷ [1993] 2 WLR 1, 4 F. Again, at 8, Lord Roskill reiterated that even though the minister had said that government would look into it again, there was no further reference to it in *Hansard*.

¹⁴⁸ *Op cit*, Stat LR at 53.

¹⁴⁹ Whether such an assurance would be regarded as creating a legitimate expectation will be dealt with later in the chapter.

¹⁵⁰ LEXIS, QBD 21 January 1994, Deputy Judge Sir Louis Blom Cooper.

¹⁵¹ At 11. He had quoted from the Minister's speech to the Standing Committee. Baroness Young and Lord Gifford were quoted in the debate in the House of Lords.

¹⁵² At 9-10.

the status accorded by the members to the Code of Guidance drawn up by the local authority. In any event, the application for judicial review succeeded.¹⁵³

6.70 In *R v Registered Designs Appeal Tribunal ex parte Ford Motor Company Limited*,¹⁵⁴ McCowan LJ did not consider it appropriate to have regard to *Hansard*, though he had looked at the statements of government ministers on the Copyrights, Designs and Patents Bill 1988 *de bene esse*.¹⁵⁵ Besides, the threshold conditions had not been met. He did not consider that the ministerial statements clearly disclosed the mischief aimed at or the legislative intention. On appeal the House of Lords recorded that the parliamentary history had been referred to in argument but that it had afforded no useful guidance.¹⁵⁶

6.71 In *Macdougall and ors v Wrexham Maelor Borough Council*,¹⁵⁷ the Court of Appeal rejected reference to the Minister's speech in *Hansard* on the relevant section of the Land Compensation Act 1973. Even though the court quoted the *Hansard* extract, they did not accept that the Minister's words were so clear as to require the court to give any other meaning to the words. Also, the words of the section were not ambiguous or obscure.¹⁵⁸

6.72 The Crown, in *R v Foreign Secretary, Ex p Rees-Mogg*,¹⁵⁹ invited the court to look at the speech of the Foreign Secretary, where he explained the effect of an amendment by referring to the advice he had received from the Attorney General. This was opposed, on the basis that the advice given by the Attorney General was wrong. The court rejected the argument, on the basis that its acceptance would undermine the utility of *Pepper v Hart*. Lloyd LJ noted the fact that Ministers act on advice, and he continued:

"It cannot make any difference whether or not the source of the advice is made explicit. Parliament has enacted section 1(2)¹⁶⁰ in the light of clear statements made in both Houses as to its intended scope. If there had been any ambiguity, which there is not, we would have regarded this as an appropriate case in which to resort to Hansard".¹⁶¹

¹⁵³ In reading the judgment as a whole, there is no doubt that the Judge was influenced by the clear distinction drawn in Parliament, between the person who is genuinely homeless, and the person whose homelessness is self induced.

¹⁵⁴ This was an application for judicial review of a decision of the Superintending Examiner acting for the Registrar of Designs. LEXIS, 2 March 1994 (QBD). The decision of the Registrar and the Deputy High Court Judge on the Appeal Tribunal are at [1993] RPC 399. It is interesting that the Registrar and the Registered Designs Appeal Tribunal had relied on *Pepper v Hart* and had allowed extensive quotes from *Hansard*. Indeed, the Appeal Tribunal had decided that the Act was "undoubtedly ambiguous and obscure, and was satisfied that *Hansard* elicited a clear Parliamentary intention".

¹⁵⁵ This is provisionally allowing in evidence in court.

¹⁵⁶ *Reg v Designs Appeal Tribunal, Ex p Ford Motor Co.* [1995] 1 WLR 18, at 29.

¹⁵⁷ Rating and Valuation Reporter [1993] 141, at 158.

¹⁵⁸ At 158-9.

¹⁵⁹ [1994] 2 WLR 115, at 123.

¹⁶⁰ European Communities Act 1972.

¹⁶¹ The counsel for Lord Rees-Mogg declined to rely on his client's affidavit which contained lengthy extracts from *Hansard*, and a commentary of what was said in Parliament. No doubt he was concerned about a possible breach of article 9 of the Bill of Rights 1688.

6.73 The Court of Appeal in *ICI plc v Colmer*¹⁶² rejected the reliance by the Crown on the definition of "holding company" put forward by the chief opposition spokesman, which the Crown now contended was correct. The court concluded that the *Hansard* reference did not assist the Crown as it did not establish that the government of the day shared that view.¹⁶³

6.74 In *AG v Associated Newspapers Ltd*,¹⁶⁴ reference was made to a statement in the House of Commons by the Attorney General that an amendment to the Contempt of Court Bill 1980 was intended to prohibit all forms of publication of a jury's deliberations, including the results of research. The Attorney General then argued, in this appeal from a conviction under the Contempt of Court Act 1981, that Parliament had extended its ban to include all forms of disclosure. However, Lord Lowry avoided relying on the extract by stating that due to the complicated and controversial Parliamentary history of the section, he would deliberately refrain from discussing the question as to whether it was appropriate to apply *Pepper v Hart* to this case.¹⁶⁵

6.75 In *Robert Gordon's College v The Commissioners of Customs and Excise*¹⁶⁶ the Tribunal justified quoting extensively from the Minister's speech in the Standing Committee. This was on the basis that the interpretation of the legislation could amount to an absurdity. However the Tribunal did not rely on the Minister's speech as it was not precise enough to assist in deciding the issue.

6.76 The English Court of Appeal¹⁶⁷ referred to the statement made to the House of Commons¹⁶⁸ by the Home Secretary which outlined the steps he proposed to take to implement the decision of *R v Secretary of State for the Home Department, Ex parte Doody*.¹⁶⁹

6.77 In *Doncaster BC v Secretary of State for the Environment*, the Court of Appeal heard submissions on the relevant Minister's explanation of "multi-occupation" and "multiple dwelling house", by reference to the debate as a whole.¹⁷⁰ Simon Brown LJ, having quoted from *Hansard*, explaining the purpose of the legislation, decided that the section was obscure.¹⁷¹ The second test was also satisfied. However, the third test was not satisfied. There was an assumption made by the Minister about the impact of the section. The final remarks of the Minister relied on by one of the parties were *extempore*¹⁷² responses to various points made by the opposition member. His Lordship continued "I certainly do not find in this crucial passage the clarity for which

¹⁶² [1993] 4 All ER 705, at 709.

¹⁶³ At 716.

¹⁶⁴ [1994] 1 All ER 556, at 566 (H.L.).

¹⁶⁵ At 566. Lord Lowry did look at a Report of the Departmental Committee on Jury Service (1965: Cmnd 2627).

¹⁶⁶ LEXIS, 23 March 1993, Edinburgh VAT Tribunal.

¹⁶⁷ *R v Secretary of State for the Home Department, Ex parte Pierson*, *The Times*, December 8, 1995.

¹⁶⁸ *Hansard* HC cols WA 863-5 July 27, 1993.

¹⁶⁹ [1994] 1 AC 531.

¹⁷⁰ 66 P & C.R. 61, and see further T.J. Bates, *Journal of the Law Society of Scotland*, *supra* at 253.

¹⁷¹ Section 172(4)(c) Town and Country Planning Act 1990 Bill.

¹⁷² The exclusion of *extempore* remarks could be useful for encouraging a continuing frankness in discussions in Bills Committees or Select Committees.

Pepper v Hart requires us to search, still less a clear statement directed to the very matter in issue." He therefore put aside the Parliamentary materials and the appeals were determined on the basis of the judgment which had been written before the *Pepper v Hart* judgment.

6.78 The dangers of relying on a statement by a minister were identified in *Griffin v Craig-Harvey*.¹⁷³ The court accepted counsel's submission that the observations of the Financial Secretary were inaccurate when he moved amendments to the legislation. The court looked at *Hansard* even though it did not think that the legislation was ambiguous or obscure.

6.79 In *Matheson PFC Limited v Jansen*,¹⁷⁴ Penlington J referred to a clear statement by the Attorney General contained in the explanatory memorandum to the Apprenticeship Bill 1975. This Ordinance was not in fact before the court, but it contained an amendment to the Labour Tribunal Ordinance, which was before the court. Penlington J regarded this statement as equivalent to a statement by a Minister, and thus it complied with the third limb in *Pepper v Hart*. The statement was used negatively to restrict the interpretation of the relevant Ordinances. Leonard J in *Real Estate Developers Association v Town Planning Board*¹⁷⁵ referred to a government consultative document¹⁷⁶ and to a statement made in the Legislative Council by the Secretary of the Planning, Environment and Lands Branch indicating the government's agreement to introduce a new bill at a later stage. It seemed to have been on the resumption of the second stage as he referred to an agreement with the Ad Hoc Group.

Application of Pepper v Hart to prior decisions on legislation

6.80 In *Crown Suppliers v Dawkins*¹⁷⁷ the Court of Appeal noted the fact that there was no definition of "ethnic origin" in the relevant legislation. Counsel sought to have the court look at statements made by the Home Secretary in the House of Commons while considering the Race Relations Bill 1975. Neill J concluded that as authoritative guidance, which was clear and unambiguous, had been given in a judgment of the House of Lords (despite the difference in approach between two of the Law Lords), it was not an appropriate case in which to refer to *Hansard*.

6.81 In contrast, the Employment Appeals Tribunal in *Sunderland Polytechnic v Evans*¹⁷⁸ did use parliamentary material to depart from their previous decision, on the basis that some of that earlier reasoning was no longer correct. They justified looking at a Standing Committee statement by the Under Secretary for Employment, and a ministerial statement, on the basis

¹⁷³ [1993] STC 54, at 62.

¹⁷⁴ (1994) CA No. 72 of 1994, 26 July 1994, unreported.

¹⁷⁵ (1996) 6 HKPLR 179.

¹⁷⁶ "Comprehensive Review of the Town Planning Ordinance", Planning, Environment and Lands Branch, 1991.

¹⁷⁷ [1993] ICR 517. Bates, in the Journal of the Law Society of Scotland article, *op cit*, has dealt quite fully with the judgment.

¹⁷⁸ [1993] ICR 392.

that the legislation was obscure. The construction that was adopted was supported by the extract from *Hansard*.

6.82 The Court of Appeal rejected the deployment of Parliamentary materials as being "a damp squib" in *In re Arrows, (No. 4), In re Bishopsgate Investment Management Ltd and anor*¹⁷⁹ None of the passages in the literature, or in the Fraud Trials Committee Report, had any direct bearing on the scheme of the Act as it subsequently evolved, though Dillon LJ had quoted the rationale furnished by the Minister to the House of Lords.¹⁸⁰ Even though the court adopted a purposive construction of the legislation, there was no ambiguity, obscurity or absurdity in it. In any event, the court was bound by a House of Lords precedent on the issue before the court.

6.83 Ironically the Court of Appeal, in another case,¹⁸¹ referred to Dillon L.J.'s reference to Lord Caithness speech as an explanation as to why Parliament had not brought the relevant sections of the Companies Act into line with the Criminal Justice Act 1987. Lord Taylor CJ also referred to comments of the Royal Commission on Criminal Justice that they would make no recommendation in this area.

6.84 In *CIR v Willoughby*,¹⁸² Lord Justice Morritt took the view that when Parliament re-enacted legislation in 1952, in identical terms to the original Act of 1936, it must have had in mind the interpretation placed upon it by the judgment in *Congreve v CIR*.¹⁸³ Thus, it must have implicitly or explicitly endorsed that interpretation. Therefore, the court could not endorse the original intention expressed by the Financial Secretary to the Treasury in the parliamentary debate in 1936. This intention had been superseded by acceptance of the decisions of the courts.¹⁸⁴ Morritt LJ did refer to a press release issued by the Revenue. ... Lintott claims that this judgment restricts the principles of *Pepper v Hart*: "it will only now apply on the first occasion when an Act of Parliament is being considered, because as soon as the Court has pronounced, that pronouncement is the law".¹⁸⁵ This may be an extreme view, but the judgment illustrates the strength of the doctrine of precedent which the judiciary can choose to be superior to the new criteria of *Pepper v Hart*.

Taxing Statutes

6.85 It is significant that *Pepper v Hart* was a tax case. Traditionally, the courts have interpreted tax legislation strictly. In *Mangin v IRC*¹⁸⁶ Lord

¹⁷⁹ [1993] 3 WLR 513, at 539-540.

¹⁸⁰ *Ibid*, at 519.

¹⁸¹ *Saunders and Others* [1996] 1 Cr. App. R.463, at 477.

¹⁸² [1995] STC 143. Court of Appeal, also referred to by Lintott and Bennett, in *The New Gazette*, February 1995, 46-7, and by Lintott in *The New Gazette*, May 1995, 38-9.

¹⁸³ [1948] 1 ALL ER 948.

¹⁸⁴ *Supra* at 174.

¹⁸⁵ *Op cit.* May 1995, at 38.

¹⁸⁶ [1971] AC 739. This statement was quoted with approval in *CIR v Asia Television Ltd* [1987] 2 HKTC 198.

Donovan set out the rules thus: "The words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices ... Moral precepts are not applicable to the interpretation of revenue statutes." The result of *Pepper v Hart* may be that a court will be able to clear up an ambiguity, by relying on a speech of the Financial Secretary that the legislation was designed to curb a tax avoidance scheme.

6.86 In *CIR v Alcan New Zealand Ltd*¹⁸⁷ the New Zealand Court of Appeal relied on the rules of interpretation of the *Mangin* case. They seemed to reject the House of Lords reliance on *Hansard* in *Pepper v Hart* to ascertain the purpose of the statute.¹⁸⁸ No parliamentary materials were referred to. Instead, the court stated that if the words were capable of more than one meaning, and the object of the legislation was clear, the words must be given "such fair, large and liberal construction" as would best ensure the attainment of the object of the Act.¹⁸⁹

6.87 In Australia, it seems that the courts are using aids to emphasise the substance rather than the form of tax legislation. They have not refused to use such aids where the result would be that taxing statutes would no longer be construed strictly in favour of the taxpayer.¹⁹⁰ As one commentator said¹⁹¹ "It is not difficult to see how *Pepper v Hart* could benefit an executive led government. When legislation is introduced, a carefully drafted statement made by the relevant secretary may well embellish the craft of the parliamentary draftsman."

Criminal statutes

6.88 In *Botross v London Borough of Fulham*,¹⁹² the respondent argued that the decision in *Pepper v Hart* was inapplicable as it was being contended that a criminal offence was being created by the provision. Any ambiguity had to be resolved against the creation of a criminal offence.¹⁹³ Beldam LJ responded that:

"we are not persuaded that merely because the ambiguity arises in connection with legislation relating to criminal proceedings the court is precluded from looking at Parliamentary material. The statement of a minister could equally put beyond doubt the

¹⁸⁷ [1994] 3 NZLR 439.

¹⁸⁸ [1992] 3 WLR 1032, at 1040C-D and 1057B.

¹⁸⁹ Section 5(j) of the Acts Interpretation Act 1924.

¹⁹⁰ P. Brazil, "Reform of Statutory Interpretation - the Australian experience of use of extrinsic materials: with a postscript on simpler drafting" (1988) 62 ALJ 503, at 506-7.

¹⁹¹ A.J. Halkyard, "*Pepper v Hart*: roadmap or minefield?", *The New Gazette*, (August 1993), 14.

¹⁹² (1995) 16 Cr. App. R (S.) 622

¹⁹³ The respondent was presumably relying on the fact that "there is a canon of construction 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." - *R v Hallstrom, ex p W (No.2)* [1986] QB 1090, at 1104.

question whether Parliament intended circumstances to continue to give rise to a criminal penalty."¹⁹⁴

6.89 The court relied on the acceptance by the minister of the amendment proposed by Lord Byron "after a clear exposition of the reasons for it, thus in effect adopting that exposition as promoter of the Bill."¹⁹⁵ The court did not dispute that there was "uncertainty"¹⁹⁶ and seemed to imply its acceptance of the submission that there was ambiguity. The ambiguity was resolved by the explanation given in Parliament, not by the language of the provision itself. The court did acknowledge that its construction of the provision was confirmed by the minister's statement.

6.90 It should be noted that the amendment restored the status quo to re-enact a provision, which made a finding or responsibility for a statutory nuisance, a criminal conviction enabling the court to award compensation. Whether or not a court would ignore the canon of construction on the interpretation of penal statutes in a more serious criminal case is a matter of conjecture.

6.91 In Hong Kong such common law rules of construction are governed by section 3(1) of the Bill of Rights Ordinance (Cap 383). This provides that all "pre-existing legislation" that can be construed consistently with the Bill of Rights Ordinance shall be given such a construction. For legislation enacted after the Bill of Rights Ordinance, section 4 provides that it shall be construed so as to be consistent with the ICCPR as applied to Hong Kong. Protection of rights comes from the substantive law (section 3(2) of the Ordinance or Article VII(5) of the Letters Patent) and not from legislation dealing with rules of interpretation.

6.92 So, the view could be taken that in cases of ambiguity the extrinsic aids will make no difference, as the courts cannot take away rights unless there is clear unambiguous language. Where reference is made to extrinsic aids to confirm the meaning, the court should not be restricted from looking at materials whether or not the materials convey an intention to restrict rights. If the court was so restricted, it could be an impediment to the court finding the legislative intention. If the intention of the legislation was clearly to take away rights, then there would no need to confirm that meaning by the use of such aids. However, in *R v Law Chi-wai*,¹⁹⁷ the Court of Appeal used *Hansard* to confirm that an offence of possession of explosive substances was an absolute one. "That was the intention of the legislature is shown by the report of the proceedings of the Legislative Council when the Bill was read".¹⁹⁸ This was so though the section "as a whole is unhappily worded and would benefit from legislative clarification".¹⁹⁹ The court rejected the argument that the Bill of Rights Ordinance (Cap 383) invalidated legislation providing for an absolute offence.

¹⁹⁴ *Ibid* at 628.

¹⁹⁵ *Ibid* at 629.

¹⁹⁶ *Ibid* at 628.

¹⁹⁷ Unrep. Cr App No. 260/1995, 7 September 1995 (CA).

¹⁹⁸ At 3. Ching J.

¹⁹⁹ At 4.

6.93 In contrast, the judgment in *R v Bolton ex p Beane*²⁰⁰ held that a clear legislative intent would be necessary to derogate from fundamental principles concerning the liberty of the individual. If such intention was not found in the Act itself, then "notwithstanding s15AB of the Acts Interpretation Act,²⁰¹ the second reading speech of the responsible Minister cannot supply the deficiency". The clarity of the parliamentary intention should be manifested from the Act itself and not supplied by the extrinsic aids, as was done in *Botross v London Borough of Fulham*.²⁰² Thus the court would proceed to use the rule of construction to interpret the penal statute in favour of the person whose rights are affected.

Use of parliamentary materials to confirm the statutory meaning

6.94 Lord Mackay was the only Law Lord who referred to the submission that *Hansard* should be allowed to confirm the meaning of a provision, as conveyed by its text, its object and purpose.²⁰³ In a recent article,²⁰⁴ Lord Lester, counsel for the taxpayers, indicated that they had abandoned this submission during the hearing because their Lordships pointed out that recourse to *Hansard* merely to confirm the ordinary meaning would become the practice in every case.²⁰⁵

6.95 *Pepper v Hart* seems to have been construed as confirming the meaning in some cases.²⁰⁶ In *R v Warwickshire County Council, ex parte Johnson*, Lord Roskill seemed to suggest that *Hansard* was being looked at to confirm a construction which had already been reached.²⁰⁷ "In my view the answers given by the minister are consistent with the construction I have felt obliged to put upon this legislation." Lord Roskill was also influenced by the fact that the adoption of a contrary construction, would go against the plain intention of Parliament, simply because the draftsman had used language, which on one view had failed to give effect to that intention. No reference was made as to whether the Minister's statement resolved an ambiguity, clarified an obscurity or prevented an absurdity.²⁰⁸ The Ministerial statement was very clear and directly on the issue before the court.

6.96 On a case stated, *National Rivers Authority (Southern Region) v Alfred McAlpine Homes East Limited*,²⁰⁹ Morland J stated that his purposive

²⁰⁰ (1987) 61 ALJR 190.

²⁰¹ 1901 (Cwealth). See further chapter 8.

²⁰² (1995) 16 Cr. App. R (S.) 622

²⁰³ 1037F.

²⁰⁴ "Pepper v Hart Revisited," 15 Stat LR 10, at 21 (1994).

²⁰⁵ Lord Lester noted that the Australian legislation (Section 15AB of the Acts Interpretation Act 1901 (Cth) (1984)) allowed extrinsic aids to confirm the meaning, but that firm judicial controls had not led to excessive recourse to *Hansard*.

²⁰⁶ T. J. Bates "Judicial Application of *Pepper v Hart*", Journal of the Law Society of Scotland, July 1993, 251, at 252 made the comment.

²⁰⁷ [1993] 2 WLR 1, at 8.

²⁰⁸ Zander, *The Law Making Process*, (4th edition, 1994), 153.

²⁰⁹ LEXIS, (QBD), 26 January 1994.

interpretation of section 85 of the Waters Resources Act 1991 meant that he did not have to consider *Hansard* for the debate on the bill that became the 1951 Act.²¹⁰ Simon Brown LJ indicated that there were two obstacles to using *Hansard* even if the pre-conditions of *Pepper v Hart* were met: (1) the courts were bound by the authoritative approach in a judgment of the House of Lords on the relevant section and (2) his Lordship differed in his interpretation from that of counsel as to what the Lord Chancellor had said in the Parliamentary debate. In fact, the *Hansard* extract supported rather than contradicted the view which he had already formed.²¹¹

6.97 In *Chief Adjudication Officer v Foster*,²¹² Lord Bridge stated that the Parliamentary material endorsed the conclusion he had independently reached as a matter of construction.

6.98 Even though no assistance could be derived from *Hansard*, the court in *In re Devon & Somerset Farmers Ltd*²¹³ confirmed the meaning it had attached to the relevant legislation from the previous legislative history.

6.99 The House of Lords, in *Scher v Policyholders Protection Board* (No. 2)²¹⁴ consented to receive extracts from *Hansard* on the Policyholders Protection Bill, as they supported the view the court had come to on the Parliamentary intention.

6.100 In *Reed v Department of Employment and others*,²¹⁵ the Court of Appeal emphasised the plain meaning of section 40(1) of the County Courts Act 1984. Stuart-Smith LJ stated that there was no ambiguity in the section, and thus no need to consult *Pepper v Hart*. However, "it may be said that the difference of judicial opinion between the judges in the courts below and this Court shows that there is an ambiguity."²¹⁶ He then proceeded to quote from the Lord Chancellor's statement to elicit the Parliamentary intention, and also to a comment by Lord Donaldson MR. This confirmed Stuart-Smith LJ in the view he had already taken.

6.101 In *R v Secretary of State for Employment, ex p Nacods*,²¹⁷ Simon-Brown LJ stated that the first limb of the test in *Pepper v Hart* was not satisfied. The second test was satisfied but the legislation was not ambiguous or obscure. However, despite the fact that the statement of the Minister did not

²¹⁰ Section 85 was in identical terms to section 2(1) of the Rivers (Prevention of Pollution) Act 1951.
²¹¹ This shows the danger of counsel taking short passages out of context in using *Hansard*, and also the danger of trying to rely on *Hansard* where, in reality, *Hansard* does not provide a clear answer to the point at issue in the litigation. However, Simon Brown LJ did look at a Law Commission report and a critique written by an academic.

²¹² [1993] 2 WLR 292, at 306D.

²¹³ [1993] 3 WLR 866, at 875.

²¹⁴ [1993] 4 All ER 840, at 852.

²¹⁵ The full title states, in addition "*Restick v Crickmore; Nisbet v Granada Entertainment Limited; Warren v Hinchliffe and Anor*". The reference is LEXIS, 17 November 1993. The decision is also reported at 143 NLJ 1712, but the report omits a reference to *Hansard*.

²¹⁶ He then referred to *Chief Adjudication Officer v Foster* [1993] 2 WLR 292, per Lord Bridge at 306B.

²¹⁷ NACODS stands for National Association of Colliery Overmen, Deputies and Shotfireres. LEXIS, (QBD) 16 December 1993.

directly address the point in issue, it seemed to confirm the conclusion the judge had reached.²¹⁸

6.102 In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg*,²¹⁹ Lloyd LJ decided that the meaning of the relevant provision was not ambiguous. He then went on to quote *Hansard* to show that this confirmed the meaning he had already decided on. Sir Stephen Brown used *Hansard* to confirm the parliamentary intention of the policy contained in the Human Fertilisation and Embryology Act 1990 that the donor's consent for storage and use of his gametes was required.²²⁰ There was nothing ambiguous in the relevant section.

6.103 The courts do not always approve of research, particularly where it yields nothing. In *London Regional Transport Pension Fund Trust Company Ltd & Others*,²²¹ Knox J criticised the research done which merely yielded a brief statement of the legislative purpose of the relevant private Bill which was not of assistance.

6.104 One commentator²²² has suggested that in the three cases that were dealt with by the House of Lords shortly after *Pepper v Hart*, the parliamentary history merely supported the conclusion which the court would have been drawn to by a process of independent textual analysis.

6.105 In *The Secretary of the Dental Council v The Dental Council*,²²³ Mayo J indicated that his view of the objects of the relevant legislation was reinforced by the extract from *Hansard*...²²⁴ In *Hardy Kowara (formerly known as Kwa Kok Min) v Headwell Investments Ltd*,²²⁵ Rogers J relied on the Attorney General's speech when introducing the relevant Bill in the Legislative Council, outlining the practice of swearing of statutory declarations relating to powers of attorney.²²⁶ Keith J in *R v Law Ka Fu*²²⁷ referred to the explanation given by the Attorney General of the reasons for an amendment Bill at its second reading.

Reference to earlier legislation

6.106 There is a question as to whether *Pepper v Hart* can be used to look at *Hansard* debates on earlier or related legislation. In *R v London Borough of Newham, ex p London Borough of Barking & Dagenham*, counsel

²¹⁸ The statement had not directly addressed the issue and had not indicated clearly how it must be resolved. The case concerned construction of The Management and Administration of Safety and Health at Mines Regulations 1993.

²¹⁹ [1994] 2 WLR 115.

²²⁰ *R v Human Fertilisation and Embryology Authority, Ex Parte Blood*, *The Times*, October 18 1995. (Family Division)

²²¹ LEXIS, (Ch D) 5 May 1993.

²²² See N. Walker, "Discovering the Intention of Parliament", (1993) SLT (News) 121, at 123.

²²³ Unrep. 1994 MP No. 1403, 11 October 1994. H.C.

²²⁴ At 9.

²²⁵ Unrep. 1994 MP No. 2701, 9 December 1994.

²²⁶ At 13 and 15.

²²⁷ [1996] 1 HKC 333. (CA)

invited the court to refer to the Standing Committee debate in order to show the Parliamentary intention on what became a section of the Rating and Valuation Act 1961, even though the court was in fact concerned with the construction of section 9 of the General Rate Act 1967.²²⁸ Potts J refused on the basis that the material was obscure. That alone made it impermissible to have regard to the material "as a source of enlightenment as to the construction."²²⁹

Reference to later legislation

6.107 The judgment in *AIB Finance Ltd v Bank of Scotland and anor*²³⁰ dealt with earlier and later Bills. The case concerned a dispute on ranking of securities and floating charges (and negative pledges), under section 410 of the Companies Act 1985. The court was invited to look at the *Hansard* report of the House of Lords in an earlier Bill (1972). The court rejected that submission because the 1988 legislation was not ambiguous or obscure. However, the court did point out that the report only showed that when the subject of floating charges was being described, reference was made, *inter alia*, to what was a negative pledge. The court did look at the legislative history of the 1985 Act, however, without resort to *Hansard*.

6.108 The opposing party then relied on section 464 of the Companies Act 1989. The court rejected this argument, and said that it was not legitimate to consider the 1989 Act, when interpreting the 1985 Act. The court may have been influenced by the fact that the section in the 1989 Act had not yet come into force. The Parliamentary intention should be ascertained at the time when the legislation was enacted.²³¹

6.109 In *Islwyn Borough Council and anor v Newport Borough Council*,²³² the Court of Appeal made reference to the Education Bill 1993, which was then before Parliament. Glidewell LJ accepted that the section which was being challenged²³³ in the court proceedings was being substituted by a new clearer section in the new Bill. The old section was not well worded and the fact that it had been thought desirable to amend it subsequently was an indication that it had proved troublesome. However, the old section was not ambiguous. Thus recourse could not be made to *Hansard*, under the rule in *Pepper v Hart*, though the conclusion of the court was in line with the Minister's interpretation of the new Bill, as quoted from *Hansard*.

6.110 In *Mendip District Council v Glastonbury Festivals Ltd*,²³⁴ Watkins J held that it was impermissible to look at later legislation because: (a) the Act post-dated the commission of the offence in the present case, and (b) he doubted, in the circumstances of the case, that it was permissible to endeavour

²²⁸ LEXIS, 18 February 1993.

²²⁹ At 9. In any event the court held that the section was not ambiguous or obscure.

²³⁰ 1993 SCLR 851, Court of Session, Inner House.

²³¹ *Ibid* at 9.

²³² LEXIS, 22 June 1993 CA.

²³³ Section 46 of the Education (No. 2) Act 1986.

²³⁴ LEXIS, 18 February 1993, QBD.

to construe an earlier statute by reference to a later statute.²³⁵ However, he did look at the *Hansard* debates on the Act in issue, to see its historical and purposive context, but this material was not of direct assistance in construing the relevant section.

6.111 In *R v Secretary of State for the Home Department, ex p Mehari and ors*,²³⁶ the court rejected a submission that the new Immigration Rules²³⁷ were not a legitimate aid to construction because the time had not yet passed within which they might be disapproved by either House under section 3(2) of the Immigration Act 1971. The court accepted that the fact that time had not yet passed might go to the weight to be attached to the Rule, but was not an absolute bar to taking it into account. The other criteria of *Pepper v Hart* were met: the Rule was unclear on its face, and the material relied on was a clear statement by a Minister promoting the Bill.

Legitimate expectation

6.112 There was strong reliance in *Pepper v Hart* on the Minister's statements, that were repeatedly voiced, that the taxpayers would only pay a small amount of tax. However, the court stopped short of imputing a legitimate expectation to the Minister's statement. In *R v Secretary of State for the Home Department, Ex p Sakala*²³⁸ the Court rejected the submission that a statement made in Parliament by the Minister for the Home Office, during the passage of the Immigration Bill 1988, that his department would almost invariably accept the recommendation of a special adjudicator, amounted to a legitimate expectation. The Master of the Rolls accepted that the statement had to be understood in its context, that is, a debate where the Government proposed restricting the rights of immigrants to appeal against deportation orders.

6.113 In *R v Secretary of State for the Home Department, ex p Mehari and ors*,²³⁹ the court declined to decide whether it was constitutionally permissible to found in legal proceedings an enforceable legitimate expectation upon anything said in Parliament.

6.114 Neither of these judgments seemed to note the comments of Lord Simon in *Docker's Labour Club v Race Relations Board*.²⁴⁰ Lord Simon stated:

"Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be the subject matter of specific statutory enactment-

²³⁵ He referred to *Halsbury Laws*, vol 44, paragraph. 888 (4th edition).

²³⁶ LEXIS, 8 October 1993, QBD.

²³⁷ The court said that the position was analogous to (though not identical with) that of a statutory instrument, which may be prayed in aid to construe main legislation.

²³⁸ *The Times*, 26 January 1994, Court of Appeal.

²³⁹ LEXIS, (QBD), 8 October 1993.

²⁴⁰ [1974] 3 WLR 533.

unless, indeed, it were too obvious to need expression. Such a convention would seem to have constitutional advantage not only as an aid to forensic interpretation and general understanding but also by way of parliamentary control of the executive."²⁴¹

Parliamentary privilege

6.115 *Pepper v Hart* has not led to many efforts to challenge Parliamentary Privilege. We have already noted the attitude adopted in *R v Foreign Secretary, ex parte Rees-Mogg*.²⁴² In *Re London Transport Regional Transport Pension Fund Ltd*,²⁴³ the court did look at the committee stage debate on a private Bill. It decided that a party was not entitled to examine proceedings in Parliament to show that the appellants had caused him loss by allegedly misleading Parliament. The court agreed with the principle that an Act has to be accepted as it stands, but that its construction is open to debate.

6.116 The Privy Council, in *Prebble v Television New Zealand Ltd*,²⁴⁴ held that parties to litigation could not bring into question anything said or done in Parliament, by suggesting that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lay entirely within the jurisdiction of Parliament, subject to exceptions.

6.117 The court also noted that "the Attorney General had rightly accepted that there could be no objection to the use of *Hansard* to prove what was done and said in Parliament as a matter of history." Bennion²⁴⁵ argued that Lord Brown-Wilkinson in *Pepper v Hart*, confused comity, that is, the mutual respect between the courts and the legislature, with parliamentary privilege.

²⁴¹ At 543.

²⁴² [1994] 2 WLR 115. See *supra* under the "third limb".

²⁴³ LEXIS, 20 May 1993 Knox J.

²⁴⁴ *The Times*, 13 July 1994.

²⁴⁵ "Hansard-Help or Hindrance?", 15 Stat LR 149, 153. (1994).

Chapter 7

Comparative Law

Part I : Non-statutory approaches to reform

Introduction

7.1 This chapter will consider the recommendations for change in the admissibility of extrinsic aids, made in a number of other jurisdictions before the decision in *Pepper v Hart*.¹ This will assist us in making recommendations as to the scope of the reform that may be needed in Hong Kong. The chapter will also deal with the response of the judiciary in various jurisdictions to the use of extrinsic aids where there is no statutory provision for their use.

The United Kingdom

(i) The Law Commissions' Report

7.2 The interpretation of statutes was the subject of a joint study by the English and Scottish Law Commissions, resulting in the publication of a Working Paper in 1967 and a final report in 1969.² The Law Commissions prefaced their views by the following pertinent remarks :

"In considering the admissibility of Parliamentary proceedings, it is necessary to consider how far the material admitted might be relevant to the interpretative task of the courts, how far it would afford them reliable guidance, and how far it would be sufficiently available to those to whom the statute is addressed".³

7.3 The Commissions noted that the problems of interpretation would not be solved by merely relaxing the restrictions on the range of material to which the court could refer to. There was a problem that sometimes there was no material which disclosed the underlying policy of the statute. This raised the question as to whether a new authoritative aid to the

¹ [1992] 3 WLR 1032.

² "The Interpretation of Statutes", Working Paper (1967) and Final Report (Law Com No 21) (Scot Law Com No 11: 1969).

³ Paragraph 49 of the Working Paper and paragraph 53 of the Final Report.

construction of statutes should be introduced.⁴ But first, we must discuss the problems with the existing aids.

7.4 Reliability Their discussion on the reliability of extrinsic aids focused more on the reliability of *Hansard*. They concluded that a rule excluding the use of *Hansard* solely on the grounds of relevance could not be supported.⁵ They expressed concern about the reliability of Parliamentary history. They referred to the views of some American critics, who stated that diverse constructions of legislation could be supported because of the varying statements made through the progress of a Bill.⁶ Another danger was that evidence could be deliberately manufactured during the legislative process by those with an axe to grind.⁷

7.5 On the other hand, the Commissions suggested, after a review of the comparative material, that where legislative material is admissible, the courts become accustomed to the ways of the legislators and learn to discriminate between the value of different kinds of material.⁸ So, *Hansard* can then be relied on less frequently than reports of Parliamentary Committees. A distinction should be drawn between the speeches of the promoter and speeches of other members of Parliament. The words of Justice Frankfurter should be remembered in this debate: "In the end, language and external aids, each accorded an authority deserved in the circumstances, must be weighed in the balance of judicial judgement".⁹ The Commissions concluded that the strictness of the rule excluding the use of such material could not be justified merely because it might sometimes be unreliable.¹⁰

7.6 One of the strongest reasons for suggesting that legislative material should be admitted was that it would make possible a more satisfactory and consistent treatment by the courts of pre-legislative material such as committee reports. However, the Commissions recommended that any changes in the rule to allow the examination of legislative materials should only govern future statutes.¹¹

7.7 Availability The Commissions attached some weight to the difficulties concerning the availability of Parliamentary materials. This would be a problem more for small firms of solicitors, in places where libraries would

⁴ Paragraph 16 of the Final Report. They suggested a specially prepared explanatory memorandum which will be dealt with later.

⁵ Paragraph 55 of the Final Report and paragraph 52 of the Working Paper. However, subject to allowing special explanatory material, (which will be dealt with *infra*) they concluded that reports of Parliamentary proceedings should not be used by the courts (paragraph 61 of Final Report).

⁶ See paragraph 53 of the Working Paper and paragraph 56 of the Final Report.

⁷ *Ibid*, referring to - Curtis, "A Better Theory of Legal Interpretation" in the (1948-9) 3-4 Record of the Association of the Bar of the City of New York, 321.

⁸ Paragraph 54 of the Working Paper and paragraph 57 of the Final Report. The Final Report stated that any rigid distinction between the admissibility of material in ascertaining the mischief, and in ascertaining the remedy, was unjustified (paragraph 52).

⁹ "Some reflections on the reading of statutes", *Proceedings of the Bar of the City of New York* (1947) 213, at 216-7.

¹⁰ Paragraph 56 of the Working Paper and paragraph 59 of the Final Report.

¹¹ Paragraph 57 of the Working Paper.

not have such materials. They noted that solicitors would be cautious about advising without seeking assistance from some specialised commentary on a new statute, or obtaining the advice of counsel.¹² The Law Commissions envisaged that reference systems and facilities would in practice tend to be adapted and increased to meet the requirements which experience showed to be necessary. They made a practical suggestion that rules of court should be drawn up requiring suitable notice to be given of an intention to use extrinsic materials.¹³

7.8 Explanatory memoranda The solution adopted by the Law Commissions was to have specially prepared explanatory materials to accompany Bills.¹⁴ They drew a useful distinction between three categories of such materials.¹⁵ These were descriptive, motivating and expounding texts. Descriptive texts are documents which contain the debates of Parliament or other bodies. Motivating texts give the reasons for the proposals in the legislation. Expounding texts comment upon a Bill or Act. An example of the latter is the existing type of Explanatory Memorandum.¹⁶ Zander described the Commissions' proposed explanatory memorandum as a mixture of the preamble, the existing explanatory memorandum and notes on clauses.¹⁷ The Commissions suggested that providing this new type of explanatory material could be of substantial assistance to the courts. It would also assist members of parliament to understand complex legislation as they did not have access to Notes on Clauses.¹⁸ The criteria for its use would be where there was ambiguous, obscure or difficult language or "with provisions of a generalised character".¹⁹ They also recommended its use when laws were being codified. It would avoid the problems with availability noted for other aids.

7.9 The Commissions noted the danger of confusion or conflict between the explanatory material and the legislation. However, safeguards could be adopted to minimise this danger. This sort of difficulty did not appear to them to have arisen in those countries that used such materials.²⁰

7.10 They recommended that the explanatory material would be prepared by the promoter of the Bill under the supervision of either officials of

¹² Paragraph 59 of the Working Paper and paragraph 60 of the Final Report.

¹³ In England, a Practice Direction was made subsequent to *Pepper v Hart*. See Practice Direction (House of Lords: Supporting Documents) [1993] 1 WLR 303. A Practice Direction dealing with the Supreme Court, crown court and the county courts, applicable to civil and criminal cases, was made on 20 December 1994 - Practice Direction (Hansard: Citation), Supreme Court [1995] 1 WLR 192. No Practice Direction has been made in Hong Kong.

¹⁴ Professor Laski, in an annex to the "Report of the Committee on Ministers' Powers" (1932) suggested that a memorandum, setting out the purposes of a Bill, could be authorised to be used by the courts as an aid to interpretation. It could be revised after a Bill had gone through all its stages, to take account of amendments.

¹⁵ They relied on the categories suggested by Professor Stig Stromholm "Legislative material and construction of statutes: Notes on the continental approach", *Scandinavian studies in law*, (1966) 175-218.

¹⁶ See paragraph 61-62 of the Working Paper.

¹⁷ *The Law Making Process*, (4th edition, 1994), at 157.

¹⁸ This was the position in 1969.

¹⁹ Paragraph 64 of the Working Paper.

²⁰ The Commissions relied on the practices of certain European countries. This will be dealt with later in the chapter.

Parliament or some other appropriate authority.²¹ The material would be similar to the Notes on Clauses.²² The material would be altered to reflect any changes in the Bill during its passage through Parliament. They went so far as to suggest that in the case of difficult legislation, a general statement, with explanations of the situations which are envisaged as being, or not being, covered would be of assistance.²³

7.11 The Commissions, in their Working Paper,²⁴ suggested that there were three ways of implementing their ideas for change. The first was to recognise that, whatever general principles might be laid down by statute, ultimately it would be up to the judiciary to interpret the legislation. The second suggestion was to incorporate all the principles of interpretation into a comprehensive statute. The difficulty with this suggestion was that this would amount to codification and thus rigidify the law. The third suggestion was to lay down broad guidelines in legislation.²⁵

7.12 They outlined four categories of suggestions made to them during their consultations:

- (i) The explanatory material would be seen as a statement of the intention of Parliament. It would be contained within the Bill, by either commenting broadly on the Bill or on particular provisions therein. Thus, it would be similar to a preamble. They did not approve of this proposal, as it was too radical a departure from existing Parliamentary conventions.
- (ii) The explanatory material, which would be published with the Bill, could be amended by officials after it was enacted. This would be similar to the functions already carried out on headings, punctuation and marginal notes. They did not approve of this suggestion, because of its implication for future interpretation of the statute.
- (iii) The explanatory material, after being amended to reflect amendments to the Bill, could be submitted for approval on the Third Reading of the Bill. The objection raised to this proposal was because of the extra parliamentary time that would be needed.

²¹ Paragraph 66 of the Working Paper and paragraph 68 of the Final Report. There is a precedent for this suggestion in that an Authority was appointed, in England, to ensure that standards were kept when explanatory notes were introduced for subordinate legislation.

²² These are prepared for the private use of the promoter. They explain the purpose and effect of the clauses. Zander, *op cit*, noted that in England it is increasingly the practice of Ministers to make these available to members of the Committee, at the committee stages of a Bill (at 157). In Hong Kong, there are the Legislative Council Briefs prepared by the promoter for members, and these are vetted by the Legal Adviser to the Legislative Council.

²³ *Ibid.*

²⁴ Paragraph 68.

²⁵ It must be remembered that the Commissions remit extended beyond the subject of extrinsic aids to statutory interpretation. So these remarks must be seen in that context.

- (iv) The material, as amended, could be submitted to Parliament after the enactment of the Bill, "possibly under a procedure which would allow for approval with modifications".²⁶ The material could have been scrutinised by a Joint Committee of both Houses.

7.13 The Law Commissions responded to these suggestions. The new explanatory material would be no more binding on the courts than other material that the courts can already be taken into account. "No interpretative device can relieve the courts of their ultimate responsibility for considering the different contexts in which the words of a provision might be read, and in making a choice between the different meanings which emerge from that consideration."²⁷

7.14 The Final Report recommended that the proposed explanatory material would be admissible in court. It would incorporate any necessary changes at the various stages of the Bill's passages through Parliament. The report also recommended that the amended material could be given some form of Parliamentary approval.²⁸

7.15 The Commissions did not accept that the extra time and labour involved would be of great significance. In any event, much of the material would have been already prepared for the Notes on Clauses. The Commissions concluded that they would recommend the use of the explanatory material, on a selected basis, for Bills that the sponsors thought to be appropriate for such use. They gave, by way of example, the Bills implementing reports of the Law Commissions or the Criminal Law Revision Committee. The advantage of a selective basis being used was that Parliament could decide in each case whether the material should be available and, if so, subject to what safeguards. The statute could specifically authorise the explanatory material to be used as an aid to its interpretation. Attempts to do this were rejected in the Animals Bill 1970 and the Matrimonial Proceedings Bill 1970.²⁹

7.16 The Commissions hoped that this recommendation would encourage bodies such as themselves, to "prepare their reports in a way facilitating the preparation of an explanatory statement for use with Bills based on the draft clauses attached to the reports".³⁰ The recommendations of the Commissions were also applied to delegated legislation.³¹

Draft Clauses

7.17 The Commissions attached a number of Draft Clauses as an appendix to the report. The relevant section on extrinsic aids is as follows:

²⁶ Paragraph 69 of the Final Report.

²⁷ Paragraph 70 *ibid.*

²⁸ Paragraph 68 of the Final Report.

²⁹ See Samuel "The Interpretation of Statutes" [1980] Stat LR, 86, 96.

³⁰ Paragraph 72 *op cit.*

³¹ Paragraph 77-78 of the Final Report.

- "(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;*³²
 - (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 purpose for which they could not be considered apart from this section".*³³

7.18 They also recommended that a purposive construction would be applied to the interpretation of legislation.³⁴ A purposive construction supported the use of extrinsic aids more than a literal construction.³⁵ The Commission did not make any final recommendation on how to evaluate the weight of extrinsic materials. However, they did note that, in European

³² 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".

³³ It is not proposed to deal with this suggestion as the judgment of *Pepper v Hart* has overtaken this matter.

³⁴ Appendix A, clause 2(9).

³⁵ Samuel "The Interpretation of Statutes" [1980] Stat LR 86, at 99.

countries, the weight of such material diminished the longer the legislative code was in force.

(ii) The Renton Committee Report³⁶

7.19 The Renton Committee was established to review the form, drafting and amendment of legislation. It included members and officers of both Houses of Parliament. The Renton Committee took the view that, in principle, the interests of the ultimate users of legislation should always have priority over those of the legislators.³⁷ Since the range of people whose needs had to be taken into account might vary from members of the public, who wanted a general broad explanation, to specialised professional interests who required a highly technical explanation, it was best that the kind of aids that should be provided be considered separately for each statute.³⁸

7.20 The Committee considered the various types of explanatory material. They recommended that the practice of publishing Green or White Papers in advance of legislation should be extended. This would also assist the users of the legislation to understand the purpose of it more clearly.

7.21 They referred to the fact that the Select Committee on Procedure of the House of Commons, had recommended that explanatory memoranda should describe the purposes and effect of a Bill and, where appropriate, of the White Paper or report from which it originated.³⁹ It also recommended that in the case of long or complicated Bills, detailed explanation should be provided in a separate White Paper,⁴⁰ which should be provided more frequently.⁴¹ The Government, at the time, undertook to implement the recommendation as far as was practicable.⁴² The Renton Committee endorsed the recommendation of the Select Committee that the memoranda should provide more information about a Bill.

7.22 The Renton Committee also recommended that Notes on Clauses and similar additional explanatory material (for example, explanations of major amendments) should be made available at Committee stage debates.⁴³ They noted that in the debate of the Local Government Bill 1972 the minister had made the Notes on Clauses available to members because of the complexity of the legislation. They did not recommend any new practice with regard to the sort of explanatory material that was made available by government departments after the enactment of legislation. This included departmental circulars, leaflets or advertisements explaining legislation.⁴⁴

³⁶ "The Preparation of Legislation", (1975: Cmnd 6053).

³⁷ Paragraph 10.3 *ibid.*

³⁸ Paragraph 15.1-15.2.

³⁹ Second Report for 1970-71. (HC 538 paragraph 22)

⁴⁰ Between 1971-1974 only 4 White Papers accompanying Bills were issued.

⁴¹ Paragraph 15.11 of the Renton Report.

⁴² Paragraph 15.7 *ibid.*

⁴³ Paragraph 15.10 *ibid.*

⁴⁴ Paragraph 15.14-15.17. The example that was given was of leaflets on new taxes.

7.23 The Renton Committee also commented on the recommendations of the Law Commissions Report on statutory interpretation.⁴⁵ Even though they had earlier made recommendations on the wider use of specially prepared explanatory materials, they concluded that, in general, such materials should not be declared to be admissible for the purposes of judicial interpretation.⁴⁶ Even though the judicial witnesses before the Renton Committee were generally in favour of draft clause 1(b) of the Law Commission's Report,⁴⁷ the Renton Committee did not agree with it.⁴⁸ They opposed the clause on the basis that "unrestricted admission of such materials would place too great a burden on litigants and their advisers and indeed on the courts." In addition, it would not make statutes more "immediately intelligible to the lay public".⁴⁹

7.24 The Committee also expressed concern that, from the draftsman's point of view, the desire for greater precision in order to avoid ambiguity arising from comparison with such materials might produce more rather than less complicated legislation. Therefore, they concluded that the question whether any, and if so, what kind of external explanatory material would be provided, was best considered separately for each statute, as at present.⁵⁰ However, they did suggest that statements of purpose should be used to clarify the scope and effect of legislation, but these should be included in clauses and not preambles.⁵¹

7.25 They agreed with the draft clause 1(2) of the Law Commissions Report concerning the weight to be given to explanatory materials. They also opposed *Hansard* being regarded as explanatory material, though they recognised that Parliament could declare *Hansard* to be admissible for the purposes of interpreting the statute.⁵² They did support the Law Commissions' recommendations on the admissibility of relevant international agreements and European Community instruments.⁵³

(iii) Interpretation Bills

7.26 The Draft Clauses that were contained in the Law Commissions Final Report were incorporated into an Interpretation Bill by Lord Scarman in

⁴⁵ "The Interpretation of Statutes" *supra*.

⁴⁶ To do so would create what Professor Reed Dickerson (*The Interpretation and Application of Statutes*, (1975) 166-173) has called a "split level" statute, of which only the primary level would have been fully debated in Parliament. See further at 19.24 of the Renton report.

⁴⁷ It states "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."

⁴⁸ 1(b) covers the admission of official reports.

⁴⁹ Paragraph 19.24 *idem*.

⁵⁰ Paragraph 15.2.

⁵¹ Paragraph 11.8.

⁵² Paragraph 19.26.

⁵³ Paragraph 19.22 and 19.39. See Draft Clause 1(1)(c) and 2(b) of Appendix A, which did not in fact include the European Community.

1980.⁵⁴ He introduced this to the House of Lords but he withdrew it after considerable opposition.

7.27 In 1981 Lord Scarman introduced a modified version of his Bill,⁵⁵ which acknowledged some of the conclusions of the Renton Committee Report.⁵⁶ It included Draft Clause 1(a), (b), (c),⁵⁷ but not 1(d) or (e), and 1(2) and (3).⁵⁸ This received more support but was not given a second reading in the House of Commons. The Law Society and the Bar Council opposed the Bill, as they felt that lawyers would feel obliged to search through the explanatory documents. This would increase their work load, which would lead to lengthier proceedings and higher fees.⁵⁹ The recommendation on the use of official reports was removed after an amendment which was supported by the Law Society. Miers, in commenting on the House of Lords debate on the Interpretation Bill 1981,⁶⁰ suggested that there were also further costs for the draftsman, who "would have to prepare the clauses of the Bill with one eye on what has been, or is being, or might be said in debate, and for departments, which, because interpreters would, for various reasons, be relying upon ministerial statements, would have to brief their ministers very carefully and ensure that they did not depart from it".

7.28 Miers summarised the principal objections to the Interpretation Bill as being that:

- (1) it confused the constitutional division of function between the courts and Parliament;
- (2) it would create further difficulties for the government draftsmen, who would be drafting Bills knowing that other texts, not prepared by them, would be construed with the statutory text to produce an interpretation of the legislation;
- (3) it would admit references to texts, whose relevance, reliability and availability was variable; and
- (4) the attendant costs for lawyers, government departments and ultimately their clients, would be significantly increased, as interpreters would have to read these texts in case they shed some light upon alternative interpretations.⁶¹

7.29 Miers also⁶² stated that there were objections that the drafting process would be made more difficult. This would be because the draftsman would have to take into account the fact that those interpreting the legislation

⁵⁴ See H L Deb Vol 405, cols 276-306 (13 February 1980).

⁵⁵ H L Deb Vol 418, cols 64-83 (9 March 1981) and 1341-7 (26 March 1981).

⁵⁶ *Supra*, (Cmnd 6053).

⁵⁷ Though the words "whether or not the UK were bound by it at that time", were added.

⁵⁸ See *infra* at 7.17.

⁵⁹ See Miers & Page, *Legislation*, (1982), at 202-6.

⁶⁰ Miers "Citing Hansard as an Aid to Interpretation" [1983] Stat LR 98, at 106.

⁶¹ Twining & Miers *"How to do things with rules"*, (1982, 2nd edition reprint, 1987) 330-331.

⁶² Miers & Page *Legislation* (1982), 204.

would also have explanatory documents available to them. This might delay the legislative programme.

7.30 Miers also pointed out that from the user's point of view, it is argued, that if the judiciary employed more determinate and systematic interpretative methods, their decisions would be better informed and hence more predictable. Such consequences would obviously be beneficial to most of those giving or relying on legal advice. For the judiciary, it is argued, that they would be able to make better informed decisions, for example, as to the admissibility, relevance and weight of policy documents, and other statements of purpose and intended impact, since they would be in a position to determine, more accurately, why and in what circumstances recourse to such material would be valuable.⁶³

7.31 Bennion⁶⁴ criticised the Interpretation Bills on the basis that this subject was much too complex to be tidied up by one or two simple clauses. Instead he suggested a code. He also commented that most people's views on the Bill were that it would be better to continue to rely on judicial development.

7.32 Research was undertaken after the demise of the Interpretation Bills by Sacks to evaluate whether the "intention of Parliament" could be more clearly elicited by the use of explanatory materials.⁶⁵ Thirty-four cases were studied by reading the judgements and then tracing the legislative history. The results were unsatisfactory. In most cases reference to *Hansard* did not clarify the points of issue. In at least one case selected use of *Hansard* was misleading.⁶⁶ Sacks concluded that "unintelligible legislation was being added to the statute book because the Government either lacked clear objectives, or, had deliberately intended to obfuscate in order to avoid controversy."⁶⁷

7.33 Sacks recommended that what was needed was a substantial overhaul of the whole legislative system. In the 34 cases studied, Parliamentarians had either not discussed the clause being litigated, or had failed to elicit the definitive meaning from the sponsors of the Bill.⁶⁸ Sacks agreed with the Law Commissions that detailed explanatory memoranda were required. If members of Parliament had a better understanding of the Bills then some of the problems would be avoided.

7.34 Bennion⁶⁹ pointed out that a court always has an inherent power to inspect any material which is put before it, or which may be relevant to the proceedings. It may also allow counsel to read out, *de bene esse*, any

⁶³ *Idem* at 200.

⁶⁴ "Another Reverse for the Law Commissions' Interpretation Bill", (1981)131NLJ 841.

⁶⁵ "Towards Discovering Parliamentary Intent", [1982] Stat LR 143.

⁶⁶ *Hadmor Productions v Hamilton* [1980] 2 All ER 724.

⁶⁷ *Op cit*, at 157.

⁶⁸ See further in chapter 9. Zander, *The Law Making Process* (4th edition 1994), commented that her article did not disclose how the 34 cases were selected, and therefore there is no way of knowing how selective or representative it was. (at 155)

⁶⁹ *Statutory Interpretation, a code* (2nd edition 1992), section 223.

relevant material.⁷⁰ However, the court has to give its permission to the material being read in this way.⁷¹

7.35 Cross⁷² expressed his views on the admissibility of extrinsic aids as follows:

- (i) Parliamentary materials should not be cited unless and until they are presented in a short and simple form;
- (ii) Pre-parliamentary materials should be used, not just to establish the mischief, but also to find the meaning; and
- (iii) The judgment in *Ellerman Lines v. Murray*⁷³ should be overruled by the House of Lords or reversed by statute.

7.36 Cross went so far as to suggest that "there was much to be said for two other views, namely (a) that no change of any kind in the existing practice is called for and, at the other extreme, (b) that the judge should have an unrestricted power to cite legislative history, for any purpose, whenever he considers it to be relevant, and whether or not he has any doubt about the meaning of the statute without recourse to such history".⁷⁴

(iv) Hansard Society's Report

7.37 The Hansard Society's Report,⁷⁵ "Making the Law", noted the widespread desire for more explanation of the meaning and implications of legislation. It stated that efforts to provide a better explanation might be more productive than attempts to simplify drafting.⁷⁶ They recommended that notes on sections, based on the Notes on Clauses, 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.⁷⁷ The courts could use the notes on sections and similar notes for statutory instruments, called "explanatory notes", as an aid to interpretation.⁷⁸ They also stressed that the legislative process should be governed by the needs of users and not primarily by the needs of those who pass legislation.

⁷⁰ At section 224.

⁷¹ *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, at 232.

⁷² *Statutory Interpretation*, (1st edition, 1976), 141.

⁷³ [1931] AC 126. See further chapter 2.

⁷⁴ At 141.

⁷⁵ It was reported as "The Report of the Hansard Society Commission on the Legislative Process" (1993). See chapter 9 further. See Zander *The Law Making process*, (4th edition, 1994), 159, and Rush "Making Better Law", [1993] 14 Stat LR 75 for summaries of the report.

⁷⁶ At 112.

⁷⁷ Paragraph 250, at 63.

⁷⁸ These notes would be drafted by government departments with the assistance of parliamentary counsel.

Europe

7.38 The Law Commissions studied the practice in many European countries in connection with the use of the explanatory materials, and this comparative material was written by European experts and contained in appendices to the Working Paper.

7.39 In Denmark, the practice at the time of the reports,⁷⁹ was that the explanatory statement was seen as an authoritative guide to the interpretation of the Act. Directives were issued by the Government setting out the style and content of the explanatory statement.⁸⁰ However, their practice with regard to new legislation was quite different to the British system.⁸¹ It should be noted that explanatory notes to amendments have the same status as the notes to the original text. As regards the availability of such materials, it was true that they were not available in every small town. However, if there was a major question of statutory interpretation, an opinion would be sought from a lawyer in Copenhagen.

7.40 The extrinsic aids included the explanatory statement of the background and purpose of the Bill, and the speech made by the promoter of the Bill. The reports of the committee of experts who made recommendations which led to the legislation were also used.

7.41 In France, academic writers exercise an important influence on the practice of the courts.⁸² The courts have adopted a principle of statutory interpretation, that if the text is clear and unambiguous, no reference to *travaux préparatoires* is allowed. Simon, the author of Appendix A, noted that French judges felt that statements made by a member of Parliament, did not necessarily reflect the intention of the legislature as a whole.⁸³

7.42 In a comparison between France, Germany and Sweden, Professor Stig Stromholm⁸⁴ pointed out that the procedures in Germany and Sweden produced more material, particularly reports by committees, which was suitable for interpretative purposes, than did the corresponding procedures in France. Therefore, the French courts were not able to get as much assistance from legislative materials as Germany and Sweden. The legislative history of a statute was used in argument before the court as much as case law.⁸⁵ The report stated that every practising lawyer in Sweden had a set of the more common volumes of "comments" to statutes, which contained

⁷⁹ The comparative material on Europe has to be seen in the context of the dates of the Working Paper and report - 1967 and 1969 respectively.

⁸⁰ The circular was attached to appendix D2 of the Working Paper. See Annex 1 for the full circular.

⁸¹ Appendix D1 of the Working Paper, written by a Danish expert, Per Federspiel, indicated that it was a committee of experts who studied the subject under debate and who drafted the legislation.

⁸² See Appendix A of the Working Paper.

⁸³ See p 69 of the Working Paper.

⁸⁴ "Legislative Material and Construction of Statutes: Notes on the Continental Approach", *Scandinavian Studies in Law*, (1966) 175-218.

⁸⁵ Appendix C of the Working Paper.

everything of importance from the legislative history. These books were not very expensive or voluminous.⁸⁶

7.43 The Final Report of the Law Commissions adopted a cautious approach to the comparative materials. They pointed out that the courts in civil law systems have not had to deal with the problem of interpreting legislation with a background of an extensive body of common law. Their systems are codified. Also, differences in legislative procedures will influence the extent to which courts are prepared to make use of extrinsic aids.⁸⁷ In civil law systems, it is recognised that the weight of extrinsic aids "contemporary with or preceding a code diminishes as the code develops its own momentum, which tends to reduce reference to the intentions of the historical legislator."⁸⁸

7.44 It can be seen that there has been a consensus over the last twenty four years that legislation needs to be clearer, that the focus needs to be on the users, rather than on the members of Parliament and that more attention should be paid to providing for extrinsic aids. Unfortunately, due to legislative and administrative inactivity, reform had to await the judgment in *Pepper v Hart*.

Ghana

7.45 Ghana was one of the first members of the Commonwealth to legislate for extrinsic aids. Section 19 of the Interpretation Act 1960 provided as follows:

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

(2) *The aids to construction referred to in this section are in addition to any other accepted aid."*

7.46 The exclusion of *Hansard* was referred to in the explanatory memoranda as follows:

⁸⁶ *Idem*.

⁸⁷ Paragraph 19. They specifically referred to committee reports of the legislature which can vary from very detailed reports to reports which are not so useful to the courts.

⁸⁸ Paragraph 73 of the Final Report.

"There are two cogent reasons for their exclusion: first, it would not be conducive to the respect, which one organ of State owes to another, that its deliberations should be open to discussion in Court; and secondly it would greatly interfere with the freedom of debate if members had to speak in the knowledge that every remark might be subject to judicial analysis".⁸⁹

7.47 Bennion⁹⁰ was involved in the drafting of the section. *Hansard* was excluded because "the extempore answer of a Minister pressed to explain a provision in a Bill is not always a reliable guide to its meaning."⁹¹

Sri Lanka

7.48 The explanatory memoranda in Sri Lanka⁹² are of two types:

- (a) statements of objects and reasons; and
- (b) statements of legal effect which are appended to amending Bills. They are prepared for the use of members of Parliament. There is no statutory provision for the use of such explanatory materials as aids to interpretation.

7.49 The courts in Sri Lanka have occasionally referred to Parliamentary debates to assist in finding out the mischief which the statute sought to remedy, but not for the purpose of interpreting the statute. The rationale for not allowing such debates for the latter purpose is because of the unreliability of the material and the volume of the material.⁹³ The memorandum concluded that there may be a case for allowing reference to the Minister's second reading speech. However, the difficulty with this is that it would not deal with amendments made to the Bill during its passage through Parliament.

New Zealand

7.50 As far back as 1978 New Zealand accepted the view that Parliamentary debates might be consulted. In *Re An Application By Winton Holdings Ltd*,⁹⁴ the New Zealand Licensing Control Commission thought that *Hansard* could be consulted to determine the mischief intended to be remedied but not "... for the purpose of interpreting any statute".

⁸⁹ See Bennion, *Statutory Interpretation, a code*, (2nd edition, 1992). Section 220.

⁹⁰ *Idem*.

⁹¹ Bennion, *Constitutional Law of Ghana* (1962), 278-9.

⁹² See "Memorandum by the Government of Sri Lanka" prepared for the Commonwealth Law Ministers Meeting, 1983.

⁹³ The memorandum stated that it is difficult to decide whether a particular speech reflects the intention of Parliament. However, it was acknowledged that a Minister second reading speech may correctly reflect the intention of parliament.

⁹⁴ (1978) 1 NZAR 363, at 366.

7.51 In 1984, after an important *Symposium* in Canberra in which eminent judges discussed the rules governing extrinsic materials, Australia brought in legislation allowing the use of extrinsic materials.⁹⁵ Indirectly, this must have influenced the New Zealand judiciary though they did not acknowledge it. The case law has developed in a similar way to Australia's, though there is no statutory provision in New Zealand such as there is in Australia. In 1985, in an extra-judicial statement, Sir Ivor Richardson, a Judge of the Court of Appeal, criticised counsel as:

*"somewhat reluctant to explore wide social and economic concerns; to delve into social and legal history; to canvass law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified; and so on."*⁹⁶

7.52 In *Marac Life Assurance Ltd v CIR*,⁹⁷ Cooke J went so far as to say that it was permissible to refer to extrinsic materials to "confirm" an interpretation already arrived at. He continued:

"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 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 aimed at or to clarify some ambiguity in the Act."

7.53 McMullin J, in the *Marac* case, relied on Australian judgments that pre-dated their legislation.⁹⁸ He accepted that the budget speech of the Minister and a departmental bulletin indirectly assisted the plaintiff, as neither of the documents stated that the legislation was intended in the way now argued by the defendant department.

7.54 This judgement was followed in *NZ Maori Council v Attorney-General*.⁹⁹ Cooke J confirmed that the Court of Appeal was willing to look at *Hansard* to see whether significant help in ascertaining the purpose of legislation was to be obtained. "Not to do so in a case of the present national importance would seem pedantic and even irresponsible".¹⁰⁰ However, *Hansard* did not provide such significant help. Thus, the Court would not be

⁹⁵ *Symposium on Statutory Interpretation*, published by the Attorney General's Department, (1983). Section 15AB of the Acts Interpretation Act 1901 (Cth).

⁹⁶ "The role of judges as policy makers" (1985) 15 VUWL 46, at 50.

⁹⁷ [1986] 1 NZLR 694.

⁹⁸ These were cases where resort had been made to Ministerial speeches, as reported in *Hansard*, to ascertain what mischief it was that a statute or statutory amendment sought to remedy. See *Wacando v Commonwealth of Australia* (1981) 37 ALR 317, at 335-336, per Mason J; *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 39 ALR 521, at 533-534 per Mason J; *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society* (1982) 42 ALR 496, at 508 (Federal Court).

⁹⁹ [1987] 1 NZLR 641.

¹⁰⁰ At 658.

justified in cutting down the scope of the words of the legislation, without much more specific evidence of what the legislators had in mind.¹⁰¹ In *Attorney General v Whangarei City Council*¹⁰² the Court of Appeal stressed that the courts, in allowing the use of *Hansard*, did not intend:

"... to encourage constant references to Hansard and indirect arguments therefrom. Only material of obvious and direct importance is at all likely to be considered; and the Court will not allow such references to be imported into and to lengthen arguments as a matter of course."

7.55 In *Real Estate House (Broadtop) Ltd v Real Estate Agents Licensing Board*¹⁰³ Cooke J referred to the explanatory note to a Bill, if only to confirm a conclusion he had already reached as to what the Act meant. It "could not be allowed to alter the meaning of an enacted provision which, in its own terms, is clear beyond any doubt".¹⁰⁴ In *Park v Park*¹⁰⁵ Cooke J referred to a discussion paper entitled *Matrimonial Property - Comparable Sharing*, which was described as "An Explanation of the Matrimonial Property Bill 1975, presented to the House of Representatives by leave of the Minister of Justice in 1975."

7.56 In *Brown & Doherty v Whangarei City Council*,¹⁰⁶ Smellie J referred to the changes recommended by a Select Committee of Parliament, which clearly deleted the right to obtain the remedy of *quantum meruit*. Even though counsel had not referred him to the reports of the Contracts and Commercial Law Reform Committee, he found that the reports, and a check on the passage of the Bill, were decisive. It is interesting that the original Bill was based on the reports which had preserved the remedy. Indeed, the recommendations of the Select Committee were based on written submissions, made by a senior lecturer in law, and these were quoted in the judgment.

7.57 What has encouraged the judiciary is the purposive interpretation called for by section 5(i) of the Acts Interpretation Act 1924, which is similar to section 19 of the General Clauses and Interpretation Ordinance (Cap 1).¹⁰⁷ Smellie J in *Brown & Doherty v Whangarei City Council* justified his reliance on the extrinsic materials as fulfilling a purposive interpretation.¹⁰⁸ Indeed, in an earlier judgment, *Wells v Police*,¹⁰⁹ (which he

¹⁰¹ At 659.

¹⁰² [1987] 2 NZLR 150, at 152.

¹⁰³ [1987] 2 NZLR 593.

¹⁰⁴ At 596. A later case, *Tasman Pulp and Paper Ltd v Newspaper Publishers Association* [1983] NZLR 600, at 605, referred to an explanatory note to a regulation.

¹⁰⁵ [1980] 2 NZLR 278, at 281.

¹⁰⁶ [1990] 2 NZLR 63, at 65-66.

¹⁰⁷ 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."

¹⁰⁸ The Court of Appeal in *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530, at 537-8, indicated that statements of general principle or purpose in the Act were a useful aid to interpretation. However, whether or not there were such aids, "the courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended".

did not refer to in the *Brown & Doherty* case) Smellie J used submissions presented by the Justice Department to the Statutes Revision Committee, and an extract from the second reading speech of the Minister of Justice, to confirm his views of the legislation.

7.58 The Court of Appeal, in *Devonport Borough Council v Local Government Commission*,¹¹⁰ observed that reference by the Court to *Hansard* may be appropriate if significant help can thereby be obtained to resolve an ambiguity or provide really useful background. However, it not appropriate as a matter of course.

7.59 The Court of Appeal, in *Southern Service Station v Invercargail City Council*,¹¹¹ stated that the introductory notes to a Parliamentary Bill when introduced in the House, and the *Hansard* transcripts of speeches by the Minister in charge of the Bill, though necessarily by no means decisive, may be of some help in matters of interpretation of the resulting legislation. They were not capable of overcoming clear words as enacted by Parliament. This observation seems to liberalise the criteria for reference to *Hansard*.

7.60 However, Cooke J, in *McKenzie v Attorney General*¹¹² seemed to backtrack somewhat from his observations in *Southern Service Station v Invercargail City Council*. After stating that the relevant passages in *Hansard* did not throw any light on the issue, he continued "while this Court is prepared to look at *Hansard*, if real help can be obtained thereby, we take the opportunity of repeating that reference to *Hansard*, in argument, is neither necessary nor desirable as a matter of course". The court also stated that, as to material outside the Act, it was highly unlikely that there could be anything strong enough to overcome the plain meaning of the Act, although there was material which supported the plain meaning of the words of the provision, such as provisions *in pari materia* with the section at issue, which assisted in its construction.

7.61 The judgment in *Pepper v Hart*¹¹³ was referred to in a High Court judgment, *Alcan New Zealand Ltd v Commissioner of Inland Revenue*.¹¹⁴ Tompkins J there stated that a court might refer to *Hansard*, although such resort ought to be rare. It was doubtful that the conditions in *Pepper v Hart* had been fulfilled in this case.¹¹⁵ Where a report¹¹⁶ has been used for the purpose of ascertaining the statutory intention, its usefulness is very considerably lessened, where that intention, is a matter of implication, rather than being stated expressly.¹¹⁷

¹⁰⁹ [1987] 2 NZLR 560, at 568-569.

¹¹⁰ [1989] 2 NZLR 203, at 208-9.

¹¹¹ [1991] 1 NZLR 86, at 90.

¹¹² [1992] 2 NZLR 14, at 19.

¹¹³ [1993] 1 All ER 42.

¹¹⁴ [1993] 3 NZLR 495.

¹¹⁵ See the appeal judgment of *CIR v Alcan New Zealand Ltd* [1994] 3 NZLR 439, in which *Pepper v Hart* was not followed, the court preferring the plain meaning of the taxing statute. Also see chapter 6 under the paragraph entitled "taxing statutes".

¹¹⁶ Report of the Taxation Review Committee.

¹¹⁷ At 506.

7.62 Tompkins J also held that a report by a departmental officer or by Treasury, to a Minister, commenting on provisions in a Bill before Parliament, did not come within the category of material that the court could look at for the purpose of ascertaining the statutory intention of legislative provisions flowing from the Bill.¹¹⁸ He did not refer to the early judgment in *Proprietors of Atihau-Wanganui v Malpas*,¹¹⁹ which did allow reference to an explanatory memorandum by a government department to demonstrate department practice.

7.63 In the case of reports of a Law Commission or Committees, such as the Criminal Law Reform Committee, the Court of Appeal has stated that they are only to be referred to as an aid where the legislation is unclear on its face. They are, however, of no assistance where the language of the statute is clear and unambiguous.¹²⁰ However, in *Brown v Langwoods Photo Stores Ltd*¹²¹ the Court of Appeal looked at a report of a Committee, even though the section seemed to be clear.

*"Although they could not of course override the Act, which must govern in the end, if they did suggest a different intention it would be necessary to reconsider whether the Act is really clear on the point. But no such query arises."*¹²²

7.64 In *Bay Milk Products v Earthquake Commission*¹²³ the Court of Appeal refused to regard the administrative practices of the Earthquake Commission as relevant to the true interpretation of the legislation.

7.65 However, in *Levi Strauss & Co v Kimbyr Investment Ltd*¹²⁴ the High Court followed Canadian and American authorities¹²⁵ to rely on the practices of the Trade Mark Office in the United Kingdom. The judge's rationale for so allowing was because of the "accumulated wisdom and experience of the Trade Marks Office in a complex and specialised field".

7.66 In an unusual case, *R v Cann*,¹²⁶ the Court of Appeal refused to look at a press release, which had suggested that the expeditious passage of the Bill through its three readings in Parliament in the one day was intended to catch the appellant. There was nothing in the legislation to suggest that the Act was of other than universal application.

¹¹⁸ He refused to accept the proposition, to the contrary, by Bennion, in *Statutory Interpretation, a Code* (2nd edition 1992). However, even Bennion had said that such a report would not be admissible if it were not intended for public use. In this case the report was not a public document.

¹¹⁹ [1985] 2 NZLR 468, at 477.

¹²⁰ *R v Howard* [1987] 1 NZLR 347, at 352-3.

¹²¹ [1991] 1 NZLR 173.

¹²² *Ibid*, at 176.

¹²³ [1990] 1 NZLR 139, at 141-2.

¹²⁴ [1994] 1 NZLR 332, at 353-5.

¹²⁵ *Harel v Deputy Minister of Revenue of the Province of Quebec* [1978] 1 SCR 851; *Skidmore v Swift & Co* 323 US 134 (1944); *Udall v Tallman* 380 US 1 (1965) at 6; *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837; *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US 421.

¹²⁶ [1989] 1 NZLR 210, at 214-5.

7.67 Not everyone is in support of the use of extrinsic materials. In a trenchant criticism, the Clerk of the House of Representatives warned that "the multiplying of extrinsic material may itself serve to import ambiguity into a provision which in its pristine state is free of it".¹²⁷ He pointed out the difficulties in accessing the material: for example, there were some 70 volumes of statute law, but there were 500 volumes of *Hansard*. Also, lawyers advising their clients would have to take account of the fact that there may be a different interpretation of the legislation when extrinsic materials are used. To summarise, he believed that such use of extrinsic material would lead to more litigation and the use of parliamentary hearsay.

7.68 Further criticisms have been made about the use of extrinsic aids. Evans in his book, *Statutory Interpretation, Problems of Communication*, said that the principal disadvantage of using parliamentary history was the danger of "undermining the reliability of the statute book."¹²⁸ However, if courts do not allow this aid to be used in such a way, then lawyers should be able to advise their clients by relying on the plain words of the statute, without having to check *Hansard*. He emphasised the problem of accessibility by lawyers and citizens to the parliamentary records. In the future he suggested that *Hansard* could be made available in public libraries. The only advantage that he could see to the use of *Hansard* would be that it might resolve an ambiguity. He suggested that the balance was correctly struck by the Australian legislation.¹²⁹

7.69 The New Zealand Law Commission did not recommend incorporating the rules governing the use of extrinsic materials into legislation. They suggested that it would be preferable to leave this to judicial development.¹³⁰ They concluded that the only advantage of legislation would be that it could define the conditions on which resort might be had to *Hansard*, and the 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."¹³¹

7.70 The Commission went further in their report, "A New Interpretation Act".¹³² They were satisfied that the courts have been developing the rules and practice about relevance and significance of such aids: "The practice appears to be developing in much the same way as in those Australian jurisdictions which do have legislation regulating the matter".¹³³ They suggested that the Australian legislation did not appear to provide any significant assistance to the courts. They pointed out some difficulties with the threshold tests laid down in some of the Australian legislation- ambiguity, obscurity, manifest absurdity, or unreasonableness.

7.71 The threshold test assumes:

¹²⁷ D G McGee, "Extrinsic aids to statutory interpretation" NZLJ (October 1989), at 341-367.
¹²⁸ (Reprint of 1st edition, 1989). At 288.

¹²⁹ Section 15AB of the Acts Interpretation Act 1901 (Cth) (1984). See chapter 8.

¹³⁰ "Legislation and its Interpretation", Preliminary Paper No 8, Paragraph 61. (December 1988)
¹³¹ At 140.

¹³² Report No 17. Paragraphs 124-6. (1990)

¹³³ At paragraph 125.

*"... a divided process of hearing and argument: that the court will settle on a meaning of the text, or find that it is ambiguous or obscure, before it knows about and gives significance to the parliamentary material. But, in practice, Judges may already know that material - at least in a general way. And they will often receive the relevant material in the course of the argument. The rules also assume that the court can say that a meaning is manifestly absurd or unreasonable without having regard to that material."*¹³⁴

7.72 The Commission also referred, in its Preliminary Paper, to the fact that the list of materials was not exhaustive and could be used to confirm but not to contradict the textual meaning.

7.73 The Commission suggested that greater weight should be given to the statements of those who were responsible for the legislation. Accessibility of *Hansard* could be improved by noting, not only the dates of the second reading speeches, but including "the name of the Bill as introduced, the dates of the other parliamentary stages, the number of the Bill and its later versions and of any relevant supplementary order paper, and a reference to any printed report on the Bill."¹³⁵

7.74 Professor J F Burrows has commented on the fact, that up to 1990, all the New Zealand cases which have used statements in parliamentary history have done so simply to confirm an interpretation, supported by other factors in the wording and context of the statute.¹³⁶

7.75 In conclusion, the New Zealand courts have adopted a creative and pragmatic approach to the use of, and development of, the range of extrinsic materials. The recommendation of the New Zealand Law Commission that the rules governing extrinsic aids should not be put on a statutory basis¹³⁷ reflects the fact that the Court of Appeal has maintained control over the development of the use of extrinsic aids.

Canada

7.76 Canada has guidelines for a purposive interpretation in its Interpretation Act.¹³⁸ Canadian provincial legislatures and the Federal Parliament have enacted similar provisions providing for a purposive interpretation. For example, section 8 of the Interpretation Act,¹³⁹ R.S.B.C,

¹³⁴ At paragraph 121.

¹³⁵ At 46. The Australian (Cwth) and Victorian legislation now note the dates of the second reading speeches.

¹³⁶ "Interpretation of Legislation: A New Zealand Perspective", 9th Commonwealth Law Conference, (April 1990).

¹³⁷ Bennion, "*Hansard*-Help or Hindrance", 15 Stat LR 149, at 159, (1994) states that this shows sensitivity to the fact that common law jurisdictions, since the middle ages, have regarded the interpretative function as belonging to the courts rather than the legislature.

¹³⁸ (1849) 12 Vict.c.10, s. 5-28. The New Zealand and Hong Kong provisions are similar.

¹³⁹ Revised Statutes, British Columbia.

1979, Cap. 206 provides that 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. The courts have developed their own rules about the admissibility of extrinsic aids without recourse to legislation. In *AG Canada v Reader's Digest Ass'n*,¹⁴⁰ the Supreme Court refused to admit evidence of statements made in Parliament. Two of the judges justified this decision by saying that "Parliament is an entity which from its nature cannot be said to have any motive or intention, other than that which is given expression in its formal acts."¹⁴¹

7.77 In *Reference re Anti-Inflation Act*,¹⁴² the exclusionary rules were relaxed. This was a constitutional case, and it was in those type of cases that the courts developed the rules governing the admissibility of extrinsic aids. The Supreme Court of Canada received submissions which included a Government White Paper, bulletins of Statistics Canada, studies by professors, opinions of economists, a speech of the Governor of the Bank of Canada, House of Commons Debates and the Minutes of a Standing Committee of Parliament. Laskin CJC stated that:

"... no general principle of admissibility or inadmissibility can or ought to be propounded ... and that the questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues, on which it is sought to adduce such evidence".

7.78 In an interesting judgment about the jurisdiction of the Ombudsman, *Re BC Dev Corp and Friedmann*,¹⁴³ Dickson J reviewed the historical development of the office of Ombudsman, and referred to similar officials in ancient China and Rome. In *R v Vasil*,¹⁴⁴ Lamer J, in interpreting the Canadian Criminal Code, referred to comments in the 1892 parliamentary debates on the Criminal Code Bill. He did warn that it was not usually advisable to refer to *Hansard*. One commentator said that the court could have rationalised its reference to *Hansard*, because the Criminal Code is a basic document like a constitutional statute.¹⁴⁵

7.79 The Court of Appeal in *R v Stevenson and McLean*¹⁴⁶ suggested that parliamentary proceedings might be examined where the examination "would almost certainly settle the matter immediately one way or the other".¹⁴⁷ This case was relied on in *Babineau v Babineau*¹⁴⁸ where the court quoted the second reading speech of the promoter of a Bill and a report of a select committee. In fact, the Minister's comments did not settle the matter.

¹⁴⁰ (1961) 30 DLR (2d) 296.

¹⁴¹ This was stated in the headnote.

¹⁴² [1976] 2 SCR 373, 68 DLR (3d) 452, 9 NR 541.

¹⁴³ (1984) 14 DLR (4th) 129, at 137.

¹⁴⁴ 58 CCC (2d) 97, 35 NR 451.

¹⁴⁵ Graham Parker "Comments on Legislation and Judicial Decisions" 60 CBR (1982) 502, at 504.

¹⁴⁶ [1980] 57 CCC (2d) 526, 19 CR (3d) 74.

¹⁴⁷ Lord Reid in *Warner v Metropolitan Police Com'r*, [1969] 2 AC 256, at 279.

¹⁴⁸ 122 DLR (3d) 508, at 513.

7.80 The exclusionary rule regarding evidence of legislative history gradually became more relaxed. In *Churchill Falls (Labrador) Corp v Newfoundland (Attorney-General)*¹⁴⁹ the province of Quebec sought to introduce evidence of speeches of public officials and a government pamphlet to show the true purpose of the legislation. On appeal, it was held that the court could consider extrinsic evidence on the operation and effect of legislation. The pamphlet was considered as evidence which was not inherently unreliable or offending public policy.¹⁵⁰ The court refused to accept the speeches and public declarations by officials, made both in and out of Parliament, on the basis that they could not be said to be expressions of the intent of the legislature. Other materials, providing information on the background to the situation, were admissible as historical facts of public knowledge. In addition, the court said that in constitutional cases, "extrinsic evidence may be considered, to ascertain, not only the operation and effect of the impugned legislation, but its true object and purpose as well".¹⁵¹

7.81 ***Use of non-parliamentary aids*** There have not been many judgements on the admissibility of reports of Commissions. A report of a Royal Commission was regarded as admissible for the limited purpose of showing the "materials" the legislature had before it when enacting the impugned legislation. In *Reference re Residential Tenancies Act*¹⁵² the court confirmed that Royal Commission Reports (and the reports of parliamentary committees) were admissible, to show the factual context and purpose of the legislation. This could include their use as an aid to determine the social and economic conditions under which the Act was enacted. Certain volumes of *Hansard*, certain special committee reports and certain *viva voce* evidence were also admissible evidence for the same limited purpose.¹⁵³ However, in a later case, *New Brunswick Broadcasting Co v Canada (Canadian Radio-Television & Telecommunications Commission)*¹⁵⁴ the court allowed a report of a Royal Commission to be admissible as evidence of the situation and context in which an Order in Council was passed.

7.82 The most recent judgment of the Supreme Court, *R v Morgentaler*,¹⁵⁵ summarised the courts' position on the use of extrinsic materials. The headnote stated:

*"In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided that it is relevant and not inherently unreliable."*¹⁵⁶ *This includes related legislation,*

¹⁴⁹ (1984) 8 DLR (4th) 1, at 18-20.

¹⁵⁰ This statement comes from Dickson J in the *Reference re Residential Tenancies Act* (1981), 123 DLR (3d) 554, at 562, who also added a proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction.

¹⁵¹ At 19.

¹⁵² (1981) 123 DLR (2d) 554, at 561-2.

¹⁵³ *Canadian Indemnity Co v British Columbia (Attorney General)* (No. 3) (1974) [1975] 3 WWR 224 (B.C.S.C.).

¹⁵⁴ [1984] 13 DLR (4th) 77.

¹⁵⁵ (1993) 107 DLR (4th) 537, at 553-4.

¹⁵⁶ *Reference re Residential Tenancies Act* (1981), 123 DLR (3d) 553, at 562, per Dickson J.

evidence of the mischief at which legislation is directed,¹⁵⁷ and the legislative history.¹⁵⁸ In addition, provided that the court remains mindful of its limited reliability and weight, Hansard evidence is admissible as relevant to both the background and purpose of the legislation."

7.83 The court adopted a passage from a text-book by Hogg¹⁵⁹ in which he said:

"The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterisation of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible."

7.84 In *Harel v Deputy Minister of Revenue of Quebec*¹⁶⁰ the Supreme Court allowed evidence of administrative practices as a guide to interpretation. De Grandpre J stated that the administrative interpretation could not contradict a clear legislative text, but in the situation where there was a clear policy, which was carried out over a long period of time, then it carried real weight. Then, where there was a doubt about the meaning of the legislation, administrative practices became an important factor.¹⁶¹

7.85 The Federal Court of Appeal considered the use of extrinsic aids, to interpret a domestic statute, which implemented an international treaty, in *National Corn Growers v Canada*.¹⁶² They held that, where the language of the statute is clear and unambiguous, the court should not resort to international agreements for clarification. However, they did accept that the courts were entitled to look at parliamentary proceedings, only to ascertain the "mischief", event or condition¹⁶³ that the legislation was

¹⁵⁷ The court referred to the case of *Alberta Bank Taxation Reference*, but its correct title is *Reference Re Alberta Bills* [1938] 4 DLR 433, 438-41. In that case the Privy Council said it was legitimate to look at the legislative history of Alberta, leading up to the legislation at issue, as "the most profound and far-reaching changes in the operations of commerce, trade, and finance were intended by Bills before the Provincial Legislature" (440).

¹⁵⁸ Sopinka J stated that this was in the sense of the events that occurred during drafting and enactment (at 553).

¹⁵⁹ *Constitutional Law of Canada* (3rd edition, 1992), at 15-14 to 15-15.

¹⁶⁰ (1977) 80 DLR (3d), at 556.

¹⁶¹ At 561.

¹⁶² (1988) 58 DLR 642

¹⁶³ But not admissible to indicate parliament's intention in passing the legislation (MacGuigan JA, diss, at 669).

designed to cure or address. Even though the parliamentary statements showed that the Act was intended to implement the Tokyo Round Treaty obligations of GATT, this did not mean that the treaty provisions should, in effect, be a substitute for the words of the relevant section.¹⁶⁴

7.86 In an unusual legislative intervention, the *Canadian Human Rights Act*, (SC 1976-77, c33), provided in section 40(3)(c), that its Human Rights Commission Tribunal was authorised to take account of parliamentary debates in the interpretation of statutes.

7.87 Bale suggests that the decision in *Pepper v Hart*¹⁶⁵ will "reinforce and accelerate a definite modification of the exclusionary rule which was already well underway in Canada."¹⁶⁶ In any event the rule had been undermined indirectly by referring to law review articles that cited *Hansard*.

United States

7.88 In the United States, extrinsic aids are used freely. The English and Scottish Law Commissions' Working Paper on "The Interpretation of Statutes"¹⁶⁷ pointed out that the topic of extrinsic aids had been a vital one in the United States:

"both because of the range and importance of the questions, which have turned upon the interpretation of the constitution itself, and because of the immense importance of the social and economic legislation, which has been enacted in a fast developing and complex society."

7.89 Some American commentators have been critical of the unrestrained use of extrinsic aids. Curtis, as far back as 1948, had this to say:

*"The courts used to be fastidious as to where they looked for the legislative intention. They used to confine the enquiry to reports by committees [of the legislature] and statements by the member in charge of the Bill, but now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention."*¹⁶⁸

¹⁶⁴ They accepted that a court should generally interpret statutes so as to be in conformity with international obligations. See *Salomon v Com'rs of Customs & Excise* [1966] 3 All ER 871, at 874-6. See also *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, at 756-7.

¹⁶⁵ [1992] 3 WLR 1032.

¹⁶⁶ "Parliamentary Debates and Statutory Interpretation", vol 74, (1995) Canadian Bar Review, 1 at 22.

¹⁶⁷ United Kingdom Law Commissions Working Paper, (1967), paragraph 20 and its final report (Law Com No 21) (Scot Law Com No 11), 1969, paragraph 18.

¹⁶⁸ "A Better Theory of Legal Interpretation", (1948-9) 3-4 Record of the Association of the Bar of the City of New York, 321.

7.90 The Commissions emphasised that much of the criticism of American judges and writers has been directed not so much against the use of legislative history in principle, as against its abuse in practice. Justice Frankfurter said:

"Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."

7.91 Another American commentator proposed four factors to evaluate extrinsic aids:

- "(a) Credibility (reliability) : This includes an inquiry into whether a given source is a reliable indication of legislative action or understanding. Also, is the material analytical and explanatory, as opposed to being politically or otherwise potentially biased? The character of the source is an important consideration.*
- (b) Contemporaneity : The Bill and the extrinsic material should be so close that the extrinsic aid actually plays a part in the thinking process of the legislators during the enactment process.*
- (c) Proximity : This has been defined as the closeness of the aid to the 'essence of the legislative action'. Thus, a legislative committee that considers the Bill would be closer to the legislative process than an outside organisation.*
- (d) Context : This is less clearly defined but seems to refer to whether the extrinsic material contributed to the historical context in which the statute was made.*¹⁶⁹

7.92 In a recent article, a Chief Judge of the United States Court of Appeals for the District of Columbia bemoaned the recent trend of the Supreme Court towards a textualist approach, at the cost of avoiding the use of legislative history.¹⁷⁰ This was in contrast to an early article by the same author¹⁷¹ which found that, in an analysis of one law term, the court had checked the legislative history in virtually every case to ensure that it did not contradict the court's reading of the plain meaning of the text.

7.93 Judge Wald analysed the opinions of the United States Supreme Court in the 1988-89 term. Out of 133 opinions issued, about half

¹⁶⁹ W K Hurst, "The Use of Extrinsic Aids in Determining Legislative Intention in California; The Need for Standardized Criteria" (1980) 12 Pacific LJ 190.

¹⁷⁰ Patricia M Wald, "The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court", (1990) 39 Amer Univ LR 227.

¹⁷¹ See Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term", (1983) 68 Iowa L Rev. 195.

involved issues of statutory construction. In almost three-fourths of those involving statutory construction (i.e. 53 cases) legislative history was relied on to assist the court in reaching its decision. In 18 cases the court referred to legislative history to confirm its interpretation of the language. "More frequently, the court's consultation of legislative history simply disclosed nothing to contradict or otherwise undermine the court's reading of the statute".¹⁷² In thirty-two cases, the court first found that the text of the laws in question was silent or ambiguous on the issue raised in the case. In eight of these cases, legislative history was able to shed some light on the particular issue for decision. In twenty-four cases, the court failed to find specific answers in the legislative history but it did assist to find the purposes of the relevant Act. In five cases, the court used legislative materials to come to a different result from that derived from the arguably "plain" language of the statute.

7.94 In one of the five cases, *Public Citizen v Department of Justice*,¹⁷³ the literal and plain meaning had to yield to a purposive interpretation. Since this was a constitutional case, the court confirmed the principle that a plausible alternative construction which would avoid constitutional problems should be given, unless such construction was plainly contrary to the intent of Congress.

7.95 In another of the five cases, the court held that a literal reading of a text, which was plain, would lead to an arbitrary result.¹⁷⁴ In conclusion, the court avoided following plain statutory language in only five cases. In two of them this was done to avoid constitutional issues. In one case, the allegedly plain language was not all that plain. Then, in the other two cases, the court agreed that the "plain" statutory language was not controlling.¹⁷⁵

7.96 Wald justified her use of legislative materials by saying that it assisted her enforcing the laws as Congress meant them to be enforced. The variety of sources helped to extrapolate the most appropriate meaning of the words of the statutes. One of the dangers of the textualist approach was that it was "executive-enhancing".¹⁷⁶ This was because the *Chevron* principle, which gives priority to the interpretation of the executive, could be followed where the legislation had not precisely dealt with the relevant issue.¹⁷⁷ She concluded: "Where judges do demonstrate weaknesses in making those discriminations, the solution is to educate them in the legislative process, not to impose a rule of censorship that excludes relevant information from them."

¹⁷² *Op cit*, at 290.

¹⁷³ (1989) 105 L Ed 2d 379.

¹⁷⁴ *Green v Bock Laundry Machine Co* (1981) 104 L Ed 2d 559. It is ironic that Justice Scalia, a "textualist", stated in this case that a literal interpretation would produce an absurd and perhaps unconstitutional result.

¹⁷⁵ Wald, *op cit*, at 298.

¹⁷⁶ At 308.

¹⁷⁷ *Chevron USA Inc v Natural Resources Defense Council* (1984) 467 US 837. This held that the Environmental Protection Agency's interpretation of a term in the Clean Air Act must be followed, where such construction does not violate clear congressional intent and is not unreasonable.

7.97 Wald regarded the leader of the textualist movement as being Justice Scalia. His textualist view is best explained in a passage from *Green v Bock Laundry Mach Co.* where he said:

*"The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accordance with context and ordinary usage, and thus most likely to have been understood by the whole Congress, which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law, into which the provision must be integrated-a compatibility which, by a benevolent fiction, we assume Congress always has in mind."*¹⁷⁸

7.98 Justice Scalia himself, in an article entitled "Judicial Deference to Administrative Interpretations of Law",¹⁷⁹ outlined some of his views on interpretation. He noted that the United States Supreme Court has gone so far as to accept an administrative agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers.¹⁸⁰ It does so where the statute does not directly address the precise question at issue, or where it is ambiguous. The rationale for this acceptance often was that the agencies were familiar with the history and purposes of the legislation, and have a practical expertise of administering the legislation.

7.99 Justice Scalia emphasised that "policy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of *Chevron* - the step that determines, *before* deferring to agency judgment, whether the law is indeed ambiguous."¹⁸¹ Justice Scalia described the judicial process in a frank way when he said that he found the meaning of a statute to be more apparent from its text, and thus he was less likely to have to follow the agency's interpretation. In contrast, a judge who is willing to use legislative history will more frequently find ambiguity and thus will defer to the agency's interpretation.

7.100 In *Public Citizen v Dept. of Justice*,¹⁸² Scalia J stated that "the fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of a statute". Scalia J dissented from the majority decision in *Ins v Cardoza-Fonseca*¹⁸³ which held that where:

"... the plain language of a statute appears to settle the question presented, the United States Supreme Court will look to the

¹⁷⁸ (1989) 104 L Ed 2d 559, at 576.

¹⁷⁹ Duke Law Journal, Vol. 1989, No. 3, at 511.

¹⁸⁰ *Chevron, USA Inc v NRDC*, 467 US 837 (1984).

¹⁸¹ At 515.

¹⁸² (1989) 105 L Ed 2d 379, at 409.

¹⁸³ (1987) 94 L Ed 2d 434.

statute's legislative history to determine only whether there is clearly expressed legislative intention contrary to that language, which would require the court to question the strong presumption that Congress expresses its intent through the language it chooses."

He was concerned that excessive exploration of legislative history would be interpreted to suggest that similar analyses were appropriate in cases where the language of the statute was clear.

7.101 Born warns the English courts about the experiences of the system in the United States where he says "Much debate on the floor of Congress takes the form of prearranged 'colloquies' in which possible supporters ... obtain detailed and very technical assurances from [the legislation's] sponsors as to its effect in their constituencies".¹⁸⁴ He suggests the importance of legislation tends to be diminished when the statements of individual representatives or small committees can also, make "law". However he acknowledged the movement in the Supreme Court to re-examine the role of legislative history.

7.102 It is submitted that the situation in the United States is unlikely to arise in our more controlled legislative process. However, there are lessons to be learned from the abuse of the rules. Lord Browne-Wilkinson, in *Pepper v Hart* noted the dangers of the system in the United States, and pointed out the importance of strictly controlling admissibility.¹⁸⁵

Republic of Ireland

7.103 In *Bourke v Attorney General and Wymes*¹⁸⁶ the Supreme Court examined the *travaux préparatoires* of the Council of Europe Convention on Extradition, as well as the text of the convention. It based its conclusions on the fact that the original draft of the convention, had been amended, and on the reasons disclosed in the *travaux préparatoires* for such amendments.

7.104 In *Wavin Pipes v Hepworth Iron*,¹⁸⁷ Costello J justified looking at the legislative history of the Patents Act 1964, on the basis that this was no different in principle from the use of *travaux préparatoires* in cases concerning international conventions. He did not find persuasive the arguments against the use of legislative history contained in the report on "The Interpretation of Statutes".¹⁸⁸ The explanation given by the Minister for the change in the law clearly assisted the court in ascertaining the legislative intent.

¹⁸⁴ "Making Law with *Hansard*" 90 Law Gazette (1993) 2.

¹⁸⁵ [1993] 3 WLR 1032, at 1059.

¹⁸⁶ [1972] IR 36.

¹⁸⁷ [1982] F.S.R. 32, at 40.

¹⁸⁸ The United Kingdom Law Commissions Report, (Law Com No 21) (Scot Law Com No 11), 1969.

7.105 He also relied on two earlier judgments in which the courts had considered official reports. In *McMahon v Attorney General*¹⁸⁹ the Supreme Court considered the Report of a Special Committee on electoral systems which preceded the Ballot Act 1872. In *Maher v Attorney General*¹⁹⁰ the court found assistance in the interpretation of the Road Traffic Act 1968 in the report of a commission which had been established to consider the law relating to driving, whilst under the influence of drink. No further justification for relying on extrinsic materials was given.

7.106 In *The People (DPP) v Quilligan*,¹⁹¹ Walsh J, of the Supreme Court, referred to the fact that it was common knowledge, and indeed was discussed in the debates of Parliament, that the purpose of the relevant legislation was to stop jurors being threatened in cases of a political nature. However, he did not quote directly from any parliamentary debates.

¹⁸⁹ [1972] IR 69 HC.

¹⁹⁰ [1973] IR 140.

¹⁹¹ [1986] IR 495, at 509-10

Chapter 8

Comparative Law

Part II: Statutory approaches to reform

Australia

(i) Federal provisions

8.1 In 1981 the Federal Acts Interpretation Act 1901 was amended to include a purposive interpretation, similar to section 5(j) of the New Zealand Acts Interpretation Act 1924. Section 15AA of the 1901 Act provides:

*"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."*¹

It was not intended at that time to make any change in the existing position as regards the use of extrinsic materials.² However, the Attorney General did state that there would be an examination of the use of extrinsic aids.

8.2 A discussion paper, "Extrinsic Aids to Statutory Interpretation", was tabled in the Australian Parliament, in 1982, to assist in deciding what proposals would be put into legislation.³ It proposed that there would be specially prepared explanatory memoranda limited, initially at least, to selected Acts considered by their sponsors to be appropriate for this purpose.⁴ It also proposed that the purpose or object of the Act could be set out in the Act itself, instead of preparing the special explanatory memorandum. It would be preferable to have the latter:

"(i) where there are diverse objects in the Act, (ii) when the history of the topic is relevant, (iii) when there are other contextual assumptions, that are to explain the particular

¹ Section 46 of the 1901 Act ensures that statutory interpretation include the interpretation of delegated legislation.

² Section 15AA(2) provided that a purposive interpretation should not be construed as authorizing the use of extrinsic materials.

³ A Memorandum by the Government of Australia, entitled "Developments in Statutory Interpretation", containing the discussion paper, was also tabled at the 1983 Commonwealth Law Ministers Conference.

⁴ This is similar to the recommendation of the report on "The Interpretation of Statutes" (Law Com No 21) (Scot Law Com No 11) (1969).

*provisions, particularly those of a complex, novel, or specialised character. An example of the third category was (a) identifying the 'mischief' and (b) explaining the rationale of the provision, illustrating its application, and (iv) to give guidance for the application in particular cases of general provisions."*⁵

8.3 The selected Bills would most likely be those implementing a Law Reform Commission Report. It was proposed that the Interpretation Act be amended to provide for the use by the courts of such specially prepared memoranda.

Symposium

8.4 An important Symposium on Statutory Interpretation took place in Canberra in March 1981.⁶ This Symposium dealt, *inter alia*, with the use of explanatory memoranda. The Deputy Secretary of the Attorney-General's Department, Patrick Brazil, suggested that there was a case for legislation to remove the difficulty of judges being restricted in looking at reports for only one purpose, i.e. to ascertain the mischief.⁷ This Symposium laid the groundwork for the paper on "Extrinsic Aids to Statutory Interpretation". There was a further Symposium in Canberra in February 1983, which Lord Wilberforce attended.⁸ Lord Wilberforce had a change of heart, and, according to Lord Brown-Wilkinson, suggested that "there should be a relaxation of the exclusionary rule, so that where a minister, promoting a Bill, makes an explicit and official statement, as to the meaning or scope of the provision, reference should be allowed to that statement".⁹ Lord Wilberforce advanced arguments in favour of admissibility of certain materials for seven different categories of legislation. His proposals did not receive support and were regarded as impractical.¹⁰ Lord Wilberforce also warned that it was the magistrate, the unrepresented defendant, or the not very elaborately equipped solicitor, who was called upon to interpret legislation in 90 per cent of cases.

8.5 At that Symposium, Professor J Richardson, Ombudsman of the Commonwealth of Australia, stated that it was not sufficient to say that the court had a discretion as to what extrinsic materials could be used. He suggested that the "court needs to go further, so that in future, persons outside the courts, required to apply legislation, are confident as to the extrinsic materials, which may be used in the instances before them."¹¹ One of the unexpected events of the Symposium was the support given by some members of the judiciary to legislative intervention on extrinsic aids. Mr Justice Mason felt that it was preferable to have legislation, as the law at

⁵ At 17.

⁶ Its record was published as "Another look at statutory interpretation", (AGPS, Canberra, 1982).

⁷ "Current Developments, An Australian Symposium on Statutory Interpretation", [1982] Stat LR 172, at 173.

⁸ *Symposium on Statutory Interpretation* (AGPS Canberra, 1983).

⁹ *Pepper v Hart* [1992] 3 WLR 1032, at 1057, Lord Browne-Wilkinson.

¹⁰ His proposals were not accepted by the Legal & Constitutional Committee of the State of Victoria in their "Report on Interpretation Bill 1982", October 1983, paragraphs 20.33 - 20.41.

¹¹ As quoted in "Statutory Interpretation and Recourse to Extrinsic Aids" (1984) 58 ALJ 483, at 490.

the time was neither clear nor convincing.¹² It was also necessary as parliament was not "afflicted by the accumulated overburden of past judicial decisions and because parliament, through its statute, speaks with a single voice ...".¹³ No doubt, the suggestions of the Commonwealth Ombudsman at that Symposium also influenced the Government to bring in legislation.

8.6 After discussion of the various proposals on extrinsic aids, a vote was taken among the delegates at the Symposium. The majority favoured the view that "judges should be free to have regard to any material which they might think relevant to their task of interpretation. A majority also thought that some statutory provision was desirable to ensure that use was made of this opportunity."¹⁴ There was little support for the proposal for special explanatory memoranda.

Judicial developments

8.7 Parallel to this development was the greater acceptance by some of the High Court Judges of the use of *Hansard*. In one case, parliamentary debates were used as direct evidence of the intention of parliament, but in doing so the court said that the debates must clearly disclose the legislative intent.¹⁵ In *TCN Channel 9 Pty Ltd v AMP Society*,¹⁶ the Federal Court of Australia held that *Hansard* reports of Second Reading Speeches and explanatory memoranda were admissible to identify the mischief which the legislation was designed to remedy. The court relied on *Wacando v Commonwealth*,¹⁷ where Mason J, though accepting that, generally speaking, reference could not be made to *Hansard*, thought that an exception could be made where a Bill was introduced to remedy a mischief. However, there was still resistance to looking at *Hansard*, despite the fact that it could assist in ascertaining the purpose of the legislation, which the courts were obliged to do to comply with section 15AA. In *Federal Commissioner of Taxation v Walsh*,¹⁸ Fitzgerald J said:

"We were pressed with the Treasurer's explanatory memorandum to Parliament ... It may be that such material is admissible for the purpose of disclosing the object of the section, thus providing a basis ... for the implementation of section 15AA of the Acts Interpretation Act, in addition, of course, to the rules of the common law which permit and require due regard to legislative intention. ... [S]uch an approach is worth little and

¹² *Symposium on Statutory Interpretation* (AGPS Canberra, 1983).

¹³ At 82, quoted in Macrossan, *infra*, at 494.

¹⁴ See Mr Justice Macrossan "Judicial Interpretation", (1984) 58 ALJ 547, at 549.

¹⁵ *Sillery v R* (1981) 35 ALR 227, at 232-3 (per Murphy J), where he relied on his earlier judgment, in *Commissioner for Prices & Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 51 ALJR 715, at 730, where he expressed the view "that where the statute is ambiguous, ... its history may be regarded, but because of the nature of the legislative process, the legislative history should be ignored unless it clearly discloses the legislator's intention." [1982] 42 ALR 496.

¹⁶ [1981] 56 ALJR 16, at 25. In that case Mason J referred to the second reading speech on the Colonial Boundaries Bill, which was introduced into the House of Lords, and which referred to the opinion of the law officers of the Crown.

¹⁸ (1983) 14 ATR 399, at 420.

indeed will seriously impede the efficient operation of the courts, adding to costs, length of hearings and delays in the judicial system if the extrinsic material itself is unclear and requires debate as to its meaning. Further, even if the extrinsic material does reveal the legislative purpose, there will continue to be boundaries beyond which the words used will not stretch even where it is known that they were intended to do so."

8.8 Most of the judgments prior to the 1984 legislation followed the judgment in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*.¹⁹ In *Wacal Developments Pty Ltd v Realty Developments Pty Ltd*, the High Court of Australia looked at the Bill which was contained in the report, but did so for the negative purpose of determining that the Act departed from the draft Bill, thereby making reference to the report redundant.²⁰ The Court relied on the *Black-Clawson* judgment. In *Barker v The Queen*²¹ the court confirmed that reference could be made to a report from a Commission or Official Committee, as an aid to understanding the mischief. However, they queried whether resort could be had to a report of an English Committee which had led to legislation upon which the Victorian legislation was based. In *Dugan v Mirror Newspapers Ltd*,²² two of the judges referred to a proposed Bill that was later enacted. Stephen J stated that it was necessary to venture into the field of legislative history to see whether the Law Reform Commission's report had, in fact, influenced the format of the Bill. To have halted at the report might have led to a wrong conclusion being drawn.²³

Federal legislation on extrinsic aids

8.9 The 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:

"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,²⁴ 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

¹⁹ [1975] 2 WLR 515.

²⁰ As summarised in Pearce & Geddes, *Statutory Interpretation in Australia*, (3rd edition, 1988) at 3.10.
²¹ (1983) 57 ALJR 426.

²² (1978) 22 ALR 439.

²³ See summary of the case at Pearce & Geddes, *op cit*, at 3.10-3.11.

²⁴ Beckman and Phang, *infra*, interpret this as abolishing the distinction between the use of aids to find the mischief, and their use to ascertain the meaning of the actual provisions of the Act itself. They also stated that *Pepper v Hart* also abolished this distinction. (at 86).

- (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),²⁵ 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;²⁶*
 - (f) *the speech made to a House of the Parliament by a Minister on the occasion of the moving by that*

²⁵ Beckman and Phang, *infra*, stated that this means that the list of materials in subsection (2) are not exhaustive. In *Fct v Murray* 92 ALR 671, at 684, Hill J stated that the classes of materials were not limited to what was set out in subsection (3). However the limiting factor is that it "must be capable of assisting in the ascertainment of the meaning". The use to which the material is put is limited to the two purposes specified in (1)(a) and (b).

²⁶ Gifford, *Statutory Interpretation* (Australia) (1990), stated that these documents, like explanatory memoranda, do not need to be laid before Parliament, and he is thus concerned as to their availability (at 128-9).

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 :²⁷*
- (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."*

8.10 This section was a natural progression from section 15AA, which had been inserted into the 1901 Act in 1981. Section 15AA has been interpreted as providing a mandatory preference for a purposive interpretation.²⁸ To implement this section fully, it became necessary to provide for the use of extrinsic materials to aid the court in establishing the object or purpose of the statute. The Commonwealth Attorney General, when introducing that Bill in 1981, stated that section 15AA was not designed to interfere with the independence of the judiciary. He reiterated "that Parliament has long played an influential and traditional role in laying down general rules of statutory interpretation for courts to observe, and that the courts have seen nothing wrong with applying the precepts laid down in the Acts Interpretation Act."²⁹ This attitude influenced the incorporation of the guidelines for the use of extrinsic aids into a statutory form.

8.11 It is important to clarify that it is only in the situations referred to in section 15AB(1)(b) that the court can use the extrinsic aids to override the

²⁷ Gifford argues that this created a "nightmare" for the lawyer and the judge, for it leaves it to the judge to decide whether to consider extrinsic materials at all, as well as to decide what weight to give to it (at 129).

²⁸ "Current Topics Statutory guidelines for interpreting Commonwealth statutes", (1981) 55 ALJ 711.

²⁹ *Ibid* at 713.

ordinary meaning of the text.³⁰ Brazil's opinion on the rationale of the section is useful, as he was Secretary of the Attorney General's Department at this time. Section 15AB(1)(a)³¹ recognized the reality that judges have referred to such aids to assure themselves as to the meaning of the text. Section 15AB(3) restricted the rationale for using such aids, because the use of extrinsic aids is potentially very wide.

8.12 The fact that the second reading speech of the Minister was referred to in section 15AB(2) separately from other material in *Hansard* showed that Parliament intended to give that speech greater relevance and weight. There is no obligation on judges or lawyers to refer to any of the extrinsic aids listed in subsection (2). This is in contrast to section 15AA, which provides for a mandatory and purposive construction. Even though the scope of the extrinsic aids is widely drawn, it is always subject to the test of relevance.³² Further, in deciding whether to consider any material, subsection 3(a) and (b) operate as restraints. Subsection 3(b) can operate, in a practical way, to ensure that the use of extrinsic aids is not used as a delaying tactic.

8.13 Bennion³³ recently commented that the provision in subsection 2(f) was remarkably narrow, but this was alleviated by subsection 2(h). He suggested that both of these provisions were cut down by section 15AB(3). He raised the question as to "what is to happen when the extrinsic aids confirm that the meaning of the provision is *not* the ordinary meaning. Presumably, it cannot be referred to (except of course under paragraph (b))." He speculated that section 15AB(1) is the source of the conditions for the relaxation of the exclusionary rule laid down in *Pepper v Hart*.³⁴

Application of section 15AB to prior legislation

8.14 Brazil in his article³⁵ noted that an appeal should not succeed against a court's decision on the grounds that certain extrinsic materials were or were not looked at. He continued: "Section 15AB clearly gives extrinsic materials the status of an aid to interpretation, but does not involve any rule of law". This is borne out in the judgment in *R v Bolton, ex p Beane*³⁶ where the second reading speech was "available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law."

³⁰ Brazil, "Reform of Statutory Interpretation - the Australian Experience of the use of extrinsic materials", (1988) 62 ALJ 503.

³¹ This provision allows the court to confirm a meaning by reference to extrinsic aids.

³² "Current Developments": "Amending Australia's Interpretation Act", [1984] Stat LR 184, at 187. (author not stated)

³³ "Hansard - Help or Hindrance? A Draftsman's View of *Pepper v Hart*", [1994] 15 Stat LR 149, at 156.

³⁴ It is interesting to note, that Zander, in *The Law Making Process*, (4th edition, 1994) stated that his note in chapter 9, on "recent developments in other common law countries" was "based on material presented by Anthony Lester QC, appearing for the appellant in *Pepper v Hart*, ... The materials has been deposited in the Manuscripts Library at University College, London." (159)

³⁵ "The Australian Approach", in Preliminary Paper No 8, New Zealand Law Commission "Legislation and its Interpretation" (1988), at 153.

³⁶ 70 ALR 225.

8.15 Gifford commented that section 15AB does not specifically deal with the question whether it is to apply to Acts prior to its insertion in the 1901 statute. "It would appear that extrinsic material irrelevant at the time when such Acts were passed and never expected to be used in statutory interpretation may now be looked at to determine the meaning of statutory provisions".³⁷ Deane J, in *R v Bolton ex p Beane*,³⁸ cautioned that:

"to attribute to the provisions of [section 15AB], which were first enacted in 1984, the effect of altering the correct construction of prior legislation would be to attribute to what should be seen as no more than an aid to interpretation, the effect of a substantive and retrospective amendment of the prior legislation".

8.16 However, section 2 of the Acts Interpretation Act 1984,³⁹ provided that section 15AB was applicable to all Acts whether passed before or after the commencement of the Act. It reads:

*"Except as otherwise provided by this Act, the amendments made by this Act apply in relation to all Acts whether passed before or after the commencement of this Act".*⁴⁰

8.17 Bennion,⁴¹ also referred to a comment by Gifford,⁴² which said that the wisdom of section 15AB was "highly controversial". Gifford also suggested that the judiciary are seriously divided internally on the subject.⁴³

8.18 Beckman and Phang⁴⁴ pointed out that Article 32 of the Vienna Convention on the Law of Treaties, which inspired the drafting of section 15AB, included reference to confirmation of the meaning. They also draw attention to the use of the word "manifestly" in section 15AB(2)(b). They argued that it must have been intended that there was a relatively strong case before a case met that threshold. They interpret section 15AB(3) as a guide to the court as to whether it should consider the material in the first place or, if it does, the weight it should be given.⁴⁵ Beckman and Phang stated that subsection (3)(a) would seem to include the admissibility of long titles, preambles, and marginal notes.

8.19 Section 15AB also applies to subsidiary legislation, though this is not stated in the section. Section 46 of the Acts Interpretation Act 1901 provides that the principles set out in the Interpretation Act are, where applicable, to apply to delegated legislation. However, Western Australia⁴⁶

³⁷ *Op cit* at 129.

³⁸ (1987) 70 ALR 225, at 238.

³⁹ This Act inserted section 15AB into the Acts Interpretation Act 1901.

⁴⁰ There is a similar provision in section 4(1) of the Interpretation of Legislation Act 1984 (Victoria).

⁴¹ *Op cit* at 156.

⁴² *Op cit* at 130.

⁴³ *Op cit* at 139.

⁴⁴ "Beyond *Pepper v Hart*: The Legislative Reform of Statutory Interpretation in Singapore", 15 Stat LR 69, at 84. (1994).

⁴⁵ *Ibid* at 86.

⁴⁶ Section 19 of the Interpretation Act 1984.

and Singapore⁴⁷ use the term "written law" instead of Act. This includes subsidiary legislation in its definition.

Judicial interpretation

8.20 Despite section 15AB, and similar provisions in other Australian States allowing reference to reports of official bodies,⁴⁸ most of the judgments on extrinsic aids seem to focus on *Hansard*, rather than on official reports. The judiciary have resisted attempts to persuade them to refer to extrinsic aids when the text appears to them to be clear. In *Re Coleman; Ex parte Billing*,⁴⁹ the High Court held that:-

*"Section 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, in its ordinary meaning leads to a result that is manifestly absurd or unreasonable."*⁵⁰

In any event, the court concluded that the Minister's speech did not purport to be an exhaustive description of the legislation. It should be read in the context of the Bill itself, and the explanatory memorandum.

8.21 In *Hunter Resources Ltd v Melville*,⁵¹ Mason C J (dissenting) stated that extrinsic aids should not be taken into account, where they merely gave an opinion as to the meaning of legislation. In any event, the materials did not relate to the legislative history of the 1978 Act, which was before the court. The materials were a second reading speech of the Minister in 1985 when he amended the 1978 Act. In contrast Danson J held that it was possible to draw a conclusion as to the intention of the legislature from these extrinsic aids even though this was not contained in the amendments.⁵²

Weight

8.22 The judiciary have relied more on the second reading speech of the Minister as an extrinsic aid than the speeches of members of Parliament. In *Commissioner of Police v Curran*,⁵³ Wilcox J stated 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". A further check on the use of speeches by individual members was placed by Kirby P in *Flaherty v Girgis*.⁵⁴ He rejected observations by such members in

⁴⁷ Section 9A(2) of the Interpretation Act 1985.

⁴⁸ Subsection 2(b).

⁴⁹ (1986) 61 ALJR 37, at 39. The court was referring to one sentence of the Minister's second reading speech.

⁵⁰ As summarised by Brazil, *supra* at 505.

⁵¹ (1988) 77 ALR 8, at 11.

⁵² At 21-2. He relied on *Grain Elevators Board (Vic) v Dun Munkle Corp* (1946) 73 CLR 70, at 86, where it was held that an amending Act might be taken into account in the interpretation of the prior legislation.

⁵³ (1984) 55 ALR 697, at 707.

⁵⁴ (1985) 4 NSWLR 248.

Parliament as to their expectation or intentions, as providing "an insubstantial basis for now determining the will of the Federal Parliament to oust State law ...".⁵⁵

8.23 In *HR Products Pty Ltd v Collector of Customs*,⁵⁶ Lee J referred to the relevance of section 15AA and section 15AB to the question whether the term "programmable controllers" was to be given its ordinary or trade meaning. The court looked at, *inter alia*, a report of the "Industries Assistance Commission" on the particular industry which had been laid before Parliament. It regarded it as a relevant report under section 15AB(2)(b), and quoted some of its recommendations. This is one of the few cases since the 1984 legislation which has dealt with official reports.

Taxing statutes

8.24 One of the impetuses for the shift in attitude which provoked the enactment of section 15AB was the judicial interpretation of taxing statutes in favour of tax avoidance schemes by taxpayers.⁵⁷ Despite the rule of interpretation that a taxing Act be strictly construed in favour of the taxpayer, extrinsic materials have been used to clarify the intention of the legislature, which has resulted in the taxpayer's construction not being preferred. In *Grant v Deputy Commissioner of Taxation*⁵⁸ the Federal Court relied on the explanatory memorandum, which had explained that the reason for the amendment to a section was to overturn the decision of an earlier tax case.⁵⁹

Confirming the ordinary meaning

8.25 Beckman and Phang⁶⁰ summarised the Australian case law under this heading as being that extrinsic aids can be used to confirm the ordinary meaning, even if the provision is otherwise clear on its face, although such materials cannot be used to alter its meaning.⁶¹ Such alteration can only be effected if the conditions in subsection (1)(b) are satisfied. In *Gardner Smith Pty Ltd v Collector of Customs, Victoria*⁶² the Full Court of the Federal Court stated that the use of extrinsic materials under section 15AB(1)(a) is not limited to the construction of words which are obscure or ambiguous, or which, if given their ordinary meaning, would lead to a result that is manifestly absurd or unreasonable. The court had regard to the explanatory notes prepared by the Nomenclature Committee established by the *Convention on Nomenclature for the Classification of Goods in Customs Tariffs*. In contrast, in *Barry R Liggins Pty Ltd v Comptroller - General of Customs*, the Full Court

⁵⁵ At 259. The *Hansard* debates were in 1901.

⁵⁶ LEXIS, Federal Court of Australia, Western Australia District, 17 May 1990.

⁵⁷ See *Commissioner of Taxation (Cth) v Westraders Pty Ltd* [1980] 144 CLR 55, referred to by Mr Justice Macrossan in "Judicial Interpretation", (1984) 58 ALJ 547, at 553.

⁵⁸ (1986) 66 ALR 690.

⁵⁹ A J Halkyard, in "Tax Corner" *The New Gazette*, 14 August 1993, expressed concern that *Pepper v Hart* would result in changing the rule which states that ambiguities in a taxing statute should be construed in favour of the taxpayer (*IRC v Ross & Coulter* [1948] 1 All ER 616, at 625).

⁶⁰ *Op cit* at 89.

⁶¹ They rely on the *Curran* case and *Gardner Smith* case, *infra*.

⁶² (1986) 66 ALR 377.

of the Federal Court of Australia held that the same explanatory notes were a secondary guide only, and could not displace the plain words of the statute, or be used when there was no ambiguity in the legislation. They could not be used to contradict the meaning of the language of a statute, that meaning being taken from its proper context.⁶³

8.26 In *Commissioner of Police v Curran*,⁶⁴ Wilcox J stated that where reference to extrinsic materials was made under section 15AB(1)(a), the legislation must be clear on its face, so that the reference is to confirm apparent certainty rather than to resolve ambiguity. In *Commissioner of Taxation v Bill Wissler (Agencies) Pty Ltd*,⁶⁵ it was held that section 15AB(2)(h) did not allow recourse to a statement made in the explanatory memorandum or to the second reading speech made in relation to amending legislation, in order to discern the legislative intention at the time when the original statute was passed.

8.27 *Hansard* has also been of assistance in explaining the mischief with which the legislation was intended to deal.⁶⁶ Pearce and Geddes stated that section 15AB has been used quite regularly by the Commonwealth Administrative Appeals Tribunal.⁶⁷

Rights of the citizen

8.28 The courts have not allowed the use of extrinsic aids to take away the rights of individuals, unless there has been express provision in the legislation. The judgment in *Re Bolton; ex parte Beane*⁶⁸ illustrates this rule. It also put the weight of extrinsic aids in context. The majority of the court valued the necessity of clear statutory language when it came to the question of the freedom of the individual.⁶⁹

8.29 Even though the second reading speech of the Minister was clear as to the scope of the proposed legislation, his words could not be substituted for the text of the law, even though the section was ambiguous:

"But this of itself, while deserving serious consideration cannot be determinative; it is available as an aid to interpretation. ..."

⁶³ (1991) 103 ALR 565, as summarised in the Australian Digest Supplement 1992.

⁶⁴ (1984) 55 ALR 697, at 707.

⁶⁵ (1986) 81 FLR 471, at 476. In any event, the judge felt that the legislation was clear, and there was no ambiguity.

⁶⁶ *Re Bragg and Australian Society of Engineers (South Australian Branch)* (1985) 60 ALR 136, at 145-8. See further Pearce and Geddes *Statutory Interpretation in Australia* (1988), paragraph 3.19.

⁶⁷ *Idem*. See *Re Waterford and Attorney General's Department* (1985) ALD 545, at 550-2.

⁶⁸ (1987) 61 ALJR 190.

⁶⁹ At 198. In *Sillery v The Queen* (1981) 35 ALR 233, Murphy J of the High Court of Australia stated that there were very exceptional circumstances which justified interpreting legislation which affected the liberty of the person, in the light of its parliamentary history. He referred to the second reading speech of the Attorney General. This speech had disclosed that the intention was that the penalty for the particular offence was a maximum one, not a mandatory one, as now asserted by the Crown. He criticised the Crown for this assertion. He continued "It is not fair to legislators and tends to undermine the standing of Parliament; it is inconsistent with a proper relationship between the three branches of government". (at 233)

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 functions of the Court is to give effect to the will of Parliament as expressed in the law."⁷⁰

8.30 Mr Justice Bryson commented on the above passage thus:

*"This passage shows the essentially auxiliary nature of any material outside the enacted text. There is no room for the view that the minister by his statements in the Parliament establishes what the legislation means or was intended to mean or what the purpose or the policy of the legislation is. Resort to the minister's words, or to any other extrinsic material, can resolve ambiguity or doubt when the text reveals them; the subject-matter under consideration remains the text as enacted."*⁷¹

8.31 The judgment in *Lisafa Holdings Pty Ltd v Commissioner of Police*,⁷² despite references being made to the Minister's second reading speech, also upheld the principle that the intention to abolish the rights of a person must be specified expressly in the text of the legislation. Here, the rights affected were those of natural justice and procedural fairness. The Court relied on the dicta of *Re Bolton; ex parte Beane*. From this case, and other judgments, Mr Justice Bryson concluded that there was:

*"... an unwritten Bill of Rights of values which are perceived by the judges to be fundamental and are sheltered by the approach which courts should take to the construction of legislation where it is said that the legislation has diminished protection of those values."*⁷³

Recent judicial developments

8.32 In a recent judgment of the Federal Court of Australia, *Commission for Safety, Rehabilitation and Compensation of Commonwealth Employees v Neil*,⁷⁴ it was held that the relevant words in the statutes should be given their natural and grammatical meaning. "It could not be said that a literal reading of the words gave section 131 an operation which Parliament obviously did not intend. ... It was impermissible to establish that such was the intention of the Minister's second reading speech." Counsel had referred to the second reading speech to allege that it was clear that the draftsman

⁷⁰ At 191.

⁷¹ "Statutory Interpretation: An Australian Judicial Perspective." 14 Stat LR 187, at 204 (1993).

⁷² (1988) 15 NSWLR 1, at 9E, 18C, and 26E. This was a decision of the Court of Appeal of New South Wales.

⁷³ *Op cit* at 204.

⁷⁴ (1993) 114 ALR 461.

had made a mistake.⁷⁵ The second reading speech expressed the purpose of the legislation and counsel relied on section 15AA. The facts of the case were such that the decision of the court resulted in compensation to the respondent not being reduced by taking superannuation into account. In that sense, it could be implied that the court was ensuring that a person's right were not taken away without an express statutory provision. As Neaves J said "It is not for the court to resolve that question but the availability of those alternatives indicates that it is a mere matter of speculation as to what was the true legislative intention."⁷⁶

8.33 In *Tickner v Bropho*⁷⁷ the Federal Court of Australia used the second reading speech of the Minister, which made the purpose of the relevant legislation very clear, to uphold a claim against a Federal Minister for not complying with the administrative requirements of the legislation.

Access to extrinsic materials

8.34 Parliament, since the enactment of section 15AB, provides for the dates of the second reading speeches to be inserted at the end of all Acts. The explanatory memorandum is presented by the Minister at the conclusion of his second reading speech.⁷⁸ Brazil has pointed out that "*Hansard*, Bills and Explanatory Memoranda are supplied to all bodies on the free distribution list of Parliament."⁷⁹ Further, the Australian Government Publishing Service (AGPS) were developing a data base of Bills and Explanatory Memoranda which would be available to the public.⁸⁰ All Bills including amendments, explanatory memoranda and notes on clauses, are held by the Parliamentary Library, the National Library of Australia, and the Australia Archives. The Victorian Legal and Constitutional Committee, in their report, noted submissions referring to a possible lack of availability of materials. However, they expected that such materials would be analysed in text-books and legal articles. They recommended that extrinsic materials should be available in municipal libraries.⁸¹

⁷⁵ In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 35 ALR 151, the High Court held that it was permissible to give a meaning other than a literal meaning to a provision where, after ascertaining the intention of parliament, from an examination of the legislative history, "the court was satisfied that the expression of that intention had miscarried by reason of a mistake on the part of the draftsman and that the intention would not be carried into effect unless there were a departure from the literal meaning."

⁷⁶ *Op cit* at 471. He was referring to two possible interpretations of the legislative intention.

⁷⁷ *Tickner v Bropho* (1993) 114 ALR 409.

⁷⁸ Brazil stated that this assists in bringing the explanatory memorandum within the terms of the section 7(1) of the Evidence Act 1905 (Cth), which provides that copies of documents contained in the *Votes and Proceedings* shall be admitted as evidence in courts. There is no similar section in the Evidence Ordinance (Cap. 8). See chapter 9 further.

⁷⁹ This include all university libraries, and all State Supreme Court libraries (apart from South Australia and Tasmania).

⁸⁰ We have not been able to find any current information commenting on availability since Brazil's article.

⁸¹ Scutt "Statutory Interpretation and Recourse to extrinsic aids", (1984) 58 ALJ 483, at 490. Dr Scutt was director of research for the Committee.

Practical implications

8.35 The Victorian Legal and Constitutional Committee believed that "any increase in costs must be balanced against the possibility of decrease in time, delay and costs in certain cases, through recourse to extrinsic sources."⁸² They rejected the view that there should be a different rule for higher courts and lower courts. Litigants should not be forced to go to the higher courts to gain justice because the lower courts would be denied access to such materials.⁸³

8.36 Concern was also expressed that solicitors would be sued for negligence for not properly advising their clients as to the impact of extrinsic aids on the interpretation of a statutory provision. The Committee did not feel that a lawyer was more at risk of being sued, just because the legislation provided a discretion to use extrinsic aids. They concluded that:

*"In the exceedingly rare case of action for negligence, the court would have to weigh matters of professionalism, due diligence, accessibility of materials and the like. Clients have a right to be afforded as good advice as possible, and this should not be denied to them because professionals fear legal action if that advice is incompetently given."*⁸⁴

8.37 Brazil concluded that the worst apprehensions that the use of extrinsic aids would result in longer proceedings and greater costs "seem not to have been realised".⁸⁵ Greater care was now taken with the preparation of second reading speeches and explanatory memoranda. He felt that the reforms had made a significant contribution to the purposive approach to legislation.

8.38 Pearce and Geddes expressed the view that there was little evidence to support the claims that the introduction of section 15AB would increase the work of lawyers and their costs. In fact, section 15AB had assisted lawyers in preparing their cases as they now had guidelines as to how the courts would deal with extrinsic aids. In some jurisdictions,⁸⁶ lawyers now knew precisely the purposes for which they might be used, as this was set out in the legislation. Subsequent experience had tended to confirm that it was only in the odd case that extrinsic aids could be of real assistance in the interpretation of a provision.⁸⁷

⁸² "Report on Interpretation Bill 1982", (1983), paragraph 20.84.

⁸³ A similar fear was expressed in Hong Kong when the Bill of Rights came into force, as regards its impact on the Magistrate Court. In practice, cases were adjourned to allow specialist counsel from the Attorney General's Chambers to present such cases, and to produce the necessary background material to explain the implications of the Bill of Rights Ordinance.

⁸⁴ *Supra* at paragraph 20.92.

⁸⁵ *Supra* at 512.

⁸⁶ With the exception of Victoria, there are similar provisions in New South Wales, Western Australia, Queensland, Tasmania and the Capital Territory.

⁸⁷ *Op cit* at 3.21.

Practice directions

8.39 In 1984, the High Court issued a practice direction⁸⁸ as follows:

"Where, in proceedings before the Court, a party proposes to rely on extrinsic material pursuant to section 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."

A judicial perspective

8.40 Mr Justice Bryson, of the Supreme Court, New South Wales, has given an insight into the views of the judiciary in a recent article.⁸⁹ He stated that it may be of significance to notice the lack of prominence of reference to extrinsic aids in the recent judgment of the High Court, *Mills v Meeking*.⁹⁰ In that case, Mason CJ and Toohey J stated:

*"For the present, there is no need to have resort to extrinsic material: the provisions may be given their ordinary grammatical meaning. If the language of a statute is ambiguous or uncertain, a risk of injustice will bear upon the construction to be given to words used. But, if the language is not ambiguous or uncertain, a court will apply its ordinary and grammatical meaning unless to do so will give the statute an operation which was not intended."*⁹¹

8.41 Dawson J,⁹² though noting that section 35 of the Victorian statute allowed reference to *Hansard*, stated that the relevance of proceedings in parliament:

"must more often than not be questionable. The report of a speech of a member of Parliament other than that of the Minister moving the second reading of a Bill may often be unhelpful, and even a second reading speech may be of little relevance. If greater significance is to be attributed to a second reading speech it seems that it must be based upon the

⁸⁸ No 1 of 1984.

⁸⁹ "Statutory Interpretation: An Australian Judicial Perspective" (1992) 13 Stat LR 187.

⁹⁰ (1990) 91 ALR 16, at 21. This was an appeal from the Supreme Court of Victoria.

⁹¹ Mason CJ & Toohey J, at 22, also said that the extracts from the second hearing speeches must be taken in context.

⁹² His judgment was a dissenting one on the ratio of the case, but his observations on the value of *Hansard* were not referred to by the majority judgment.

*assumption that it is less likely to express a mere individual view.*⁹³

8.42 Mr Justice Bryson went on to say that judgments like this showed that in the High Court, "any tendency to enthusiasm for modifying the literal meaning of the whole of an enactment is well-contained, perhaps a little chilled".⁹⁴ Thus section 15AB has had a cautious reception. To him, section 15AB "did nothing to alter the commitment of courts to ascertaining the meaning of the provision which the legislature has made."⁹⁵ He queried why subsection 1(a) did not include "disaffirm" the meaning.⁹⁶ He further queried that subsection: "Could it really mean that if the extrinsic material showed very clearly that the meaning of the provision was not the ordinary meaning conveyed by the text, consideration could be given to the extrinsic material?"⁹⁷

8.43 In relation to subsection (2), he suggested, that if reliance was to be placed on extrinsic aids, then it was important to be sure that the court had looked at all the aids concerning the legislation at issue. The court ran a risk that it would give undue weight to some of the aids (for example, second reading speeches) without considering the other aids that might be available.⁹⁸

8.44 He stated that section 15AB 3(b) might result in a court coming to one conclusion "in litigation about small matters where quantum of costs is important, but give different consideration to litigation, which is of wide importance, for which the length of the proceedings would be a less pressing factor."

8.45 He concluded that it was not clear whether section 15AB was directed to ascertaining the purpose or object of the legislation, within the meaning of section 15AA. The courts have put clear and appropriate limitations on the use to be made of ministerial speeches and therefore resort to them in counsel's argument has become less frequent than it was in the first years after the enactment of the legislation.⁹⁹

8.46 It is not proposed to deal with other extrinsic aids, for example, prior statutes or similar Acts, as the focus has been to learn from the experience of how statutory provision for extrinsic aids operates in practice. These other extrinsic aids are not controversial.

⁹³ At 31-32.

⁹⁴ At 200.

⁹⁵ At 202.

⁹⁶ In only inserting the right to confirm the meaning, the legislation was following Article 32 of the Vienna Convention on the Law of Treaties.

⁹⁷ Roberts, in "Mr Justice John Bryson on Statutory Interpretation, A Comment", 13 Stat LR 209, at 215, (1992) gives his impression of subsection 1(a), as being "that where the extrinsic material ... *disaffirms* that view, the interpreter *is* to disregard the material, and allow the text of the legislation to dominate, unless, of course, the ordinary meaning leads to a result that is manifestly absurd or is unreasonable, in which case the material may be resorted to for the true meaning of the provision, in accordance with paragraph (b)."

⁹⁸ Reference to material other than second reading speeches are apparently not usual – Bryson J, *supra* at 203.

⁹⁹ *Ibid* at 205.

(ii) Victoria

8.47 In October 1983 the Victorian Parliamentary Legal and Constitutional Committee produced its "Report on Interpretation Bill 1982". It contained draft alternative clauses governing the admissibility of extrinsic aids. The Committee noted the usual arguments against the use of extrinsic aids, but stated that these arguments were not sufficient to outweigh the advantages accruing if Parliament spelt out in legislation the right of the courts to have recourse to extrinsic aids.¹⁰⁰ They rejected the idea of special explanatory memoranda that would limit the courts to using them as the only extrinsic aids.¹⁰¹

8.48 The Committee did not recommend that a Bill should incorporate a statement that the discretion of the courts should only be exercised where there was ambiguity. They suggested that the proposed clause would be interpreted in accordance with the accepted practice that resort is had to extrinsic aids only where ambiguity occurs, and where words are not clear on their face. They suggested that the term "ambiguous" meant that a word had a double meaning. It did not include the idea that the word had no meaning at all. In any event, there was no need to have recourse to extrinsic aids where the legislation was clear and unambiguous. One of the most important reasons for not including ambiguity as a criteria was because the Committee wanted the assumption to continue that "legislation emitting from Parliament is certain and unambiguous, and that it is only in the rare case that uncertainty or ambiguity arises."¹⁰²

8.49 The proposals of the Committee were endorsed by the Government, and the Interpretation of Legislation Act 1984 was passed before the Federal Legislation was enacted. Section 35 of the 1984 Act provides as follows:

"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*

¹⁰⁰ There is a good summary of the report in Scutt, "Statutory Interpretation and Recourse to Extrinsic Aids", (1984) 58 ALJ 483.

¹⁰¹ 20.106.1-2 of the Report. The United Kingdom Law Commissions, in their report on "Interpretation of Statutes" (dealt with in chapter 7) had recommended a similar provision.

¹⁰² Paragraph 20.109.3 of the Report.

- (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."*

8.50 The Victorian legislation allowed freer rein to judicial discretion on the weight of extrinsic materials. The attitude of their Legal and Constitutional Committee was that the job of a judge was to determine the relevance and the weight of all material coming before them. Therefore, there was no reason for judges to be less able to assess the relevance and weight of statements made in parliament than they are able to assess relevance and weight of other extrinsic materials, or of evidence generally.¹⁰³

8.51 Brazil remarked that some of the judges in Victoria have used the concepts of the more detailed Federal provisions in deciding on the admissibility of extrinsic aids.¹⁰⁴ In *Crawford v Murdoch*¹⁰⁵ Hampel J considered that the extrinsic materials confirmed his conclusion. In *Motor Accidents Board v Jovicic*,¹⁰⁶ McGarvie J justified looking at extrinsic aids as the object of the legislation was "obscure".

8.52 Tomasic took the view that judges would resist statutory intrusion into the judicial process, even if it was done with the best of intentions by the executive.¹⁰⁷ East¹⁰⁸ stated that this view is supported by two decisions of the Supreme Court of Victoria. He suggested that the

¹⁰³ Scutt, "Statutory Interpretation and Recourse to Extrinsic Aids" (1984) 58 ALJ 483, at 492.

¹⁰⁴ Brazil was Secretary of the Commonwealth Attorney General's Department in Canberra around the time that the Commonwealth legislation was enacted. He also contributed one of the papers to the *Canberra Symposium*. His remarks here are extracted from an article "Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting", (1988) 62 ALJ 503, at 511-2.

¹⁰⁵ [1985] VR 333, at 336.

¹⁰⁶ [1985] VR 171, at 178.

¹⁰⁷ "The Courts in Australia", in Waltman and Holland, *The Political Role of Law Courts in Modern Democracies* (1988), 47.

¹⁰⁸ "The Lawmaking Role of the Appellate Judiciary: Some Lessons from Australia" (1990) Stat LR 48, at 66.

assumption, made by the judge in *Walker v Shire of Flinders*,¹⁰⁹ was that the common law rules continued alongside the statutory guidance of section 35(a) of the Interpretation of Legislation Act 1984,¹¹⁰ and the latter only operated if the literal approach could not be adopted, because there was an ambiguity. This assumption was based on the fact that the judge held that there was no ambiguity and, therefore, a literal interpretation had to prevail. This is why the judge never referred to section 35, nor did he try to ascertain the purpose of the legislation from extrinsic materials. East concluded from this judgement that "there is strong circumstantial evidence of Australian judicial hostility to such statutory guidelines".¹¹¹

8.53 In *Catlow v Accident Compensation Commission*,¹¹² the High Court of Australia considered section 35 of the Interpretation of Legislation Act 1984 (Vic). Brennan and Gaudron JJ, in a strong dissenting judgment, confirmed that, apart from section 35, material relating to the evolution of the relevant Act could not properly be taken into account at all.¹¹³ The court noted that, unlike section 15AB, section 35 did not restrict the purposes for which it was permissible to consider the extrinsic aids. Brennan and Gaudron JJ continued:

*"Whether or not extrinsic material is considered, ... it is clear that the meaning attributed to the statute, must be consistent with the statutory text. If the meaning, which would otherwise be attributed to the statutory text, is plain, extrinsic material cannot alter it. It is only when the meaning of the text is doubtful (to use a neutral term rather than those to be found in section 15AB...), that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of construction. If, when that is done, the meaning of the statutory text is not doubtful, there is no occasion to look to the extrinsic material."*¹¹⁴

8.54 The other judges did not comment on this interpretation. McHugh J relied on the industrial background of similar awards, judicial decisions on similar expressions in comparable statutes, the legislative history, but more particularly, the explanatory notes on the draft proposals for the relevant Bill, but no extracts from *Hansard*.

8.55 Pearce and Geddes have not taken as pessimistic a view as East in relation to judicial interpretation of the Victorian provisions. They stated that extrinsic aids have been referred to most commonly to ascertain the underlying purpose or object of the legislation.¹¹⁵ However, the Full Court

¹⁰⁹ [1984] VR 409.

¹¹⁰ This provide for a purposive interpretation.

¹¹¹ At 68.

¹¹² (1989) 87 ALR 663, at 667 et seq.

¹¹³ At 667. They referred to *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 14 ALR 485.

¹¹⁴ At 668.

¹¹⁵ *Op cit* at 3.20.

of Victoria, in *R v Kean and Mills*¹¹⁶ noted that under section 35(b), the court was permitted, and not obliged, to refer to extrinsic aids. Indeed, in *Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd*,¹¹⁷ McGarvie J said that "it was open to a court to adopt a construction of legislation that has not been supported in argument by any party". In *Transport Accident Commission v Clark*,¹¹⁸ the Supreme Court of Victoria stated that it was one thing to refer to *Hansard* to aid the interpretation of the legislation being enacted, but it was another thing altogether to refer to the debates to justify a view about pre-existing legislation, passed some time previously, and under consideration only indirectly because of the legislation being enacted. More recently, in *Humphries v Poljak*,¹¹⁹ the Full Court of the Victorian Supreme Court has held that, even if it appears that the language of a statute is clear and unambiguous, it is not improper for a court to have recourse to parliamentary debates and other material relating to the history of the legislation to ensure that applying the ordinary and grammatical meaning of the words does not give the statute an obviously unintended meaning.

8.56 In 1991 the "VicStatutes" project to computerise legislation was launched. It was anticipated that this would enable extrinsic aids to be incorporated into legislation at a later stage. This would greatly facilitate accessibility for lawyers and the judiciary.¹²⁰

(iii) New South Wales

8.57 Section 33 of the Interpretation Act 1987 provided for a purposive construction, in similar terms to other States. However, even before its enactment, some of the courts had expressed a preference for such a construction. In *Accident Insurance Mutual Ltd v Sullivan*,¹²¹ the court held that it was legitimate for the court to prefer a purposive construction, which would provide benefits to the workers, where the legislation was ambiguous. Section 34 of the Interpretation Act 1987 went on to provide:

"(1) In the interpretation of a provision of an Act or statutory rule,¹²² if any material not forming part of the Act or statutory rule 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 or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object*

¹¹⁶ [1985] VR 255, at 259.

¹¹⁷ [1987] VR 529, at 567.

¹¹⁸ (18 March 1993), 8091/92, Australian Current Law, 14 April 1993. [425 VIC 15].

¹¹⁹ [1992] 2 VR 129.

¹²⁰ "Launching of the VicStatutes project, Melbourne, 7 August 1991", 66 ALJ 5-6.

¹²¹ (1986) 7 NSWLR 65 (CA).

¹²² This applies to delegated legislation.

underlying the Act under which the rule was made);¹²³ or

(b) to determine the meaning of the provision:

(i) if the provision is ambiguous or obscure; or

(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the 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 Parliament before the provision was enacted or made;¹²⁴

(c) any relevant report of a committee of Parliament or of either House of Parliament before the provision was enacted or made;¹²⁵

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the provision was enacted or made;¹²⁶

¹²³ This is similar to section 15AB, *supra*, except for the addition of the provisions concerning statutory rules, which seem useful.

¹²⁴ This last sentence is slightly different to section 15AB, *supra*.

¹²⁵ This is a shorter version of section 15AB(2)(c).

¹²⁶ This is a more readable version of section 15AB(2)(e).

- (f) *the speech made to a House of Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill for the Act¹²⁷ 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 Minutes of Proceedings¹²⁸ or the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament.*

(3) *In determining whether consideration should be given to any material, or in considering the weight to be given to any 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 or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made); and*
- (b) *the need to avoid prolonging legal or other proceedings without compensating advantage."*

Practice Note

8.58 The Practice Note of the Supreme Court of New South Wales provides:

"Where, in proceedings in the Court, a party intends to rely on extrinsic material pursuant to s. 15AB of the Acts Interpretation Act, 1901, of the Commonwealth, that party shall, not later than a reasonable time before the occasion for using it arises, give to any other party and to the registrar:

- (a) *written notice of intention, specifying the material on which it is intended to rely; and*

¹²⁷
¹²⁸

Section 15 AB(2)(f) has "the Bill containing the provision".
The rest of (h) is the same as section 15AB.

(b) *a copy of the material.*

*Failure to do so may result in an adjournment and orders for payment of costs wasted by the adjournment.*¹²⁹

Section 34(2)(h) was considered in *Bayeh v Attorney General (NSW)*.¹³⁰ Hunt CJ observed that the explanation of an amendment given by the member of Parliament moving the amendment appeared to have the same relevance as that of a Minister moving a second reading.¹³¹

(iv) Queensland

8.59 The Queensland Full Supreme Court relied on section 15AB in their interpretation of a Commonwealth Act in *Barameda Enterprises Pty Ltd v O'Connor*, before legislation was passed allowing the use of extrinsic aids.¹³² McPherson J stated that a literal interpretation would have defeated the obvious intention of Parliament, and would lead to a result that was manifestly absurd or unreasonable. He therefore looked at the international convention, which was a schedule to the Act, and the second reading speech of the Minister.¹³³

8.60 The Acts Interpretation Amendment Act 1991 (Qld) introduced a provision for extrinsic aids. It amended the Acts Interpretation Act 1954 by the insertion of section 14B into that Act. The section provides :

"(1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation :

- (a) if the provision is ambiguous or obscure - to provide an interpretation of it; or*
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable - to provide an interpretation that avoids such a result; or*
- (c) in any other case - to confirm the interpretation conveyed by the ordinary meaning of the provision.*

(2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to :

¹²⁹ Contrast these with the recent English Practice Direction, *Practice Direction (Hansard: Citation)*, *Supreme Court* [1995] 1 WLR 192.

¹³⁰ (1995) 82 A Crim R 270.

¹³¹ At 276.

¹³² [1988] 1 Qd 359.

¹³³ He referred to section 15AB(2) (a) and (d), at 388.

- (a) *the desirability of a provision being interpreted as having its ordinary meaning; and*
 - (b) *the undesirability of prolonging proceedings without compensating advantage; and*
 - (c) *other relevant matters.*
- (3) *In this section :*

"extrinsic material" means relevant material not forming part of the Act concerned, including, for example :

- (a) *material that is set out in the document containing the text of the Act as printed by the Government Printer; and*
- (b) *a report of a Royal Commission, Law Reform Commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly before the provision concerned was enacted; and*
- (c) *a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted; and*
- (d) *a treaty or other international agreement that is mentioned in the Act; and*
- (e) *an explanatory note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given to the members of, the Legislative Assembly by the member bringing in the Bill before the provision was enacted; and*
- (f) *the speech made to the Legislative Assembly by the member in moving a motion that the Bill be read a second time; and*
- (g) *material in the Votes and Proceedings of the Legislative Assembly or in any official record of debates in the Legislative Assembly; and*
- (h) *a document that is declared by an Act to be a relevant document for the purpose of this section.*

"ordinary meaning" means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act."

(v) South Australia

8.61 The Law Reform Committee of South Australia prepared a report on the use of *travaux préparatoires* and other aids.¹³⁴ They suggested having a special form of explanatory memorandum, similar to that proposed in the report of the United Kingdom Law Commissions.¹³⁵ Such a memorandum might have to be revised from time to time, because "the intent at the time of a Statute many years old may not govern the exposition of the Statute today". They recommended that the South Australian Acts Interpretation Act 1915-1960 be amended to incorporate a similar section to the draft clauses provided in the Law Commissions' report, with a restriction on clause 1(1)(c).¹³⁶ They also suggested a provision that where an undertaking has been given in Parliament that a statute will be administered in a certain way, in order to have the statute passed, then it should be possible to prove that undertaking on any prosecution for an infringement of the statute.¹³⁷

8.62 The Legislature responded by enacting a section which incorporated a purposive interpretation.¹³⁸ In *Commonwealth Scientific and Industrial Research Organisation v Perry* (No 2), it was held that section 15AB should be applied by analogy to State enactments.¹³⁹ Lunn J stated:

"Although there is no equivalent section in the South Australian Acts Interpretation Act, a similar interpretation should be given to the equivalent provision of the South Australian Act, to that which is given to the Commonwealth Act,¹⁴⁰ albeit that material may be used in the interpretation of the Commonwealth Act, which is not otherwise available to interpret the State Act."

¹³⁴ "Ninth Report of the Law Reform Committee of South Australia, The Law relating to Construction of Statutes", (1970.)

¹³⁵ (Law Com No 21), (Scot Law Com No 11), 1969.

¹³⁶ This related to treaties. They did not agree that if Australia is not bound by a treaty at the relevant time that it should be material for the court. Their views were more conservative than the United Kingdom Law Commissions report.

¹³⁷ This has some similarities to Lord Simon's statement in *Docker's Labour Club v Race Relations Board* [1974] 3 WLR 533. An argument that such a ministerial statement created a legitimate expectation was rejected in *R v Secretary of State for the Home Department, ex p Sakala*, *The Times*, 26.1.94, CA, where counsel relied on *Pepper v Hart*, to inform the court of the relevant statement. See chapter 6 further.

¹³⁸ Section 22(1) of the Acts Interpretation Act 1915 (as amended by section 4 of the Acts Interpretation Act Amendment Act 1986), is similar to section 15AA of the Commonwealth provisions except that it is restricted to adopting a purposive approach where "a provision of an Act is reasonably open to more than one construction...". This requirement that an ambiguity must first exist before the purposive approach is applied is unique to South Australia. See further, Campbell, Glasson, York & Sharpe, *Legal Research Materials and Methods* (1988) 105. We have not been able to obtain a copy of the section itself.

¹³⁹ (1988) 53 SASR 538, at 546.

¹⁴⁰ The South Australian Parliament had passed similar legislation on the issue in dispute to the earlier Commonwealth legislation.

He then proceeded to look at the explanatory memorandum of the similar relevant Commonwealth Bill.¹⁴¹ However, in *Arrowcrest Group Pty v Gill*,¹⁴² the Federal Court of Australia held that the common law of South Australia excluded reference to the second reading speech. The Federal Court had to apply the common law of the State in the construction of State statutes. This was to avoid inconsistent judgments between State courts, which could not look at such an extrinsic aid, and the Federal Court.¹⁴³

(vi) Northern Territory

8.63 The Law Reform Committee of the Northern Territory recommended in their "Report on Statutory Interpretation"¹⁴⁴ that the law on extrinsic aids should not be changed, except that there should be statutory provision for a purposive interpretation. However, this would not be a general requirement, such as section 15AA of the Commonwealth provisions, but could be a clause in a particular Act which would state the object. This could help towards a better understanding of the intention of the legislature.¹⁴⁵

8.64 The Committee noted that explanatory memoranda were provided by the Commonwealth, New South Wales, and Victorian Parliaments, but they did not see that such memoranda would necessarily assist in the interpretation of legislation. They noted the difficulty of making *Hansard* and other materials available in areas outside the capital of the Territory (Darwin). Another reason for not agreeing to a statute was the fact that much legislation in that Territory came into being as a result of proclamation by the Governor-General, in Executive Council. They also rejected replacing the common law with a wider statutory provision, as it "would encourage counsel to argue that a provision is ambiguous where no ambiguity is apparent on the face of the Act".¹⁴⁶ The fact that they recognised that there are cases where *Hansard* would make parliamentary intention clear¹⁴⁷ did not outweigh their previous conclusions. The limited ability at common law to refer to expert committee reports, where relevant, did not need to be expanded. They concluded that "the Committee considers that the words of a provision, interpreted in the context of the Act as a whole and the purpose of that Act, provide more certainty of meaning than would be achieved by allowing reference to extrinsic material to be made in more instances than the law presently permits".¹⁴⁸

8.65 In *Maynard v O'Brien*, the Northern Territory Supreme Court held, that where the Bill had been introduced to remedy a mischief, then the

¹⁴¹ The Full Court of the Supreme Court went on to consider the case but they did not make any reference to Lunn J's decision on this point.

¹⁴² 15 November 1993, LEXIS.

¹⁴³ At 14. The Court did not refer to the judgment in the *Perry* case, *supra* (which predated the provision in legislation on extrinsic aids) - *Devine v Solomijczuc and Todd*, (1983) 32 SASR 538.

¹⁴⁴ Report No 12, December 1987.

¹⁴⁵ At 22. The conclusions were at 27.

¹⁴⁶ At 24.

¹⁴⁷ They also noted that *Hansard* may be relevant to the general effect of the legislation but that it was unlikely to assist with particular provisions in most cases (at 25).

¹⁴⁸ At 26.

weight of the authority was in favour of allowing recourse to a minister's second reading speech to search out the reasons why the Act was passed and to "eke out [sic] the mischief sought to be remedied".¹⁴⁹

(vii) Tasmania

8.66 In Tasmania the Act Interpretation Amendment Act 1992 amended the Tasmanian Acts Interpretation Act 1931 by providing amongst other matters for:

- "(a) the interpretation of Acts to take into account the purpose of the Act;¹⁵⁰ and*
- (b) the use of extrinsic material in interpretation.¹⁵¹"*

8.67 Under the amendments, extrinsic material may be considered in the interpretation of a provision of an Act :

- "8B(1) (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or*
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or*
- (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision."*

8.68 The amendment also provides that, in considering and using extrinsic material, regard is to be given to:

- "8B(2) (a) the desirability of a provision being interpreted as having its ordinary meaning; and*
- (b) the undesirability of prolonging legal or other proceedings without compensating advantages; and*
- (c) other relevant matters."*

¹⁴⁹ (1991) 78 NTR 16; 57 A Crim R 1, Angel J. As summarised in the *Australian Digest Supplement* 1992.

¹⁵⁰ Section 8A.

¹⁵¹ Section 8B.

8.69 Such material includes:

- "8B(3) (a) material that is set out in the document containing the text of the Act as printed by the Government Printer; and*
- (b) a relevant report of a Royal Commission, Law Reform Commission or Commissioner, board or committee of inquiry, or a similar body, that was laid before either House of Parliament before the provision concerned was enacted; and*
- (c) a relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the provision was enacted; and*
- (d) a treaty or other international agreement that is mentioned in the Act; and*
- (e) any explanatory note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given to the members of, either House of Parliament by the member bringing in the Bill before the provision was enacted; and*
- (f) the speech made to a House of Parliament by a member of the House in moving a motion that the Bill be read a second time; and*
- (g) relevant material in the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament; and*
- (h) a document that is declared by an Act to be a relevant document for the purposes of this section."*

(viii) Western Australia

8.70 Section 19 of the Interpretation Act 1984¹⁵² permits the use of extrinsic aids. Its provisions are almost identical to section 15AB of the Commonwealth provisions. The Western Australian provisions refer to a

¹⁵² It has not been possible to obtain a copy of the Western Australian provision. An article in the "Legislation" section of the Commonwealth Law Bulletin, October 1994, 1466-1467 has been relied on, with comments made by the Northern Territory Law Reform Committee in their "Report on Statutory Interpretation", (1987), 18.

"written law"¹⁵³ whereas the Commonwealth provisions refer to an "Act". A "written law" is defined to include "all subsidiary legislation".

(ix) Australian Capital Territory

8.71 Section 11B of the Interpretation Ordinance 1967 (ACT) was enacted in similar terms to section 15AB of the Interpretation Act 1901 (Cth).¹⁵⁴

Explanatory memoranda

8.72 The Attorney General's Department of the Australian Capital Territory reviewed the role and value of explanatory memoranda in a recent report.¹⁵⁵ It stated that research suggested that there is strong support for the continued production of such memoranda. The main recommendation was that groups of clauses, dealing with the same topic, could be discussed together rather than by the old clause-by-clause format.

8.73 It was also suggested that to put the legislation in context, it was better to include more background and history. This should give an explanation as to why the legislation was necessary and what it was trying to do. This was what the consumer would find the most useful: "With better memoranda, it may even be possible to sometimes avoid costly litigation".¹⁵⁶

8.74 From a practical viewpoint, accessibility was found to be a major obstacle. It was suggested that this could be improved by ensuring that complete collections of memoranda are maintained.¹⁵⁷ This report has to be seen in the context of a policy of ensuring that law is more accessible to all citizens. This includes simplifying the drafting of legislation. Indeed, in September 1991 the same Attorney General's Department proposed a significant reform of legislation in its *Report on Legislation Review*.¹⁵⁸

Singapore

8.75 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 1993¹⁵⁹ has a provision

¹⁵³ Section 9A of the Interpretation Act 1985 (Singapore) also refers to "written law", though Beckman and Phang, in their article, *supra*, do not refer to this being the origin of that term.

¹⁵⁴ Beckman and Phang, *supra*, state that the section does not have the equivalent of section 15 AB (2)(c), (f) and (h). Unfortunately we have not been able to obtain a copy of the legislation. It was inserted by the Interpretation (Amendment) Ordinance 1985 (No. 24).

¹⁵⁵ Report on Explanatory Memoranda", July 1991

¹⁵⁶ At paragraph 87.

¹⁵⁷ This report is summarised in Commonwealth Law Bulletin, January 1993, 190-1.

¹⁵⁸ *Idem* at 191-3.

¹⁵⁹ 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.

which is similar to section 15AB of the Australian Acts Interpretation Act 1901 (Cth). It provides as follows:

"Section 9A (2):¹⁶⁰ Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law 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 written law and the purpose or object underlying the written law; or*
- (b) to ascertain 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 written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.*
- (3) Without limiting the generality of subsection (2), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law shall include –*
 - (a) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer;*
 - (b) any explanatory statement relating to the Bill containing the provision;*
 - (c) the speech made in 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 Parliament;*

¹⁶⁰

Subsection 1 is the same as section 15AA of the Acts Interpretation Act 1901 (Cth), and section 35 of the Interpretation of Legislation Act 1984 (Victoria), though it has adopted the Western Australian substitution of "written law" instead of "Act or subordinate instrument". The former term includes subsidiary legislation. The subsection provides for a purposive interpretation. For the text, see chapter 8.

- (d) *any relevant material in any official record of debates in Parliament;*
 - (e) *any treaty or other international agreement that is referred to in the written law; and*
 - (f) *any document that is declared by the written law to be a relevant document for the purposes of this section.*¹⁶¹
- (4) *In determining whether consideration should be given to any material in accordance with subsection (2), or in determining 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 written law and the purpose or object underlying the written law; and*
 - (b) *the need to avoid prolonging legal or other proceedings without compensating advantage."*

8.76 The rationale given by the Law Minister in Parliament for introducing the Bill was that the courts were now dealing with more complex and varied cases, and legislation was necessary if they were to make "well-reasoned decisions".¹⁶²

8.77 In *Tan Boon Yong v Comptroller of Income Tax*,¹⁶³ the Court of Appeal refused to accept a literal interpretation as it would lead to an absurdity. They held that "in principle parliamentary reports may be looked at if, as in the present case, reference to the reports would greatly facilitate the court in determining the intention of parliament." The court referred to the minister's second reading speech.

8.78 In a recent article, Beckman and Phang¹⁶⁴ analysed the new legislation. They bemoaned the fact that no specific reference was made to the inclusion of Select Committee reports. These reports are not part of the official reports. Singapore's Select Committees have similar functions to our Bills Committee.¹⁶⁵ Bills are committed to Select Committees after their

¹⁶¹ It should be noted that section 15AB(2)(b), allowing official reports, and (c) reports of committees of Parliament, were not included in the Singaporean legislation.

¹⁶² "The Straits Times Weekly Overseas Edition", 6 March 1993.

¹⁶³ [1993] 2 SLR 48 (CA). Also reported in Commonwealth Law Bulletin, October, 1993, 1451-2. The judgment post-dated *Pepper v Hart*, but pre-dated the new legislation.

¹⁶⁴ "Reform of Statutory Interpretation in Singapore", 15 Stat LR 69, at 87-88.(1994).

¹⁶⁵ The authors point out that in England, select committee reports are often made prior to legislation, thus being classified as pre-parliamentary materials, which can be referred to under the rule allowing the use of official reports. (at 76).

second reading, and the Select Committees' reports often recommend amendments to the Bill. However, they suggest that Select Committee reports may be admissible under section 9A(2), in its reference to "any material not forming part of the written law [which] is capable of assisting in the ascertainment of the meaning of the provision".

8.79 Beckman and Phang also referred to the first case under the new legislation, *Raffles City Pte Ltd v The Attorney General, Singapore*.¹⁶⁶ The legislation had come into force after the proceedings had been commenced. LP Thean J summarised the rules thus:

"The general rule is that all statutes, other than those which are merely declaratory¹⁶⁷ or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature;¹⁶⁸ However, in my opinion, it is a declaratory enactment."

8.80 He explained the impact of this rule on the legislation:

"Section 9A does not change the meaning of any existing statutory law but simply allows the courts, ... to have recourse to additional materials ... to ascertain the meaning of a statutory provision. It merely provides an aid to interpretation and seeks to clarify existing law¹⁶⁹ ... There is nothing to rebut the presumption that it is to operate retrospectively.¹⁷⁰"

8.81 The court ruled that section 9A operated retrospectively, and thus applied to the instant case. Thean J indicated that if he were wrong in applying section 9A, then he could rely on the "parallel" common law rule set out in *Pepper v Hart*.

Conclusion

8.82 It can be seen that the 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 the

¹⁶⁶ [1993] 3 SLR (Singapore Law Reports) 580.

¹⁶⁷ Bennion defines this as an enactment which declares what the law is and often "for the avoidance of doubt". Since it does not purport to change the law it is presumed to have retrospective effect. However, it may in fact change the law. In the case of a common law rule, it is taken to have been operative in the past.

¹⁶⁸ The judge referred to 44 *Halsbury's Laws of England* (4th ed) paragraph 921.

¹⁶⁹ Beckman and Phang, *supra*, in a footnote, (95) comment that this point is arguable inasmuch as it could be said that section 9A may in some cases result in the reversal of the existing law. Looking it from another perspective, it could be argued that section 9A actually changed the existing law embodied in *Pepper v Hart*. They also suggested that the judge could have relied on an argument that section 9A was procedural or evidential and therefore retroactive.

¹⁷⁰ At 587.

other States who have stricter criteria to apply. It is interesting that it was members of the judiciary who called for legislative intervention. The statutory provisions have not inhibited the courts developing a jurisprudence which has balanced the needs of the citizen to the needs of the executive. Some of the fears expressed by commentators in the United Kingdom after the judgment in *Pepper v Hart* have not been realized in Australia. Indeed, Lord Browne-Wilkinson in that judgment,¹⁷¹ noted that Australia (and New Zealand) had relaxed the rule to the extent that he favoured. Also, there was no evidence of any complaints coming from those countries. It is also interesting to note that there has been a dearth of commentators in Australian legal journals on the various statutory provisions.

¹⁷¹ [1992] 3 WLR 1032, at 1059.

Chapter 9

The Legislative Process

Introduction

9.1 Lord Simon of Glaisdale pointed out in the *Black-Clawson* case:¹

"In essence, drafting, enactment and interpretation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves. If it comes about that the declared meaning of a statutory provision is not what Parliament meant, the system is at fault."

9.2 This chapter will deal with the connection between drafting, enactment and interpretation, as it relates to how *Hansard* becomes an extrinsic aid to interpretation.² The question of accessibility of *Hansard* and other legislative materials, and whether changes are needed to the legislative process itself, are also dealt with.

The drafting process

General or specific intent

9.3 The court's duty when construing a statute is to determine what was the intention of Parliament. Lord Simon emphasised that the courts are to ascertain the meaning of what Parliament has said, and not what Parliament meant to say.³ This view reflects the constitutional convention that the courts and the legislature should not inquire into each other's internal processes.⁴ There is also 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 to say.⁵ Then there would be no need to have recourse to extrinsic aids. But in reality words themselves can have different meanings and so it can be difficult for the draftsman to accurately convey the meaning intended by the promoter of the Bill. In those circumstances, the

¹ [1975] AC 591, 652.

² The Law Lords held a vigorous debate on whether *Hansard* should be taken into consideration by the courts, on 18 January 1989, HL Deb Vol 503, cols 278-307.

³ The *Black-Clawson* case, *ibid* at 645.

⁴ Burrowes, "Interpretation of Legislation: a New Zealand perspective", 9th Commonwealth Law Conference, April 1990.

⁵ See Lord Simon, *op cit* at 645.

courts are justified in looking at extrinsic aids, in order to understand the meaning of what Parliament has said.

9.4 In the past, the courts have generally held that the intention of Parliament could only be ascertained from the language of the statute.⁶ The United Kingdom Law Commissions suggested that the "the concept of the legislative intent may however be clarified, if a distinction is drawn between a *particular* legislative intent, in the sense of the meaning in which the legislature intended particular words to be understood, and a *general* legislative intent in the sense of the purpose which the legislature intended to achieve."⁷

9.5 The discussion paper "Extrinsic Aids to Statutory Interpretation" drew a distinction between the legislative intention and the meaning of the words of a statute:⁸

"If 'legislative intent' is the criterion for interpretation, the primary emphasis should rest on the intention of the law makers. Inquiry as to the 'meaning' of the statute suggests greater concern to find out how the statute is understood by the audience for which it is aimed."

9.6 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".⁹ Lord Roskill further queried Lord Reid's famous statement on Parliamentary intention,¹⁰ 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.¹¹ He criticised the failure to implement the Renton Committee's recommendations¹² and suggested that it was up to the courts to make progress on statutory interpretation, rather than wait for Parliament to do so.

9.7 One commentator stated that it was a fiction that the courts merely try to find the legislative intent. The courts in reality are "in partnership

⁶ See *Salomon v Salomon* [1897] AC 22, 38.

⁷ Paragraph 55 of the Final Report "The Interpretation of Statutes" (Law Com No 21, Scot Law Com No 11). See chapter 7 further.

⁸ This was tabled in the Australian Parliament on 14 October 1982.

⁹ "Some Thoughts on Statutes, New and Stale", (1981), Stat LR 77, 80.

¹⁰ "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.

¹¹ *Supra* at 80.

¹² In a footnote, in the same Statute Law Review (1981) it was noted that the Government had accepted two recommendations of the Renton Committee (see *infra*) - (i) the draftsmen are to include statement of principle and purpose "subject to drafting instructions by responsible Ministries" in a Bill (H.L. Deb., Vol 412, col 1588, 7 August 1980), (ii) the convenience of ultimate users of the statutes is to be borne in mind (*idem*. Vol 410, col 1111, 18 June 1980). The Renton Committee's full recommendation on the latter point was "In principle the interests of the ultimate users should always have priority over those of the legislators: a Bill should be regarded primarily as a future Act" (Chapter X, (8)). See chapter 7 further.

with Parliament in the making of statute law."¹³ He saw the problem as being that Parliament thought it had to provide a complete set of answers in legislation, to maintain the fiction that the courts merely interpret statutes.

9.8 The realities of the parliamentary process must be kept in mind. As Sir Nicholas Lyell recently said "The realities of the ebb and flow of parliamentary debate during the passage of a Bill often make it difficult to say with any degree of certainty that a particular statement represents the intention of Parliament".¹⁴ He suggested that the proposition that Parliament must have acted on a Minister's statement when it enacted a particular provision, after the Minister had given his view on it, was applicable only when the statute was clear. It was artificial to say that the Minister's words at the early stages of the process were part of Parliament's intention. "In practical terms parliamentarians are not and cannot be equipped to consider nuances of language used by Ministers ... in the course of debate."¹⁵

9.9 It has been argued that there is a difference between the concept of parliamentary intention, as expressed in the United Kingdom, and Hong Kong. In *Ngan Chor Ying v Year Trend Development Ltd*,¹⁶ Findlay J stated:

"Where a majority party exists, one can be reasonably sure that what is said by a minister or other promoter of a bill represents the intention of the majority of the legislature. In Hong Kong, statements in the Legislative Council cannot be said to be clearly representative of the intention of the majority of the council."

However, none of the other Hong Kong judgments which referred to *Hansard* since *Pepper v Hart* have raised this point.¹⁷

The language of the statute

9.10 Zander showed sympathy for the problem of the draftsman in trying to draft documents reflecting solutions arising from conflicting different interests. "The problem of drafting language so as to avoid ambiguity and uncertainty is great enough where the relevant parties have broadly the same point of view. It is infinitely greater where they have an incentive to find different meanings in the words used."¹⁸ Sacks argued that the legislative process should uncover difficulties of language and, if not, then the fault lay with that process. She concluded from her research that "unintelligible legislation was being added to the statute book because the Government

¹³ Bloom "Law Commission: Interpretation of Statutes" 33 MLR 197, 200. (1970).

¹⁴ "*Pepper v Hart*: The Government Perspective" 15 Stat LR, 1, at 2. (1994) He was the Attorney General of the United Kingdom at that time.

¹⁵ At 2.

¹⁶ [1995] 1 HKC 605, 610.

¹⁷ The Court of Appeal in *Hong Kong Racing Pigeon Association Ltd v Attorney General & Anor*, [1995] 2 HKC 201, did not refer to this issue either.

¹⁸ *The Law Making Process*, (4th edition, 1994).

either lacked clear objectives, or had deliberately intended to obfuscate in order to avoid controversy."¹⁹

9.11 In contrast, Lord Denning focused on the method of drafting in his book, *The Discipline of the Law* :

*"The trouble lies with our method of drafting. The principal object of the draftsman is to achieve certainty - a laudable object in itself. But in pursuit of it, he loses sight of the equally important object - clarity. The draftsman ... has conceived certainty: but has brought forth obscurity; sometimes even absurdity."*²⁰

9.12 The Renton Committee also found problems with the drafting method. They concluded that "interpretation of Acts drafted in simpler, less detailed and less elaborate style than at present would present no great problems provided that the underlying purpose and the general principles of the legislation were adequately and concisely formulated."²¹ One of its recommendations was that the needs of the users of statutes must be given priority over those of the legislator when proposals for amending existing legislation are being framed.²² Berry argued that a person should not be made to suffer the ordeal of expensive litigation in order to ascertain the meaning of a term whose doubt might, with proper foresight, have been removed by the drafter.²³

9.13 Mr Justice Nazareth²⁴ argued against the idea of making statutes less detailed. This might make statutes easier to read but it would result in there being less specific answers to issues. The courts would then be faced with filling in the gaps. This has always been a controversial issue.²⁵ Mr Justice Nazareth recommended that "governmental and parliamentary pressure"²⁶ (exacerbated by existing rules of interpretation) could be eased". Drafters might be able to use simpler language if drafters were given more time and clear instructions from the legislators. He did not see that the ideal of making legislation intelligible to the layman could be realised. He also thought that the idea of a committee "on a loose analogy with the *Conseil d'Etat*, has much to commend it."²⁷

¹⁹ "Towards Discovery Parliamentary Intent" (1982) Stat LR 143, 148, 157.

²⁰ *Op cit* at 9.

²¹ *Infra* at paragraph 19.41.

²² *Idem* at para 13.17.

²³ Duncan Berry "Legislative Drafting: could our Statutes be Simpler", Senior Legislative Draftsman, New South Wales, 8th Commonwealth Law Conference (1986).

²⁴ "Legislative Drafting: Could Our Statutes Be Simpler?", 8th Commonwealth Law Conference, (1986).

²⁵ He quoted Lord Hailsham, in his address to the Statute Law Society, 1984, where he said that throwing the burden of ascertaining the meaning of legislation completely on judges would bring the judges into political controversy.

²⁶ Turnbull, "Problems of Legislative Drafting" [1986] Stat LR 67, 77 who was a Parliamentary Counsel, made a plea in defence of the draftsman, who has to imagine all possible contingencies and anticipate all possible misunderstandings and draft legislation under pressure.

²⁷ *Op cit* at 6. Sacks, *supra*, had originally recommended this option.

9.14 Efforts have been made in other common law countries to make legislation more "user-friendly". In Australia, extensive use is now made of reprinted Acts as an alternative to consolidations. This has been encouraged by the use of the "textual style" of drafting amending legislation instead of the "referential style" used by England. The referential style consists of a direct amendment of a principal statute by another statute which refers to it. So, for example, the scope of an existing statute may be extended to make it applicable to new circumstances. This is achieved by reference to the old statute in the new statute, rather than directly amending the earlier statute.²⁸ The textual style requires that words be omitted from the principal statute and others inserted instead. Pearce argues that the textual style facilitates the reprinting of Acts.²⁹ Indeed, the Renton Committee's recommendations seem to have been taken more seriously by Australia and New Zealand, than by England itself. Hong Kong also adopts a textual style.

9.15 Parallel to the debate, on the extent to which extrinsic aids should be used, is a debate on the use of "Plain English", which would make statutes more intelligible to their users.³⁰ The Statute Law Society has recommended that, in drafting, "technical terms and ordinary language, clarity of expression, grammar and construction should be a primary consideration."³¹ In Hong Kong, a guide for the analysis of complex legislation has recently been published.³² Its purpose is that "the application of the rules and directions should create a legislative syntax that would enable legislation to be expressed in a simpler way to reflect the policy or intention."³³

9.16 In its report, "The Format of Legislation",³⁴ the New Zealand Law Commission recommended that there be an improvement in the design of legislation to make it more accessible and more easily understood. Two issues arose from this. The first was that the time devoted to such matters needed reducing, and the second was the right of the people to know how the law affects them. With regard to the former, the report said:

*"It must be beneficial if Members of Parliament spend more time dealing with policy questions in new legislation than trying to ascertain the meaning of the proposals put before them; if administrators can apply the law more efficiently; if lawyers can more readily find the law and so advise their clients; and if the public can more easily determine the rules which govern their personal or business transactions".*³⁵

²⁸ Thornton, *Legislative Drafting* (1970) 111.

²⁹ Pearce, *Statutory Interpretation in Australia* (1981).

³⁰ See "Plain English and the Law", Law Reform Commission of Victoria, Report No. 9. (1987)

³¹ "Radical Simplification" (1974) paragraph 138, 48.

³² Fung and Watson-Brown, "The Template" (1994) Both were working in the Attorney General's Chambers in the Law Drafting Division at the time.

³³ *Ibid*, at 1.

³⁴ Report No. 27, (December 1993). See Commonwealth Law Bulletin, (January 1994) at 202 for a summary.

³⁵ *Ibid* at paragraph 5.

9.17 Miers expressed concern that the draftsman would be put under further pressure to ensure compatibility, between what was stated in the legislation, and what the Minister said in debate.³⁶ He further argued that the courts could now look at Notes on Clauses as they fell within the scope of the second limb of the rule laid down in *Pepper v Hart* - as "such other parliamentary material as is necessary to understand such statements and their effect."³⁷ He suggests that "government will have to institute mechanisms to ensure that what goes to Ministers by way of briefing for debate is also to be judge-proof."³⁸

9.18 There is no doubt that since *Pepper v Hart* the draftsman may have to take a more active part in checking documents which brief the promoter of a Bill or Members of Parliament. Jenkins suggested that this would include Notes on Clauses, notes on amendments, and Minister's speaking notes to check that they accurately and comprehensively explain the provisions of a Bill. This also may extend to documents like press releases, circulars, or advertisements issued by Government Departments which explain new legislation. Also, he suggested that the draftsman and the civil servants in the various departments will have to check what was actually said in the House and in Committees, to ensure that no additional statements or corrections are required.³⁹

9.19 Bennion⁴⁰ has suggested that the draftsman should merely carry on as before. However, courts and practitioners needed to be better educated in the techniques and practices of legislative drafting. Civil servants should resist "the temptation to 'plant' in their Ministers' briefs statements about what they want the Act to mean".

The format of legislation

Preamble and objects clause

9.20 In older legislation the preamble set out the mischief that the legislation was decided to remedy. Lord Diplock in the *Black-Clawson*⁴¹ case warned that "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 any reference to extraneous documents for this purpose."

9.21 One response to assisting the interpretation of legislation is to incorporate an objects clause into an Ordinance. This would be designed to

³⁶ "Taxing Perks and Interpreting Statutes: *Pepper v Hart*" 56 MLR 695, 705.(1993)

³⁷ See headnote at [1992] 3 WLR 1032, 1033.

³⁸ *Op cit* at 707.

³⁹ Also in "*Pepper v Hart*: A Draftsman's Perspective" 15 Stat LR, No. 1, 23, 25 (1994).

⁴⁰ "Hansard - Help or Hindrance? A Draftsman's View of *Pepper v Hart*" 15 Stat LR 149, 162. (1994).

⁴¹ [1975] AC 591, 638.

delimit and illuminate the legal effects of the Bill.⁴² It would be used when it was the most convenient method of clarifying the scope and effect of legislation. However, it would not be contained in a preamble, but would be in a clause format. The *Hansard* Commission on the Legislative Process⁴³ did not agree with the Renton Committee's suggestion of an objects clause instead of preambles.⁴⁴ They did not think it would assist the principle of certainty in the law.

9.22 Those who oppose the insertion of an objects clause, or a reversal to the old practice of preambles, would argue that the purpose of the Bill should be apparent on the face of the Bill. This is achieved by incorporating a purposive meaning into a clause itself. The proposal of an objects clause was criticised by Parliamentary Counsel, Turnbull, as being of little use to the interpretation of the details of legislation. The problems of interpretation came, not from cases that fell within the scope of a Bill, but from cases that were on the borderline, thus requiring a consideration of the details of the legislation.⁴⁵

9.23 The Commission has considered the argument that incorporating objects clauses might reflect more clearly the purpose of legislation.⁴⁶ It might also be more in keeping with the spirit of section 19 of the Interpretation and General Clauses Ordinance (Cap 1). **However, on balance the Commission concluded that mandatory objects clauses would cause too many practical difficulties and strictures on the draftsman.**

9.24 The Renton Committee suggested that legislation should be enacted to provide that a construction which would promote the general legislative purpose would be preferred.⁴⁷ The general view of commentators and such official bodies was that if there was not such an enactment, then the literal rule of interpretation might prevail in the courts. It is true that such an enactment in Australia⁴⁸ has encouraged the judiciary to adopt a more purposive interpretation. In New Zealand, despite having a similar enactment for some time,⁴⁹ the judiciary seemed to ignore the impact of the requirement of a purposive interpretation, up to recent judicial changes of attitude.⁵⁰ The Law Commissions suggested that one of the reasons why the New Zealand

⁴² The Renton Committee Report on "The Preparation of Legislation", paragraph 11.8 (1975: Cmnd 6053). Also, the discussion paper, "Extrinsic Aids to Statutory Interpretation", (1982), and the *Symposium* on Statutory Interpretation, Canberra, February 1983 (see chapter 8).

⁴³ (*Making the Law*) (1992). See chapter 7.

⁴⁴ Paragraph 11.8.

⁴⁵ Turnbull "Problems of Legislative Drafting" (1986) Stat LR 67, 73.

⁴⁶ 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).

⁴⁷ Paragraph 19.28. This is the same as Draft Clause 2(a) of Appendix A of the United Kingdom Law Commissions Report.

⁴⁸ Section 15AA of the Acts Interpretation Act 1901.

⁴⁹ Section 5(j) of the Acts Interpretation Act 1924.

⁵⁰ See Burrowes "Statutory Interpretation in New Zealand", New Zealand Universities Law Review, Vol 11, (June 1984), 1. See also, the Final Report of the United Kingdom Law Commissions, *supra* at paragraph 33, quoting from Denzil Ward, the then New Zealand Law Draftsman, who, in an article, in [1963] NZLJ 293, 296, said, that the courts had paid little attention to section 5 (j), being "so busy cultivating the trees that they lost sight of the pathway provided by Parliament in the Acts Interpretation Act."

provision had been ignored by the courts was that it did not deal with the problem of how the mischief and the remedy were to be ascertained.⁵¹ Asking the courts to adopt a "large and liberal" interpretation, begs the question as to what is the real intention of the legislature. The circumstances may require a broad or a narrow construction of language.

9.25 Burrowes, in a more recent article,⁵² stated that the insertion of general statements of purpose in current legislation was being taken very seriously by the New Zealand courts. The New Zealand Law Commission has suggested that section 5(j) of the Acts Interpretation Act 1924 be amended to reflect a more modern purposive approach.⁵³ They recommended in their more recent report that, instead of a long title, Acts should have a separate purpose section as the first section of the Act.⁵⁴ But this should be included only if it will be genuinely helpful. "It should not be a 'manifesto' but should facilitate parliamentary debate and add something to the body of the Act".⁵⁵

9.26 Those who have objected to the use of the phrase "legislative intention" have preferred to use the term "legislative purpose".⁵⁶ This is facilitated by a legislative provision for a purposive interpretation. However, the absence of such a provision did not prevent the English courts increasingly referring to a purposive approach. 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."⁵⁷ It could thus be argued that the courts more truly give effect to the intention of Parliament when they adopt a purposive approach, which may have been facilitated by the use of extrinsic material such as *Hansard*. In Australia, there was more justification for resorting to a range of extrinsic materials once the legislature enacted that the courts should adopt a purposive interpretation.⁵⁸

9.27 In Hong Kong, despite the enactment of section 19 of the Interpretation and General Clauses Ordinance, the judiciary do not seem to have allowed this provision to influence their style of interpretation.⁵⁹ There are exceptions. In *Robert H P Fung v First Pacific Bank Ltd*⁶⁰ the Court of Appeal, having noted section 19, read words into the Ordinance, where there was an obvious drafting error, and where there was certainty as to what the

⁵¹ *Supra* at paragraph 33. In fact they referred, at this juncture, to section 19 of the Ghana Interpretation Act 1960 which did set out some extrinsic aids.

⁵² "Interpretation of Legislation: A New Zealand Perspective" 9th Commonwealth Law Conference, April 1990.

⁵³ Report No 17, *op cit* at clause 9 of the draft Interpretation Act 1991.

⁵⁴ Report No 27, December 1993. See Commonwealth Law Bulletin, January 1994 at 202 for a summary. At paragraph 26.

⁵⁵ At paragraph 27.

⁵⁶ Zander, *supra*, at 170-1.

⁵⁷ [1992] 3 WLR 1032, 1040 D.

⁵⁸ See chapter 8 further. The Commonwealth of Australia enacted section 15AA of the Acts Interpretation Act 1901, in 1981. It was not until 1984 that section 15AB was enacted dealing with extrinsic aids.

⁵⁹ See chapter 4 further.

⁶⁰ [1989] 2 HKLR 614.

additional words should be, in order to prevent an absurd result which would defeat the plain intention of the Legislature.⁶¹

9.28 In a more recent judgment, *The Queen v Soo Fat-ho*,⁶² the Court of Appeal decided that "the special presumption in favour of a strict interpretation of penal statutes is displaced by section 19 of the Interpretation and General Clauses Ordinance Cap 1." The Court of Appeal noted that section 19 is "all too frequently conveniently ignored. Like all legislation, however, it represents the will of the legislature and, as such, must be given full recognition and effect by the courts."⁶³

Explanatory memoranda

9.29 The explanatory memoranda of Hong Kong Bills⁶⁴ are not very detailed. The only requirement is that they should state the contents and objects in non-technical language.⁶⁵ Originally they were called "objects and reasons" and they had set out more of the policy behind the bill than is now contained in the explanatory memoranda. They are drafted by the Law Draftsman, unlike the United Kingdom, where they are drafted by the civil servants. Hong Kong courts have referred to them as extrinsic aids, in contrast to the position in England.⁶⁶

9.30 The Commission considered that the United Kingdom Law Commissions note on descriptive, motivating and expounding texts⁶⁷ is useful in deciding what type of explanatory material should be attached to a Bill. Government departments should also bear in mind the helpful criteria of credibility, contemporaneity, proximity, and context.⁶⁸

9.31 The Commission considered whether an explanatory memorandum should be issued for amendments at the committee stage. This would implement a Renton Committee recommendation that the practice should be developed of making available notes on clauses and similar additional explanatory material at Committee stage debates.⁶⁹ **The Commission concluded that it would not be necessary to deflect resources to prepare such a memorandum for all amendments.** An authoritative memorandum with the Bill at the initial stages would be sufficient.

9.32 However, it would be of considerable assistance, to have an explanatory memorandum for amendments of complicated and sensitive Bills.

⁶¹ They followed *Jones v Wrotham Park Estates* [1980] AC 74.

⁶² [1992] 2 HKCLR 114.

⁶³ At 120. The court stated that the principle that penal statutes must receive a strict interpretation emanates from England, where there is no equivalent of section 19.

⁶⁴ 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.

⁶⁵ Order 38(6) of the Standing Orders of Legislative Council.

⁶⁶ *Elson-Vernon Knitters Ltd v Sino-Indo-American Spinners Ltd*, [1972] HKLR 468. *R v Cheng Chung-wai* [1980] HKLR 593. However, these were references to the "objects and reasons", rather than the more modern technical explanatory memoranda. See chapters 2 and 4.18.

⁶⁷ See 7.9 *supra*.

⁶⁸ See 7.97 *supra*.

⁶⁹ Paragraph 15.10 of the report, *supra*.

Therefore, the Commission **recommends that an explanatory memorandum be issued for amendments at the committee stage of complicated and sensitive Bills.**

9.33 The Commission also considered whether an ordinance should incorporate a final version of an explanatory memorandum, revised to reflect all amendments passed. However, it concluded that this was unrealistic.

9.34 **The Commission does not recommend that an ordinance should incorporate a final version of an explanatory memorandum, revised to reflect all amendments passed.**

Specially prepared explanatory memoranda

9.35 The Commission gave serious consideration to whether a specially prepared explanatory memorandum,⁷⁰ which included the background, object and purposes of legislation and which was amended to reflect changes as the Bill went through the Legislative Council, should be recommended. This would be a post enactment explanatory memorandum.⁷¹ It could expand the objects and reasons format of the old explanatory document which was very useful. Such a memorandum might avoid the need to consult *Hansard*, though if in a particular case it did not assist, *Pepper v Hart* could be relied on.

9.36 However, there would be disadvantages in relying on such an explanatory memorandum. It would be prepared by the executive (although one option would be to require its approval by Legislative Council); it might well suffer from the same lack of comprehensibility as the ordinance; it might deflect attention from the ordinance itself; and there may be inconsistency between the purpose set out therein and what was achieved in the ordinance. It would be more useful to have longer objects and reasons set out in the existing explanatory memorandum.

9.37 **The Commission has therefore decided not to recommend the introduction of specially prepared explanatory memoranda.**

The Parliamentary process

The United Kingdom

9.38 The judges have sometimes focused the blame on the draftsman, rather than breach the constitutional convention of not criticising the Parliamentary process. However, other bodies have placed the responsibility on the parliamentary process itself. The Renton Committee

⁷⁰ See *supra*, at 7.8 *et seq.*

⁷¹ This could be as an alternative to legislation along the lines of section 15AB of the Acts Interpretation Act 1901. See chapter 11 further.

indicated that little could be done to improve the quality of legislation unless those concerned in the process were willing to:

"... modify some of their most cherished habits. We have particularly in mind the tendency of all Governments to rush too much weighty legislation through Parliament in too short a time, with or without the connivance of Parliament, and the inclination of Members of Parliament to press for too much detail in Bills."

9.39 Sir George Engle, First Parliamentary Counsel, criticised Governments for continuing to overload the Parliamentary process because they commit themselves to an unduly heavy legislative programme.⁷² However, he valued the use of more pre-legislative consultation, by way of White and Green Papers.⁷³ He also found that the practice in England of a set of Notes on Clauses being given to members of Parliament has assisted their understanding, and has thus reduced the time spent in committee explaining the Bill or amendments.⁷⁴

9.40 Sacks suggested that the parliamentary process failed to scrutinise legislation as it went through Parliament. She called for a new procedure which would reveal drafting defects and obscurely worded clauses. Sacks referred to the French system in her article:⁷⁵

"All drafts of new laws are presented to the Conseil d'Etat which appoints a rapporteur to consider them. The rapporteur studies the text from all points of view - including whether the words used are sufficiently precise so as to avoid problems of interpretation. They will, in general, look into the legal and administrative implications as well as the correctness of the language used. To some extent this work can be compared to that done by the Joint Committee on Statutory Instruments."

9.41 The United Kingdom Commissions Report acknowledged that the existing legislative procedures were not well adapted for the use of Parliamentary material because of the absence of committee reports of the kind which were found in countries such as Germany and Sweden.⁷⁶

9.42 Concern has been frequently expressed about the legislative process in the United States, and the use of extrinsic aids in its courts. Corry, in a strongly worded comment on the American legislative process, stated that the process of enacting legislation is "... an essay in persuasion or perhaps almost seduction", and that "to appeal from the carefully pondered

⁷² "The Legislative Process Today", 8th Commonwealth Law Conference, (1986).

⁷³ This can include interested professional and other groups who may specialise in the particular area that the Government is legislating on.

⁷⁴ In Hong Kong there are Legislative Council Briefs, for the assistance of members. See *infra*, under "Legislative procedures, Hong Kong".

⁷⁵ *Op cit* at 157.

⁷⁶ *Op cit* at paragraph 59 of the Final Report.

terms of the statute to the hurly-burly of Parliamentary debate is to appeal from Philip sober to Philip drunk".⁷⁷

9.43 Jenkins, Second Parliamentary Counsel, concluded from his analysis of the impact of *Pepper v Hart* on drafting, that it was potentially helpful, as it would make it easier to resist requests to put unnecessary detail in a Bill. It would not result in a marked change in the way a draftsman does his work. There was a risk of Ministers making law, by filling in gaps where legislation was drafted by way of general principles. But this was not the way legislation was drafted in the United Kingdom.⁷⁸ As regards the repercussions in Parliament, it was "likely to mean that more statements are made with the possibility of litigation in mind".

9.44 The Hansard Commission on the Legislative Process made 111 conclusions and recommendations in their recent report.⁷⁹ They, 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.⁸⁰ They suggested that the greater use of draft texts and Green Papers would achieve a much wider consultation with the proposed users. The style of drafting should take account of the principal proposed users of a particular Bill. They suggested that there should be more extensive use of committees. They also recommended that the courts should be allowed to make use of explanatory notes on sections of Acts and statutory instruments.⁸¹ Rush suggested that the implementation of their proposals will require some financial investment but an even greater investment in changed attitudes if better law is going to be produced.⁸²

9.45 **The Commission rejected the proposal by the *Hansard* Commission on the Legislative Process⁸³ of providing notes on sections⁸⁴ as being inappropriate to Hong Kong.**

9.46 There can be a fine balance in the use of *Hansard* for the purpose of ascertaining the Parliamentary intention. If sufficient guidelines for the use of *Hansard* are not laid down, either in legislation or by case law, then the integrity of the Parliamentary process itself can be damaged. The report of the United Kingdom Commissions drew attention to this danger, by suggesting that evidence of Parliamentary intention could be "deliberately manufactured during the legislative process by those with an axe to grind".⁸⁵

⁷⁷ "The Use of Legislative History in the Interpretation of Statutes", (1954) 32 Can. Bar Rev. 624, 632.

⁷⁸ It is interesting that he gave a Bill of Rights as an example of legislation by general principle. (At 29).

⁷⁹ "Making the Law: The Report of the Hansard Society Commission on the Legislative Process" (1993).

⁸⁰ *Ibid* at paragraph 7.

⁸¹ See chapter 7.38 further.

⁸² "Making Better Law: A Review of the Hansard Society Commission on the Legislative Process" 14 Stat LR 75, 83. (1993) It gives a good summary of the report.

⁸³ See *supra*, at 7.37 and 9.44.

⁸⁴ 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.

⁸⁵ Paragraph 56 *op cit*. It referred to an American commentator, Curtis "A Better Theory of Legal Interpretation" (1949) *The Record of the Association of the Bar of the City of New York* 321, 328.

In that regard, Jenkins, Second Parliamentary Counsel,⁸⁶ doubted that government would deliberately create ambiguity in their statements to Parliament. They had nothing to gain from this approach. However, where legislation was framed in general principles Jenkins speculated that a Minister might use the opportunity in Parliament to explain such principles in advance, thus pre-empting the courts.

9.47 The legislative process has to be understood by the judiciary before they can assess the reliability and the weight to be given to *Hansard*. However, the Law Commissions did note that courts become accustomed to the legislative process and thus can assess the relative weight of different kinds of legislative materials.⁸⁷ Burrowes took the view that in all of the New Zealand cases, statements of parliamentary history have been used, "simply to *confirm* an interpretation supported by other factors in the *wording* and *context* of the statute".⁸⁸

9.48 Lord Hailsham, in *McIntyre v Armitage Shanks Ltd*,⁸⁹ did not share Lord Avonside's ironic suggestion that the court should have a procedure, to ask the promoter of a Bill to explain what was his understanding of certain clauses in a Bill. Instead, Lord Hailsham suggested that a draftsman should be attached to "committees or commissions charged with proposing technical alterations in the law". Then the report of such a committee could include a detailed draft bill which had been scrutinised by the members of that committee.

9.49 Lord Browne-Wilkinson in *Pepper v Hart*⁹⁰ warned that experience in the United States "shows how important it is to maintain strict control over the use of such material." It is unlikely that changes in the use of extrinsic materials will lead to abuse of the integrity of the legislative and judicial process in Hong Kong, as these systems are so different to the United States. Indeed, Lord Browne-Wilkinson commented that there was no evidence of complaints from New Zealand or Australia, arising out of their relaxation of the rule. He approved of the extent to which they had relaxed it.⁹¹

Hong Kong

9.50 The legislative procedures are set out in Standing Orders of the Legislative Council of Hong Kong.⁹² Part K deals with the procedure on Bills. Order 38(3) provides that "the bill shall be given a long title setting out the purposes of the bill in general terms." Order 38(6) provides that an

⁸⁶ "Pepper v Hart : A Draftsman's Perspective" 15 Stat LR 23 at 28-29 (1994).

⁸⁷ Paragraph 57 of the Final Report, *supra*. They referred to the distinction between the speeches of the promoter of the Bill and speeches in the general debate.

⁸⁸ "Interpretation of Legislation: a New Zealand perspective", 9th Commonwealth Law Conference, April 1990.

⁸⁹ [1980] SLT 112, at 117.

⁹⁰ [1992] 3 WLR 1032, 1059A.

⁹¹ *Idem*.

⁹² These are available in App. 1, p. C1, Issue 8 of the Laws of Hong Kong.

explanatory memorandum shall be attached to the Bill. The First Reading is merely a formal reading of the title of the Bill, and then it is deemed that the bill is set down for Second Reading.⁹³ The relevant policy Secretary makes a speech explaining briefly the main issues in the Bill, and then the debate is adjourned. The Bill is referred to the House Committee, unless the Council otherwise orders.⁹⁴

9.51 The House Committee may allocate the bill to a Bills Committee for consideration.⁹⁵ Order 60D(6) provides that "A Bills Committee shall consider the general merits and principles and the detailed provisions, of the bill allocated to it; and may also consider any amendments relevant to it". The implications and the practical consequences of a Bill are discussed on an ad hoc basis by the committee. The minutes of the meetings of the Bills Committee are not published in *Hansard*, though the record is regarded as public, and is available on request. Meetings of the Bills Committee are open to the media and the public to attend. The Bills Committee advises the House Committee of the result of its deliberations on the Bill.⁹⁶ Indeed, there is no reference to their minutes in the Standing Orders, except to their "deliberations".⁹⁷ These deliberations are not binding and are not referred to as a report.⁹⁸

9.52 In contrast, reports of other committees are referred to in Orders 60A(5A), 60E(14) and 62(10). In theory, the House Committee may only discuss any deliberations of a Bills Committee "for the purpose of assisting members in preparation for resumption of second reading debate in the Council".⁹⁹ In practice, recommendations for changes in the Bill can be made by the Bills Committee to the House Committee.

9.53 The Second Reading debate is resumed, after notice given by the Member in charge of the bill, and after consultation with the chairman of the House Committee.¹⁰⁰ The speech on the resumption of the Second Reading by the Policy Secretary may throw light on the policy of the Bill and deal with the deliberations of the Bills Committee. The debate may cover the general merits and principles of the Bill.¹⁰¹

9.54 When the motion for the Second Reading is agreed to, the Bill is committed to a committee of the whole Council, or a select committee.¹⁰² Order 44 provides that any such committee shall only discuss the details of the Bill, but not its principles. It also has power to make amendments,

⁹³ Order 41(3).
⁹⁴ Order 42(3)(A).
⁹⁵ Order 60C(3).
⁹⁶ Order 60D(8).
⁹⁷ Order 60D(8 and 9).

⁹⁸ Order 60D(9).

⁹⁹ Order 60C(8).

¹⁰⁰ Order 42(3B).

¹⁰¹ Order 42(3).

¹⁰² Order 43(1). In practice, a select committee is rarely established. It is more suitable to a situation where a bill would specially affect some particular person or association. See Order 43(1)(b).

provided that the amendments are relevant to the subject matter of the bill.¹⁰³ In the Bills Committee efforts are made to reach a consensus between the Administration and the Members on the nature of the amendments.

9.55 If agreement has been reached on the amendments at that stage, then the Committee stage will be dealt with more quickly, with a formal voting on them. In any event, the policy Secretary will make a speech introducing and explaining the amendments. If there are substantial amendments, then the Law Draftsman may prepare a consolidated version of the Bill. This will make the Bill easier to read and assist the Members in seeing what the final version will look like in the event of the amendments being passed. There are guidelines on amendments, which assist in maintaining the scheme of the bill, such as ensuring that the amendment is not inconsistent with any other clause, or making the existing clause "unintelligible or ungrammatical".¹⁰⁴

9.56 The policy Secretary may sum up the result of the deliberations of the Council at the conclusion of the Committee Stage. When the proceedings on the Bill have been concluded in committee, the Bill is reported to the Council, and the Council is then deemed to have ordered it to be set down for a Third Reading.¹⁰⁵ The Third Reading will incorporate the amendments agreed to by the Council. Any debate at the Third Reading is confined to the contents of the Bill and no amendments of a material character can be taken at that stage.¹⁰⁶ Then when the Third Reading has been agreed to, the Bill is, in effect, passed by the Legislative Council.¹⁰⁷ The Bill is then submitted to the Governor for his assent.¹⁰⁸

Applicability of Pepper v Hart to Hong Kong

9.57 The question arises as to whether *Pepper v Hart* applies to the Legislative Council and, if so, in what way and to what extent. The relevant limb of the criteria in *Pepper v Hart* is "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."¹⁰⁹ Hong Kong does not have a ministerial system. However, the criteria also states "promoter" of the Bill. The policy Secretary, or in certain circumstances the Attorney General, would be seen as the equivalent in Hong Kong. Indeed, in *Matheson PFC Limited v Jansen*¹¹⁰ Penlington J regarded a statement in the explanatory memorandum by the Attorney General as "a clear statement from the equivalent of a Minister...". In *Attorney General v Pham Si Dung*,¹¹¹ the court

¹⁰³ Order 44(2), and Order 45(4)(a).

¹⁰⁴ Order 45(4) (b) and (c) respectively.

¹⁰⁵ Order 47.

¹⁰⁶ Order 51. However there is provision for correction of errors or oversights.

¹⁰⁷ Order 51.

¹⁰⁸ Order 53.

¹⁰⁹ [1992] 3 WLR 1032, 1033. This is from the headnote.

¹¹⁰ (1994) Civil Appeal No. 72 of 1994, (CA) 26 July 1994.

¹¹¹ (1993), High Court, MP No. 3111 of 1993, 6 September 1993. Deputy Judge Yeung.

looked at the second reading speech of the Secretary for Security.¹¹² Thus, the courts have already applied the criteria of *Pepper v Hart*, albeit in a small number of cases, despite the different legislative process to the United Kingdom. Only in *Ngan Chor Ying v Year Trend Development Ltd*¹¹³ was a reservation expressed about the different legislative process by Findlay J.

9.58 A question then arises whether statements by promoters, or their representatives, made in a Bills Committee come within the criteria of *Pepper v Hart*. If the statement was clear, and complied with the other two limbs of the criteria, then, in principle, a court could exercise its discretion to rely on the statement. However, it is unlikely that spontaneous responses made by a promoter or his representatives, to questions put to them in a Bills Committee, would be seen as sufficiently clear, or of sufficient weight to fall within the criteria. The other difficulty is that statements made in Bills Committees are not recorded verbatim, and it is up to those who attended the sessions to correct the minutes of the Committee so as to ensure that it is an accurate record. In any event, such Committee records, though they are an official record are not included in *Hansard*.

9.59 Some light can be thrown on this point by the judgment in *Doncaster BC v Secretary of State for the Environment*.¹¹⁴ The Court of Appeal accepted that the extract satisfied the first and second limb. However, it refused to accept *extempore* remarks made by the Minister where he made an assumption about the impact of the section. The Minister would not have had the opportunity of clarifying the legal implications of his remarks. In contrast, the Employment Appeals Tribunal, in *Sunderland Polytechnic v Evans*,¹¹⁵ did make reference to the statement by an Under Secretary to a Standing Committee which explained the relevant section.

9.60 Though the Hong Kong courts have not been addressed on the minutes of Bills Committees it would seem that the courts have indirectly allowed in some information about their deliberations through the speeches of the Chairman or member of these Committees on the resumption of the debate on the Second Reading stage. In *Re Chung Tu Quan & Ors*,¹¹⁶ Keith J allowed counsel to address him on the speech of the Chairman of the Ad Hoc Committee, scrutinising the Bill which became the Immigration (Amendment) Ordinance 1991, on the resumed second reading. However, Keith J did not rely on it as the amendments to the legislation "speak for themselves".¹¹⁷

9.61 In *L v C*¹¹⁸ Barnett J, *inter alia*, referred to a members report of the meetings of the Legislative Council's Ad Hoc Group on the reasons for proposed amendments to the particular Bill before him. Leonard J in *Real Estate Developers Association v Town Planning Board*¹¹⁹ referred to a

¹¹² For further judgments in Hong Kong which have applied the rule in *Pepper v Hart*, see chapter 6.

¹¹³ [1995] 1 HKC 605, 610. See *supra*.

¹¹⁴ 66 P&C R. 61. (1993)

¹¹⁵ [1993] ICR 392.

¹¹⁶ [1995] 1 HKC 566, 574.

¹¹⁷ At 574.

¹¹⁸ Unrep, 1993 MP No. 4167, 9 May 1994, High Court.

¹¹⁹ (1996) 6 HKPLR 179.

statement made in the Legislative Council by the Secretary of the Planning, Environment and Lands Branch indicating the Government's agreement to introduce a new bill at a later stage. It seemed to have been a speech on the resumption of the second stage, as he referred to an agreement with the Ad Hoc Group.

9.62 There is no doubt that the draftsman and legal advisers in Government may have to vet more closely documents or statements made in explanation of a Bill.¹²⁰ It may well be that discussions at Bills Committees may not be as frank or forthcoming, arising out of fear of statements being used in a subsequent court case. However, in practice, this does not seem to have happened. The statements made in the Bills Committee must be seen in the context of the exploratory or deliberative process that the committee are engaged in. It is also arguable that such statements could not be relied on to support a claim of legitimate expectation. So far, in England, the courts have rejected such purported reliance.¹²¹

9.63 The second part of the second limb of the criteria in *Pepper v Hart* refers to "such other Parliamentary material as was necessary to understand such statements and their effect". The question arises as to whether Legislative Council Briefs come within this definition. These briefs are prepared by the policy branch and forwarded to the Legislative Council when a Bill is introduced into the Legislative Council. These are prepared for the use of the Members of the Legislative Council, unlike the Notes on Clauses, which are briefing notes for the Minister. The Members may also seek the advice of, or clarification from, their legal advisers at the Legislative Council Secretariat. The briefs are regarded as accessible to the public since 1991. They are available in the Legislative Council library and copies can be made. There is no reason why these briefing notes cannot come within this part of the second limb of the criteria.

Status of government circulars

9.64 Any submissions by a government department to an official committee¹²² may come under the scrutiny of the courts and be regarded as falling under the second limb of *Pepper v Hart*. In *Pepper v Hart* the Law Lords scrutinised a press release. The House of Lords in that case paid particular reference to the assurances given by the Minister, and by civil servants. More attention needs to be paid to assurances given in such documents as briefing notes or press releases¹²³ as regards the consequences of a particular Bill to a particular identifiable class of persons.

¹²⁰ See remarks of Jenkins, "Pepper v Hart: A Draftsman's Perspective" 15 Stat LR 23 (1994). See further under "Practical implications" *infra*.

¹²¹ See *R v Secretary of State for the Home Department Ex p Sakala*, The Times, CA, 26.1.1994, and *R v Secretary of State for the Home Department, Ex p Mehari and ors*, LEXIS (QBD) 8 October 1993. Also see chapter 6. 112-6. 114.

¹²² *Wells v Police* [1987] 2 NZLR 560. See *supra*, at 7.57.

¹²³ See *supra*, at 9.63.

9.65 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. However, it may be that the judiciary will regard the common law criteria of *Pepper v Hart* as applying to such materials.

9.66 **The Commission recommends that government 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.**¹²⁴ This should ensure that the legal and factual accuracy of, and the accuracy of assurances given in, such documents would be vetted before they become public.¹²⁵

Subsidiary legislation

9.67 Subsidiary legislation is either laid on the table of the Legislative Council pursuant to section 34 of the Interpretation and General Clauses Ordinance, (Cap. 1) (the so called "negative resolution" measure) or dealt with under section 35 (the "positive resolution" measure). Legislative Council Briefs are always prepared by the Administration in respect of the first category but only occasionally in the case of the second category. In the case of a positive resolution a public officer will make a speech introducing the measure and explaining the reasons for it. In both cases, members can address the Council under Standing Order 14(4). The speeches are then recorded in *Hansard* and available to the public. There is no special Legislative Council record to deal with speeches concerning subsidiary legislation.

9.68 In New Zealand, where there is no statutory provision for extrinsic aids, the judiciary have relied on select committee reports,¹²⁶ and submissions made by the Justice Department to the Statute Revision Committee.¹²⁷ It seems from the judgment in *Wells v Police* that the reports of such committees do not form part of *Hansard*, yet they were relied on.

9.69 It does not seem possible for a disclaimer from the criteria in *Pepper v Hart* to be made by government representatives, to their statements before Bills Committees, or select committees.

¹²⁴ If it is for internal use then this briefing document should not itself come within the criteria
¹²⁵ See Jenkins, "Pepper v Hart: A Draftsman's Perspective", 15 Stat LR, No.1, 23, 25 (1994).
¹²⁶ *LD Nathan & Co Ltd v Hotel Association of New Zealand* [1986] 1 NZLR 385.
¹²⁷ *Wells v Police* [1987] 2 NZLR 560, 569.

Access to Parliamentary materials¹²⁸

Australia

9.70 The Discussion Paper prepared for Parliament by the Australian Government suggested that even though amendments to Bills might be available,¹²⁹ they would not be "'accessible' unless a special compilation of the legislative history that included them was freely available."¹³⁰

9.71 Brazil has stated that the presentation of the explanatory memorandum of a Bill at the conclusion of the Second Reading speech assisted in bringing the memorandum within the terms of section 7(1) of the Evidence Act 1905 (Cth). That section 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."¹³¹ There is no direct equivalent of the Australian section in Hong Kong.¹³²

9.72 Section 35 of the Evidence Ordinance provides that in civil proceedings the Gazette may be proved by the production thereof. Since Bills are gazetted, this section can be used if there is an objection to the admissibility of a Bill. But it would not cover reference to *Hansard*. If there is to be statutory provision for the use of extrinsic aids, for the removal of doubt, **the Commission recommend that a provision similar to section 7(1) of the Evidence Act 1905, such that extrinsic materials may be proved by the production thereof, ought to be inserted in the legislation.** This will facilitate the proof of *Hansard* in court. This is preferable to assuming the matter is covered by the common law.

9.73 In Australia, there is a practice of inserting the date of the Second Reading Speech in the Act. 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.¹³³

¹²⁸ The Australian discussion paper "Extrinsic Aids to Statutory Interpretation" (1982) *supra*, defines accessibility:- "This means that the material is not only publicly available but also readily available to the users of the Act, their advisers and all courts."

¹²⁹ In Votes & Proceedings of the House of Representatives and the Senate Journals.

¹³⁰ "Extrinsic Aids to Statutory Interpretation" 14 October 1982, 167. The author referred to the fact that there are such special compilations in the United States.

¹³¹ Brazil "Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials" (1988) 62 ALJ 510.

¹³² The only relevant Hong Kong provision is section 21 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) which provides that journals printed by order of Legislative Council can be admitted as evidence in an inquiry touching its privileges, immunities and powers.

¹³³ Paragraph 115 of the Report No 17, *op cit* at paragraph 37.

9.74 There are practical difficulties in implementing these recommendations in Hong Kong. The front page of the Laws of Hong Kong already contains the previous legislative history. If there were a number of amendments, the date could be inserted in the individual amending Ordinance. However, if it is combined into the looseleaf edition when enacted, especially when there was a long Ordinance with a lot of amendments, it may be confusing if more than the date of the Second Reading Speech was inserted. A compromise would be to insert the information in each ordinance as originally printed but to omit it in the revised edition.

9.75 The Commission conclude that the New Zealand proposals should be adopted in a modified form as follows: the date of the second reading speech should be inserted in each ordinance as originally printed but omitted from the revised edition.

9.76 There is an accepted practice in New Zealand of explanatory notes following a section. These brief notes of the legislative history appear in the Bill and are retained in the Act. Arising from this, the New Zealand Law Commission in their more recent report¹³⁴ thought it would be useful if there were 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). Sometimes material from the explanatory notes of the Bill might be usefully included in notes to the Act. Explanatory memoranda, whether included like this or not, could be expanded and made more useful.¹³⁵ The New Zealand Commission also suggested that if explanatory notes appeared after or alongside the relevant clauses,¹³⁶ they would be easier to use. This might make it less likely that the explanatory note would merely paraphrase a clause, but would instead explain its purpose and effect.¹³⁷

9.77 The Commission considered the suggestion of the New Zealand Law Commission of explanatory notes appearing after or alongside clauses but concluded that this was impractical for Hong Kong.

9.78 The Commission recommends that it would be useful in Hong Kong ordinances to provide cross references to other legislation, or to reports of law reform bodies, on which the ordinance is based. This should include legislation from other jurisdictions where that was the source of the Hong Kong provision.

9.79 The New Zealand Law Commission suggested that a brief summary of the Act's legislative history should appear at the very end and this could also include references to any relevant law reform publications.¹³⁸ The information could not just be inserted into the explanatory memorandum as it

¹³⁴ "The Format of Legislation", Report No. 27, December 1993, paragraph 33. See Commonwealth Law Bulletin, January 1994, at 202 for a useful summary.

¹³⁵ At paragraph 33.

¹³⁶ As appears in some New South Wales Bills, and in reports of the United Kingdom Law Commission, and the New Zealand Law Commission reports.

¹³⁷ At paragraph 42 of the report.

¹³⁸ "The Format of Legislation" report at paragraph 37.

is not part of the ordinance. **The Commission accept that where legislation implements a law reform report it should refer to any relevant law reform publications.**¹³⁹ **The Commission also recommends that legislation could include a reference to a law reform report from overseas where that was its source.**¹⁴⁰

9.80 The Commission considered that the most appropriate vehicle for this reference would be in a schedule. This would be similar to the Arbitration Ordinance (Cap 341),¹⁴¹ where a schedule of extrinsic materials was inserted which facilitates tracing the relevant documents. **The Commission concluded that it would be useful in complex legislation, legislation implementing a report of a law reform body, or legislation with an international element to refer to the extrinsic materials in a schedule.**

United Kingdom

9.81 The United Kingdom Law Commissions report did not give much attention to the difficulties with availability of Parliamentary materials, even though they made a recommendation in favour of specially prepared explanatory memoranda. They suggested that it was probable that "the burden on the lawyer and other users of statutes would be lightened by the inclusion in text-books of significant extracts from the legislative history of the statutes with which they deal."¹⁴² They also expected that reference systems and facilities would tend to be adapted and increased to meet the necessary demands. They noted that the availability of legislative material did not appear to present problems in European countries.

9.82 Bates outlined all the steps that a legal adviser must take in checking *Hansard*. This involves checking the opening and winding-up speeches at the Second Reading Stage, the discussion on the relevant section and proposed amendments at the Committee stage, the opening and winding-up speeches at the Report Stage, together with a similar search in the House of Lords. If a relevant statement is identified, then a further check needs to be done of subsequent Parliamentary proceedings to ensure that the statement has not been varied or withdrawn. It would also be necessary to ensure that there had been no subsequent amendment to the relevant section.¹⁴³

¹³⁹ This was done in the Sixth Schedule to the Arbitration Ordinance (Cap. 341).

¹⁴⁰ 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 *infra* at 10.38-39 and chapter 11.67 and 68.

¹⁴¹ Sixth Schedule. It also included a report of UNCITRAL and of the Secretary General.

¹⁴² Paragraph 60 of the Final Report, *supra*.

¹⁴³ "Parliamentary Material and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*" (1993) 14 Stat LR 46, 54.

9.83 Tunkel set out a useful guide on accessing *Hansard*. He also pointed out some deficiencies in accessibility.¹⁴⁴ He suggested starting research by looking at the *Current Law Statutes* version of the Act. This inserts the *Hansard* references to debates in the House of Commons and the House of Lords by volume and column number. Each volume has an individual index and there are separate sessional index volumes.

9.84 Standing Committee reports are important, as they deal with each clause in detail. However, it is only in the last few years that *Current Law Statutes* have been giving details of Standing Committee discussions. It is easier to access the committee stage, if that stage was taken by the whole House. The monthly or annual *Catalogue of Government Publications* makes reference to Standing Committees. This catalogue, under the heading of "Parliamentary publications – House of Commons debates", gives an alphabetical list of each Bill with the name of the committee, date of sitting and column references. There is also an index of subject matter.

9.85 *Current Law* does provide a monthly guide, under the heading "Progress of Bills", to debates on Bills during the current calendar year. This gives the dates of the various stages of the bills. Tunkel regretted that *Current Law Year Book* does not redeliver these details. However, the "Lawtel" service does have the information, but only back to the mid-1980s.

9.86 When the relevant standing committee has been identified by its designating letter with the dates of its sittings, then access can be made to the reports of the committee's discussions. These are contained in a separate committees' series of volumes "or more recent paper parts". Unfortunately, this series is not available in the usual research libraries. They are also not included in the CD-ROM edition of *Hansard*.

9.87 To understand what the Minister says in context, or what amendment is being dealt with at the standing committee, it may be necessary to have a copy of the Bill that is relevant to that stage. The HMSO catalogues give details of every Bill at each printing, listed in numerical order within each session and for each House. Tunkel states that "This numbering is helpful because there may be two or more similarly named Bills in a session. The number appears on the front page of the Bill itself and on each supplementary document."¹⁴⁵ If the letter 'a', 'b', etc, is added on to the Bill number, this shows that it is a printing only of add-ons and amendments for consideration. "Roman numerals indicate marshalled amendments. 'R' is used for a revised version of the Bill." If the Bill has been extensively revised then it may be given a new number.

9.88 For information on very recent Bills, access can be made to either *Current Law*, or *House of Commons Weekly Information Bulletin* or the

¹⁴⁴ "Research After *Pepper v Hart*" 90 Gazette No. 18, 12 May 1993. For Australia there is a useful guide to accessing Parliamentary material in Enright & Moore *Legal Research, Traditional Skills and Modern Techniques*, (1991). See also Campbell, Glasson, York & Sharpe *Legal Research Materials & Methods* (1988).

¹⁴⁵ *Ibid* at 18.

HMSO *Daily List*.¹⁴⁶ Tunkel recommended that HMSO should publish a list of all libraries that hold the complete set of *Hansards* for at least the post-war years. The Parliamentary libraries could publish a booklet for the guidance of lawyers. He continued:

*"Current Law Statutes could give fuller references, specifying the reading in each House and the standing committee. Current Law Year Book and Halsbury's Laws Annual Abridgment should give all the year's progress of Bills. Current Law Legislation Citator should give the pre-history of each Act, not just the date of royal assent. Halsbury's Statutes and Halsbury's Statutory Instruments should give Hansard and standing committee references with each Act and SI, and these should be added retrospectively to all modern Acts and SIs as the Halsbury sets come to be revised. ... For that matter, why can't Queen's Printer's copies of Acts and SIs themselves give the necessary background references, perhaps in a new schedule?"*¹⁴⁷

Tunkel concluded by asking that *Hansard* be included on *LEXIS*. In fact, *Hansard* is now officially available on the Internet for the session 1996-97. Bills from the summer of 1996 are also available on the Internet.

9.89 The increasing computerization of legislation can lead to greater accessibility of legislative materials. The Renton Committee, in 1975, recognised the value of computer technology as an aid to the draftsman, and the users of statutes.¹⁴⁸ It further recommended that the information retrieval system should include a historical file unless it proved prohibitively difficult and costly. It should be noted that when the Renton Committee and the United Kingdom Law Commissions objected to the admissibility of *Hansard*, the official report of parliamentary proceedings was only available in hard copy. Now it is available on CD-ROM from the 1988/89 sessions and "many sets of chambers and firms of solicitors will have access to it".¹⁴⁹ Lord Griffiths in *Pepper v Hart*¹⁵⁰ stated that "modern technology greatly facilitates the recall and display of material held centrally." He did not think it took long to recall and assemble the relevant passages.

9.90 The Hansard Society Commission on the Legislative Process recommended that public access to legislation should be improved. The Commission stated that this could partly be done by the Statute Law Database which was currently being prepared.¹⁵¹ They recommended that it should be made available to all interested organisations outside

¹⁴⁶ Tunkel also outlined the procedure for accessing statutory instruments, *supra* at 19. Anecdotal evidence suggests that the British *Hansard* is available in Hong Kong within a month of its publication.

¹⁴⁷ At 19.

¹⁴⁸ *Supra* at paragraph 16.

¹⁴⁹ D Miers "Taxing Perks and Interpreting Statutes; *Pepper v Hart*", 56 MLR 695, 705 (1993).

¹⁵⁰ [1992] 3 WLR 1032, 1040.

¹⁵¹ According to Rush, "Making Better Law: A Review of the Hansard Society Commission on the Legislative Process" 14 Stat LR 75, 80. (1993)

Parliament.¹⁵² They also suggested that the cost of using the database, and the cost of appropriate HMSO publications, should be subsidized,¹⁵³ and financial help should be given to bodies who incur significant extra expense in explaining new laws to the public.¹⁵⁴

9.91 The Commons Information Committee was reported as recommending that all parliamentary documents should be made available on the Internet without charge, "bringing this country into line with the US, Canada and Australia".¹⁵⁵ It was also reported that the statutory publications office, through the Statute Law Project, was looking at the possibility of using computers to update statutes rather than hand written amendments. The Commons Deregulation Committee had chastised government lawyers for illegible handwritten amendments.¹⁵⁶

Hong Kong

9.92 The Hong Kong Law Digest provides a list of Bills that have been presented to the Legislative Council, under the heading of "Legislative Council". There is also a Cumulative Index of legislation and subsidiary legislation, which gives the commencement/gazetted dates. It also gives paragraph numbers in that index which, when accessed, give a brief description of the sections and the date of assent and the date of coming into force of the legislation. There is also a separate Cumulative Index of amended legislation which also notes the repealed sections. This Index has a similar retrieval system to the Cumulative Index of legislation.

9.93 Law practitioners in Hong Kong should not be hampered by lack of accessibility to *Hansard*, because of the central location of law libraries and the Government Publications Office. However, one of the difficulties in accessing *Hansard* is that the index is approximately 18 months out of date. The priority is to finish indexing for the year 1995-96 though this leaves indexing for 1994-95 in arrears. However, the Legislative Council Annual Report does have an index of bills, with the dates of the first, second and third readings. Thus, the dates of the relevant speeches of the policy Secretary or members may be traced. The latest available copy of *Hansard* is between six to 12 months old. This delay is explained by the fact that there has been a shortage of translators and other staff, the draft of speeches have to be approved by the members themselves, and there have been difficulties with computerization. It has been possible to put part of *Hansard* for 1995-96 on the Internet due to a new computer system. This has not been possible for 1994-95 due to an older computer system. It is hoped that extra resources will continue to be provided to shorten the time delay in the availability of *Hansard* and to improve accessibility through the Internet and otherwise.

¹⁵² Paragraphs 454 and 455 of the Commission's Report.

¹⁵³ *Ibid* at paragraphs 456 and 458.

¹⁵⁴ Paragraph 474.

¹⁵⁵ "Government lawyers:'scruffy' statutes warning", Sol. J, 19 April 1996.

¹⁵⁶ *Idem*.

9.94 In Hong Kong, the Legal Department has developed the Bilingual Laws Information System (BLIS) which has computerized all Ordinances, Bills, and subsidiary legislation. There are some outside subscribers, such as government departments and private law firms, who are serviced under the name "Info-Law". BLIS and Info-Law also contain unreported and reported judgments. The Hong Kong Government decided in early 1996 that the best way to improve accessibility was to publish the ordinances on the Internet.¹⁵⁷ However, before this can be accomplished it is necessary to update Info-Law. It is hoped that the project, which will replace Info-Law, will be completed by the summer of 1997. It is a daunting task considering that there are 600 ordinances and almost 1,000 statutory instruments.¹⁵⁸

9.95 The Law Faculty of Hong Kong University have provided "Law-On-Line", which is on line access through a computer network service.¹⁵⁹ Hong Kong *Hansard* is now available from 1988 to March 1994. It is also hoped that eventually the current *Hansard* will be available. However, this is dependent on the approved version from the Legislative Council being available, which it is not, due to the difficulties already outlined.¹⁶⁰

9.96 Legislators have their own computer network called the "Legislative Council Business Information System" introduced in 1994. Through this they can access Legislative Council papers, reports on Bills, government information papers and Legislative Council records.¹⁶¹

Conclusion

9.97 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, and so that more detailed explanatory memoranda are prepared for complicated and sensitive Bills. Accessibility must also be improved by increasing the availability of *Hansard* and its index at the earliest possible time.

Practice Direction

9.98 It would seem from the small number of cases in Hong Kong that have used *Hansard* that there is a need to educate both branches of the profession and the Judiciary on the value of using *Hansard*. As more practitioners use *Hansard*, there may well be a demand to make statements in Bills Committees and Select Committees, or their reports, available in

¹⁵⁷ "Law in the Information Age", Hong Kong Lawyer, November 1996 at 38.

¹⁵⁸ "Legal gaps seen after handover", Eastern Express, 2 December 1995.

¹⁵⁹ There are corporate and commercial rates for the service. There are discount rates for individuals and certain groups.

¹⁶⁰ See *supra* at 9.92.

¹⁶¹ "Computers to smooth way for lawmakers" Eastern Express, 15 August 1994.

Hansard too. That is, if there is not a prohibition on using statements unless they are contained in *Hansard*.¹⁶² It should be noted that the English Practice Direction on *Hansard* extracts¹⁶³ specifically excludes production of any report of parliamentary proceedings other than the official report in *Hansard*. One disadvantage of including such statements in *Hansard* is that it may dampen open discussion by government representatives on the implications of a Bill. In any event, the outcome of the deliberations of Bills Committees, if it produces amendments, will appear in *Hansard* if the amendments are passed in the Legislative Council.

9.99 The recent English Practice Direction requires parties relying on statements in *Hansard* to serve copies of the relevant extract and a summary of the proposed argument on the other parties and the court.

9.100 **The Commission recommends that such a Practice Direction in Hong Kong would be worthy of support.**

9.101 **The Commission recommends that further consideration ought to be given by those involved more directly in the legislative process (the Law Draftsman, the Clerk of Councils and his legal advisers, the Director of Administration and other relevant bodies) to the type of explanatory legislative materials that are needed, their availability and the weight to be attached to them.**

¹⁶² This would be because of the unreliability of *ex tempore* comments in such committees which afterwards could be sought to be relied on in court.

¹⁶³ See Practice Direction (*Hansard*; Citation), Supreme Court [1995] 1 WLR 192.

Chapter 10

Collateral Matters

Introduction

10.1 This chapter will bring together some outstanding issues which need to be addressed before making our final recommendations. The issues include the impact of the Bill of Rights Ordinance (Cap 383), sources of law in Hong Kong, both pre-and post-1997, extrinsic aids and the post-1997 situation, precedent and *stare decisis*, and treaties.

The impact of the Bill of Rights on statutory interpretation

10.2 Section 3(1) of the Bill of Rights Ordinance "requires pre-existing legislation to be interpreted consistently with the Ordinance if the legislation admits of such a construction." Sub-section (2) provides that "if pre-existing legislation does not admit of such a construction, then it is repealed to the extent of the inconsistency." The courts have used international materials which have interpreted similar provisions to the Bill of Rights, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights. Indeed, the preamble indicates that it is intended to give effect to the rights recognised in the ICCPR.

10.3 Section 2(3) of the Ordinance gives authority to the courts to use such materials. It provides "In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong and for ancillary and connected matters." A Commentary on the Draft Bill of Rights Ordinance was published in March 1990 with the Bill. This could be in itself a source to assist in interpretation.

10.4 The Court of Appeal laid down some general principles for the interpretation of the Bill of Rights Ordinance in *Sin Yau ming*.¹ It decided that the Ordinance, viewed in the light of the accompanying amendment to the Letters Patent,² was a constitutional instrument and it should therefore be

¹ [1992] 1 HKPLR 88, at 105-106.

² Article VII(3) of the Letters Patent provides that no law shall be made after 8 June 1991 "that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is consistent with [the ICCPR] as applied to Hong Kong".

interpreted in a broad and generous manner.³ Silke VP, after quoting the preamble to the International Covenant on Civil and Political Rights, stated the approach of the courts to be:

"We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give 'full recognition and effect' to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred."

10.5 The Court of Appeal also gave guidance on the sources that could assist the courts in the judgment:

*"Considerable assistance could be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the United States), from the general comments and decisions of the Human Rights Committee under the ICCPR and the Optional Protocol to the ICCPR, and from the jurisprudence under the European Convention on Human Rights. While none of these were binding, in so far as they reflect the interpretation of articles in the ICCPR and are directly related to Hong Kong legislation, these sources are of the greatest assistance and should be given considerable weight."*⁴

10.6 Kempster J referred to Lord Diplock in *Quazi v Quazi*⁵ where he confirmed the principle that, where an Act was ambiguous⁶ or vague, the terms of the treaty could be looked at. The ambiguity or obscurity was to be resolved in favour of the meaning that was consistent with the provisions of the treaty.

³ In *Attorney General v David Chiu* [1992] 2 HKLR 84, at 111-2, Clough J A stated "this court should, in my opinion, construe the Hong Kong Letters Patent in a purposive manner as an organic basic constitutional instrument which was intended to be fleshed out by local legislation and given the flexible interpretation which changing circumstances require".

⁴ At 107-108.

⁵ [1980] AC 744, at 808. See further on treaties in chapter 2.54 *et seq* and chapter 10.51 under the heading of treaties.

⁶ Dr Rose D'Sa, in "The United Nations Convention on the Rights of the Child" Commonwealth Law Bulletin, (July 1993), 1274, 1280, stated that the English Courts have accepted that the European Convention and the ICCPR, which have not been given effect to in domestic legislation, are relevant where a statute is ambiguous (*R v Miah*, [1974] 1 WLR 683 (HL)), or where the common law is uncertain or ambiguous (*Attorney General v Guardian Newspapers* [1987] 1 WLR 1248 (HL)). She concluded her article by expressing the hope that *Pepper v Hart* would encourage judges in domestic proceedings involving children to refer to extrinsic material such as the texts of international instruments and the jurisprudence of international bodies on human rights law. Barnett J, in *L v C* (1994) H Ct, MP No. 4167 of 1993, noted that, in relation to children, the court had wide powers and should strive to give effect to the intent of the legislation and to the principles governing jurisdiction generally in relation to children. (at 11).

10.7 The English Court of Appeal recently held in *Saunders and Others*⁷ that "English courts can have recourse to the European Convention on Human Rights and decisions thereon by the European Court of Justice only when the law of England is ambiguous or unclear". Lord Taylor CJ noted that this issue had been taken by Saunders to the European Court. However, in *Saunders v United Kingdom*⁸ this point does not seem to have been discussed in the judgment of the European Court.

10.8 We have not been able to find any reference to a Hong Kong court refusing to look at human rights jurisprudence under the ICCPR or the European Convention on Human Rights on the basis that decisions can only be looked at where there is an ambiguity in any of their respective articles. However, there has been criticism of misguided attempts to use the BORO in irrelevant situations⁹ Leonard J criticised the fact that litigation was prolonged by optimistic submissions on the BORO.¹⁰ This should sound as a warning to practitioners not to abuse the relaxation of the exclusionary rules in *Pepper v Hart*.

10.9 Nazareth VP in *Cheung Ng Sheong Steven v Eastweek Publisher Ltd*¹¹ referred to the long title of the BORO¹² to justify interpreting the law to accord with treaty obligations applying to Hong Kong.¹³ In so doing, he relied on Lord Goff in *Attorney General v Guardian Newspapers (No 2) Ltd*¹⁴ who had conceived it to be "his duty to interpret the law in accordance with the obligations of the Crown under this treaty [the European Convention on Human Rights]".¹⁵

10.10 In *Kwan Kong Company Limited v Town Planning Board*,¹⁶ Waung J argued that the *Sin Yau-ming* judgment was not binding on the lower courts on the question of the interpretation of Articles in the Bill of Rights Ordinance. Instead:

"from the judgments of AG v Lee Kwong-kut¹⁷ and Ex Parte Lee Kwok-hung,¹⁸ I can detect the common law asserting its good sense requiring that proper interpretation of the human rights Articles in the Hong Kong Bill of Rights to be subjected to the common law rules of interpretation with its concentration on the text of the statute rather than by resorting to the complex, uncertain and huge volumes on foreign jurisprudence

⁷ [1996] 1 Cr. App. R. 463 at 477-8.

⁸ (Case 43/1994/490/572) December 17, 1996 reported in *The Times*, December 18, 1996.

⁹ *Kwan Kong Co Ltd v Town Planning Board* (1996) 6 HKPLR, Godfrey J at 259C.

¹⁰ *Real Estate Developers Association v Town Planning Board* (1996) 6 HKPLR 183 at 214-5.

¹¹ [1995] 3 HKC 601 at 610.

¹² This incorporated the ICCPR as applied to Hong Kong into Hong Kong law.

¹³ See 10.51 further on treaties.

¹⁴ [1990] 1 AC 109.

¹⁵ At 283-284.

¹⁶ [1995] 3 HKC 254.

¹⁷ [1993] 2 HKCLR186 (PC).

¹⁸ [1993] 2 HKLR 51, at 56. Litton J.A.

importing ... foreign concepts which run contrary to the normal meanings of words under a Hong Kong statute".¹⁹

10.11 On appeal, Litton VP called for a generous and purposive approach²⁰ which would give effect to the true intent, meaning and spirit of the ordinance. "Whether this is any different from the requirements of s19 of the Interpretation and General Clauses Ordinance (Cap 1) is academic: there the words used are 'fair, large and liberal construction'".²¹ Godfrey J preferred the word "generous" to a "purposive" approach to interpretation.²² Thus, the approach of Waung J to interpretation was rejected.

10.12 Leonard J in *Real Estate Developers Association v Town Planning Board*,²³ despite agreeing with a generous and purposive interpretation, warned that this did not permit a court to rewrite the Ordinance. "There is nothing new about giving a generous and purposive interpretation to Hong Kong legislation".²⁴ He then quoted section 19 of the Interpretation and General Clauses Ordinance (Cap 1). Leonard J did refer to a Government consultative document²⁵ and to a statement made in the Legislative Council by the Secretary of the Planning, Environment and Lands Branch indicating the government's agreement to introduce a new bill at a later stage.²⁶

10.13 In *R v Ng Po-lam*,²⁷ Deputy Judge Wong referred to an article in *Human Rights Quarterly*²⁸ which contained interpretative principles relating to limitations, as a guide to interpreting article 11(1) of the Bill of Rights Ordinance.²⁹ In *Auburnton Ltd v Town Planning Board*,³⁰ the High Court adopted a purposive interpretation to the scheme of town planning legislation, in a judicial review that included a challenge under the Ordinance.

10.14 The Bill of Rights Ordinance has also been interpreted restrictively. In a ruling in the District Court, in the case of *R v Yiu Chi-fung*,³¹ Judge Lugar-Mawson confined the ICCPR, as referred to in section 2(3) of the Bill of Rights Ordinance, to construction of the Bill of Rights Ordinance

¹⁹ *Op. cit.* at 290.

²⁰ These words were used by Lord Diplock in *Attorney General of Gambia v Jobe* [1984] AC 689 at 700H as being the appropriate method of interpreting a constitutional document. They were also adopted by Keith J in *Hong Kong Polytechnic University v Next Magazine Ltd* (1996) 6 HKPLR 117 at 121-2.

²¹ (1996) 6 HKPLR 237 at 253.

²² At 258. He relied on Lord Mustill in *Chan Chi Hung v The Queen* (1995) 5 HKPLR 1 at 11C who said: "Quite often the benefits of a 'purposive' approach are illusory, since the purpose which is used as a point of reference merely reflects the contention of one or other of the parties about what the words ought to mean".

²³ (1996) 6 HKPLR 179.

²⁴ *Ibid* at 210.

²⁵ "Comprehensive Review of the Town Planning Ordinance", Planning, Environment and Lands Branch, 1991.

²⁶ *Supra* at 197.

²⁷ [1991] 1 HKPLR 25, at 50.

²⁸ "Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR", (1985) 7 *Human Rights Quarterly* 3-14.

²⁹ Judge Wong described the *Siracusa Principles* as being a compendious statement of the position relating to permissible limitations on the ICCPR written by a group of international law experts.

³⁰ [1994] HKLD, D4.

³¹ [1991] 1 HKPLR 167, at 172, 178-9.

itself and not to any other Ordinance. He then referred to section 19 of the Interpretation and General Clauses Ordinance to guide him in interpreting section 17 of the Summary Offences Ordinance. In one of the few civil cases, *Tam Hing-yee v Wu Tai-wai*,³² the Court of Appeal held that the Bill of Rights Ordinance had no application to litigation between private individuals. Even though the Ordinance should be given a generous interpretation, the court held that it could not override the clear intention of the legislature. "This was so even though the inevitable result of this interpretation was that the Ordinance does not fully comply with the intention expressed in its preamble."³³

10.15 The Privy Council laid down guidelines for the interpretation of the Bill of Rights Ordinance in *Attorney General v Lee Kwong-kut*.³⁴ They agreed with the guidelines set out by the Court of Appeal in *R v Sin Yau-ming*.³⁵ In deciding what were the essential ingredients of the relevant offence, they stated that what would be decisive would be the substance and reality of the language creating the offence, rather than its form. They noted that decisions from other common law jurisdictions and international decisions could give valuable guidance for interpretation. However, these decisions were persuasive and not binding and the situation in those jurisdictions might not necessarily be identical to that in Hong Kong.³⁶ The Privy Council, *per curiam*, stated that "The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion."³⁷ They warned that questions of policy remained primarily the responsibility of the legislature.³⁸

10.16 In *Wong King Lung v Director of Immigration*,³⁹ Jones J refused to regard section 11 of the Bill of Rights Ordinance as being ambiguous. He interpreted it as being consistent with the aims and objects of the ICCPR as applied to Hong Kong. He was "quite satisfied that the legislature at the time when the Bill of Rights was debated never envisaged that these submissions would be advanced."⁴⁰ Martin Lee QC, for some of the applicants, had submitted that there was no evidence to suggest that the intention of the legislature in enacting section 11 was to ensure that decisions made under the Immigration Ordinance would not be affected by the BORO. "Indeed he said that it appears that the question in issue had not been considered by the

³² [1991] 1 HKPLR 261.

³³ At 266.

³⁴ [1993] 3 HKPLR 72, at 90-91.

³⁵ [1991] 1 HKPLR 88. That a generous and purposive construction be given.

³⁶ Lord Lester, QC, in Chan & Ghai, *The Hong Kong Bill of Rights: A Comparative Approach*, (1993) argued that construing an instrument which guarantees fundamental human rights and freedoms, in a generous and purposive way, meant that "using extrinsic aids ... where they will assist the courts in translating the values enshrined in the Bill of Rights into practical reality." (213) Lord Lester was the counsel for the tax-payer in *Pepper v Hart*.

³⁷ *Op cit* at 100. Downey J, in *Building Authority v Business Rights Ltd* [1993] HKLD 26, used this guidance to adopt a contextual interpretation of the relevant statute as a whole, rather than interpreting the relevant section in isolation.

³⁸ At 100.

³⁹ [1993] 1 HKC 461.

⁴⁰ At 477.

Legislative Council at the time when the BORO was debated and that the Immigration Ordinance was scarcely mentioned during the debates."⁴¹

10.17 The Court of Appeal used "realism and good sense" in interpreting section 11 of the Bill of Rights Ordinance in the case of *Hai HoTak (a minor) v AG; Wong Chung Hing & Others v Director of Immigration*.⁴² The court held that section 11 was not obscure or ambiguous and its meaning was clear. Mortimer J A stated that because section 11 limited the rights under the Bill, this made it necessary to interpret the section strictly in accordance with its plain meaning and effect. The judges were influenced by the reality of Hong Kong's necessary immigration policy. Nazareth J went so far as to say:

"Suffice to say that unless section 11 is ambiguous or obscure or leads to absurdity, it is to be given its ordinary or literal meaning."⁴³ In the absence of ambiguity or obscurity, it is neither necessary nor permissible to refer to matters extraneous to the Ordinance, like the terms of the Covenant or the Siracusa Principles."

10.18 Nazareth J also stated that, even if the meaning of section 11 had not been clear, he would have been driven to the same construction, by the purpose of the immigration legislation in Hong Kong. The court followed the guidance of the *Privy Council in AG of Hong Kong v Lee Kwong Kut* that:

"the court had to hold the balance between the individual and society as a whole, and maintain a sense of proportion in so doing. It should not impose unrealistic standards on the Hong Kong Government's attempts to resolve the difficult and intransigent problems that Hong Kong faced."

10.19 The High Court judgments which have relied on or mentioned *Hansard* have generally not referred to *Pepper v Hart* as being the justification for that reliance. In *L v C*,⁴⁴ Barnett J looked at the legislative history, including extracts from *Hansard* and a Law Reform Commission Report, to justify his decision, *inter alia*, that a time bar limiting the mother of an illegitimate child's application to court was discriminatory and inconsistent with the Bill of Rights. No mention was made of *Pepper v Hart* in the judgment, though we understand that it was referred to by the applicant's counsel. Neither was mention made of the judgment in *Tam Hing-yee v Wu Tai-wai*,⁴⁵ where the Court of Appeal said that the Bill of Rights was not

⁴¹ At 469.

⁴² [1994] HKLD, D1. This was the appeal from *Wong King Lung & Ors v Director of Immigration* [1993] 1 HKC 461, *supra*.

⁴³ This is in contrast to the Court of Appeal's decision in *The Queen v Lam Wan-kow and Yuen Chun-kong* [1992] 1 HKCLR 272, at 276-7, which adopted a Canadian principle that "a statute authorising an administrative body to exercise a discretion, may be a source of law capable of limiting Charter rights. Legislation which confers an imprecise discretion on a decision maker should be interpreted so as not to allow Charter rights to be infringed - *Slaight Communication Inc. v Davidson* (1989) 59 DLR (4th) 416.

⁴⁴ (1994) High Court, MP No. 4167 of 1993, 9 May 1994, Barnett J (in chambers).

⁴⁵ [1991] HKPLR 261.

applicable to inter-citizen disputes. The decision would seem to be *incuriam*.⁴⁶

10.20 In contrast, the Court of Appeal has referred to the *Pepper v Hart* rules even when they are not relying on *Hansard*. In a recent case,⁴⁷ Bokhary J decided that the reference to the meaning of "permanent residence" in article 21 of the Bill of Rights Bill, in the speech of the Chief Secretary when moving the second reading, was unclear. Since the other two limbs of the criteria in *Pepper v Hart* were not complied with, the Chief Secretary's speech was not relied on.

10.21 Lord Jauncey of Tullichettle in *Ming Pao Newspapers Ltd v A.G.*⁴⁸ noted that the Solicitor General had drawn the Privy Council's attention to what was decided in the discussion in the Legislative Council on an amendment to the Prevention of Bribery Ordinance (Cap 201). The position of the Legislative Council was endorsed as a sensible policy decision.⁴⁹

10.22 Byrnes⁵⁰ has stated that the courts, following on from the judgment in *Sin Yau-ming*, have been reasonably receptive to a wide range of material which counsel has placed before them. He noted that there has been less reference to the jurisprudence under the ICCPR itself, either in the *General comments* of the Human Rights Committee, or decisions under the First Optional Protocol to the ICCPR. This he attributed to, *inter alia*, the limited availability of this type of material, compared to Canadian cases or cases under the European Convention on Human Rights.

10.23 His analysis of the use of such extrinsic materials is of some guidance to what can be the difficulties with accessing legislative materials, or other extrinsic aids, as a consequence of the decision in *Pepper v Hart*. He stated that the performance of counsel has varied between fully researched materials, and cases where Bill of Rights points have been raised without detailed examination. In the latter cases, the point has usually been rejected by the court. He noted the extensive use made of detailed written submissions, particularly by the Crown.⁵¹ He also noted the difficulty that lawyers had in getting access to international materials, particularly in the early stages after the coming into force of the Bill of Rights Ordinance. Even though accessibility has improved,⁵² there is still a problem for lawyers and judges in researching international materials, which they are unused to, having been trained in a common law background.

⁴⁶ According to the Editor of the Bill of Rights Bulletin, vol 3, No. 2, October 1994.

⁴⁷ *The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service and the A.G.* unreported, CA No. 260 of 1995, November 22, 1996.

⁴⁸ (1996) 6 HKPLR 103 at 115.

⁴⁹ At 116.

⁵⁰ "The Impact of the Bill of Rights on Litigation", Law Lectures for Practitioners 1992, 151, 156.

⁵¹ This is usually included in skeleton arguments. Provision is made for this in 0.59 of the *Supreme Court Practice*, usually called *The White Book*, which is followed in Hong Kong as a guide to procedural practice in the High Court and Court of Appeal.

⁵² The University of Hong Kong Library, the Legal Department Library and the Supreme Court Library have collections of the basic materials.

10.24 Bill of Rights decisions are now more accessible,⁵³ but it remains difficult for practitioners to keep abreast of the decisions of the lower courts. Byrnes concluded that it is likely that empirical and sociological materials are likely to be used in the future. "In the United States, Canada and before the European Court considerable use is made of sociological material when courts are asked to consider whether a pressing social need exists or to determine whether a particular measure is a rational and proportionate one."

10.25 Nowak⁵⁴ has suggested that if the meaning of a certain provision of the ICCPR is ambiguous, then recourse should be made to the *travaux préparatoires*.⁵⁵ He also suggested that human rights norms are subject to the rules of interpretation laid down in articles 31 and 32 of the Vienna Convention on the Law of Treaties. It was these provisions that guided the drafting of the Australian legislation providing for extrinsic aids.⁵⁶

10.26 Chan⁵⁷ has warned that even though drafting history is a relevant consideration, it "is far from conclusive and could be displaced by other relevant considerations." The values underlying the particular article of the ICCPR need to be taken into account. The Vienna Convention on the Interpretation of Treaties refers to *travaux préparatoires* as being supplementary means of interpretation.⁵⁸ He also pointed out that there are many cases where the European Court of Human Rights, after considering the drafting history of the Convention, has "extended the protection of the treaty beyond the contemplation of the drafters as revealed by the drafting history."⁵⁹

10.27 Lord Lester referred to the fact that written submissions similar to the "Brandeis brief"⁶⁰ were used in the European Court of Human Rights in the *East African Asians'* case.⁶¹ This sort of information is usually filed by affidavit, even though the European Court has the power to receive evidence from expert witnesses. This information is also being used in judicial review cases in England, arising out of European Community law.

10.28 Chan and Ghai⁶² have stated that the Court of Appeal refused to look at *Hansard* in *R v Sin Yau Ming*.⁶³ The question was not fully argued,

⁵³ He referred to the Bill of Rights Bulletin and the Hong Kong Public Law Reports.

⁵⁴ Chapter 7 "Interpreting the Hong Kong Bill of Rights: Techniques and Principles", in Chan & Ghai *The Hong Kong Bill of Rights: A Comparative Approach*, (1993) 143, 156.

⁵⁵ He referred to M Bossuyt, *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights* (1987). Lord Mustill in *The Queen v Chan Chi-hung* [1995] 2 HKCLR 50 at 55 referred to the fact that no *travaux préparatoires* [sic] had been brought forward in argument concerning article 12(1) of the ICCPR.

⁵⁶ Section 15AA and 15AB of the Interpretation Act 1901 (Cth).

⁵⁷ "Corporations and the Bill of Rights" (1992) 22 HKLJ 270, at 274.

⁵⁸ Article 32.

⁵⁹ *Op cit* at 272. He referred to *Golder v UK* (1975) 1 EHRR 524.

⁶⁰ This is named after Louis Brandeis, who filed a brief referring to medical and social science data to show that long working hours could constitute a health risk to women. This was in a constitutional case, *Muller v Oregon* 208 US 412 (1908).

⁶¹ (1981) EHRR 76.

⁶² *Op cit* at 17.

⁶³ [1992] 1 HKPLR 88.

because they said that the Crown only sought to introduce *Hansard* at the very last stage of the hearing. However, the court did accept statistical evidence, on affidavit, of the drug consumption pattern in Hong Kong.

10.29 Even though there are lessons to be learnt from the experience of handling Bill of Rights cases, practitioners and judges adapted relatively quickly to accessing and understanding international materials. However, it would seem that only a small number of lawyers have familiarised themselves adequately with the materials. Generally, these are lawyers who specialise in criminal law and administrative law. *Hansard* has been used more in the High Court and particularly in judicial review and Bill of Rights cases.⁶⁴ In that sense, probably the same small number of lawyers will become familiar with accessing *Hansard* and relying on it in court.

Sources of law in Hong Kong : pre-1997 and post-1997

10.30 We must be clear as to what constitute the sources of Hong Kong law before we can decide whether it is appropriate that they can be used as extrinsic aids. Wesley Smith has categorised the sources as being imported and local. The former includes English primary legislation and subsidiary legislation; Letters Patent, Royal Instructions and Prerogative Orders in Council; and common law and equity.⁶⁵

10.31 The sources of the law will change after 1 July 1997. According to Zhou-wei,⁶⁶ the sources of the law will be:

*"(1) the Basic Law, (2) the laws previously in force in Hong Kong as provided for in BL8,⁶⁷ (3) the laws enacted by the legislature of the Region, (4) national laws listed in Annex III to the Basic Law, and (5) strictly limited decisions or orders declared by the Standing Committee of the National People's Congress (SCNPC)."*⁶⁸

Zhou-wei states that decisions previously made by English courts, which have been adopted by the courts of Hong Kong, will be authoritative if not contravening the Basic Law. The list of sources in Article 8 does not include laws which come from the United Kingdom (such as British statutes and

⁶⁴ Anecdotal evidence suggests that counsel are looking at *Hansard*, and making submissions on it, but the Judiciary, especially in the High Court, are not necessarily referring to it or relying on it when they give judgment.

⁶⁵ *An Introduction to the Hong Kong Legal System* (1987) 47.

⁶⁶ "The Sources of Law in the SAR" in *Hong Kong's Transition, Problems & Prospects* (1992) 79, at 82.

⁶⁷ Article 8 of the Basic Law states that "the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for those which contravene this Law or have been amended by the legislature of the Hong Kong Special Administrative Region." Article 172 states that the laws previously in force shall be adopted as laws of the SAR "except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law."

⁶⁸ This is according to article 18 of the Basic Law. See Wei, *op cit*, at 82.

subsidiary legislation which were applicable to Hong Kong), Letters Patent, Royal Instructions, and prerogative Orders in Council, etc.⁶⁹

10.32 Zhou-wei has suggested that implied sources of law will also play an important role in the legal system. He referred to the Constitution of the People's Republic of China, the interpretation of the Basic Law by the SCNPC, interpretation of the Basic Law by the courts of the SAR, and international treaties and covenants.⁷⁰ Article 84 of the Basic Law provides that the courts of the Special Administrative Region (SAR) may refer to precedents of other common law jurisdictions. "These precedents are not binding under the principle of *stare decisis* unless they are adopted into the decisions of the courts of the SAR."⁷¹

Extrinsic aids post-1997

10.33 There are significant differences between the systems of statutory interpretation in the PRC and Hong Kong. The PRC constitution empowers the SCNPC to "interpret laws".⁷² The latter can give a binding interpretation of a law at any time. They can directly add new contents to laws and decrees, by exercising their interpretative power. Article 19 of the Basic Law provides that the courts of the SAR have no jurisdiction over defence and foreign affairs. Article 158 of the Basic Law provides that the power of interpretation of the Basic Law is vested in the SCNPC. But the courts are given the power to interpret Basic Law provisions, when adjudicating cases. However Article 158 goes on to provide that, if the courts need to interpret provisions concerning affairs which are the responsibility of the Central People's Government, or the relationship between the Central Authorities and the Region, before making their final judgment they shall seek an interpretation from the SCNPC. The courts shall follow this interpretation.

10.34 Besides the SCNPC, the Supreme People's Court (SPC), and the Supreme People's Procuracy, have the power to provide interpretations of specific application of laws and decrees. Judicial interpretation takes the form of Announcements, Regulations, Official Opinions and Replies. Apart from these formal interpretative powers, there also is a form of informal interpretation, comprising comments on the law, and scholarly writings. Speeches made in the NPC sessions are referred to in the formal and informal interpretations of the law.

10.35 Unfortunately, Zhou-wei does not deal with the accessibility of the sources of law that originate in the PRC. Consideration needs to be given as to how the judiciary, lawyers and the public will gain access to such

⁶⁹ Wesley-Smith and Chen (edition) *The Basic Law and Hong Kong's Future*, (1988), at 174.

⁷⁰ *Hong Kong in transition, 1992* (1992), published by Hong Kong Institute of Asia-Pacific Studies Chinese University of Hong Kong.

⁷¹ *Op cit* at 82.

⁷² Article 67(4) of the Chinese Constitution (1982). See Wesley-Smith and Chen *The Basic Law and Hong Kong's Future* (1988), 130.

sources as SCNPC interpretations of the Basic Law, and indeed the extrinsic materials which would assist in understanding such sources.

10.36 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 a person who is suitably qualified can give expert evidence "as to the law of any country or territory outside Hong Kong ...".⁷³ It seems that this section will not be applicable after the 1st 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 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.⁷⁴ This may be an area that needs some further consideration.⁷⁵

10.37 The Law-On-Line service⁷⁶ now has the laws and regulations of the PRC currently in force between 1949 and June 1994 promulgated by national and local authorities. The database also contains judicial interpretation and cases from 1949.⁷⁷ It was reported that Law-On-Line had entered into an agreement with the Information Centre of the Legislative Affairs Bureau of the State Council of the PRC to provide regular updates of their regulations and laws.⁷⁸ It was also reported that a consultation service on the interpretation of legislation would be offered by the Legislative Affairs Bureau of the State Council through the Law-On-Line service. The Hong Kong Government plans to computerise its China Law Database by the summer of 1997.⁷⁹

Precedent and *stare decisis*⁸⁰

10.38 At this juncture, we have to consider whether or not the courts in Hong Kong consider themselves bound by the decision in *Pepper v Hart*, a House of Lords decision. The Privy Council, in *De Lasala v De Lasala*⁸¹ decided that where the wording of recent Hong Kong legislation was the same as that of its English equivalent, the Privy Council would treat a decision of the House of Lords as if it were binding on the Hong Kong courts.

⁷³ It is submitted that post-1997, this could not be interpreted to regard China as being "a country ... outside" Hong Kong.

⁷⁴ See *Li Jin-fei and Others v Director of Immigration* [1993] HKLR 256, at 264-5.

⁷⁵ 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.

⁷⁶ See further in chapter 9.94.

⁷⁷ "Laying the law on the line", Hong Kong Lawyer, May 1995 at 8.

⁷⁸ *Idem*.

⁷⁹ "Territory's legislation to get own Internet site". South China Morning Post, 3 October 1996.

⁸⁰ The doctrine of binding precedent. Wesley-Smith has argued that the doctrine is better treated as part of the practice of the courts, and is therefore not law. Thus it does not come within Article 8 of the Basic Law. Seminar on "Hong Kong Legal System and Constitution", 7 March 1992. See *infra*.

⁸¹ [1980] AC 546, at 557-8.

10.39 In contrast, decisions of the House of Lords on questions governed by the common law, as applied in Hong Kong by the Application of English Law Ordinance (Cap 88),⁸² were not *ipso facto* binding, although they were of great persuasive authority. This was because the Judicial Committee of the Privy Council shared a common membership with the Appellate Committee of the House of Lords. Thus, Lord Diplock continued in *De Lasala v De Lasala*:

*"this Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."*⁸³

10.40 In a later case, the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*⁸⁴ decided that once the applicable law is English,⁸⁵ the Privy Council will follow a decision of the House of Lords on the point in issue. However it was open to the Privy Council to depart from a House of Lords decision "in a case where, by reason of custom and statute or for other reasons peculiar to the jurisdiction where the matter in dispute arose the Judicial Committee is required to determine whether English law should or should not apply."⁸⁶

10.41 In *Chan Hing-cheung v R*,⁸⁷ the Court of Appeal stated that any relevant decision of the Privy Council was binding on Hong Kong, whether on appeal from Hong Kong or not.⁸⁸ In *R v Pang Shun Yee & Others*⁸⁹ the Court of Appeal held that decisions of the House of Lords in respect of the common law, should be treated as binding on all Hong Kong courts (including the Privy

⁸² Section 3 of the Application of English Law Ordinance (Cap 88) provides, *inter alia*, that "the common law and the rules of equity shall be in force in Hong Kong - (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants (b) subject to such modifications as such circumstances may require".

⁸³ *Op cit* at 558. This was recently relied on by Nazareth VP in *Cheung Ng Sheong Steven v Eastweek Publisher Ltd* [1995] 3 HKC 601 at 611 to justify Hong Kong courts not following the English practice of quantum in libel awards.

⁸⁴ [1986] 1 AC 80, 108.

⁸⁵ They did not make the distinction between the common law and recent legislation made in *De Lasala, supra*. The *Tai Hing* case concerned the common law.

⁸⁶ Wesley Smith in "The Effect of *De Lasala* in Hong Kong" (1986) 28 Malaya Law Review 50, at 58, interpreted the *Tai Hing* decision to be "If, therefore, on a matter of English law the Privy Council is bound by the House of Lords, and the Hong Kong courts are bound by the Privy Council, then House of Lords decisions on English law are strictly binding in Hong Kong." He concluded that it was difficult to reconcile the decision in *Tai Hing* with the decision in *De Lasala*. "*De Lasala* recognises no principle by which House of Lords decisions on the common law can be binding in Hong Kong whereas *Tai Hing* insists that such decisions strictly fetter even the Judicial Committee."

⁸⁷ [1974] HKLR 196, at 213.

⁸⁸ In a commentary on the judgment of *Chan Kai-lap v R, infra*, entitled "Pak Pais and Precedent" (1971) 1 HKLJ 80, the author referred to conflicting Privy Council dicta as to whether its decisions, which are not appeals from Hong Kong, should bind Hong Kong. The author argued that the House of Lords was not part of Hong Kong's hierarchy of courts.

⁸⁹ This is the headnote in [1988] 2 HKLY 252. The case is also reported at [1988] 2 HKLR 146, which does not so state.

Council)⁹⁰ unless local differentiating circumstances made it clearly inappropriate.⁹¹ In a more recent judgment, *R v Ng Kin Yee*,⁹² the Court of Appeal decided that a House of Lords judgment was binding on Hong Kong, in reliance on Lord Diplock's dictum in *De Lasala v De Lasala*.⁹³ No reference was made to the *Tai Hing* judgment.

10.42 The Privy Council in *De Lasala v De Lasala*⁹⁴ stated that "judgments of the English Court of Appeal on matters of English law where it is applicable in Hong Kong are persuasive authority only; they do not bind the Hong Kong Court of Appeal." This should be noted in analysing developments by the English Court of Appeal in the criteria laid down in *Pepper v Hart*.⁹⁵

10.43 If there is a conflict between a Hong Kong Court of Appeal decision and a House of Lords decision, then the latter will prevail where there are no local differentiating circumstances.⁹⁶ In *The Securities and Futures Commission v The Stock Exchange of Hong Kong Ltd.*,⁹⁷ Kaplan J, *per curiam*, stated that where there was a direct conflict between case authorities from England and those of Scotland, the English authorities must be followed. The common law of England did not include the law of Scotland, and there was nothing in the Application of English Law Ordinance (Cap 88) which required a different view.

10.44 The Court of Appeal have referred to *Pepper v Hart* in several cases, though the most extensive comments were made in *Hong Kong Racing Pigeon Association Limited v Attorney General and Anor.*⁹⁸ No argument was made in any of the cases that *Pepper v Hart* was not applicable to Hong Kong. However, in *Ngan Chor Ying v Year Trend*

⁹⁰ In *AG v Tsui Kwok-leung* [1991] 1 HKLR 40, at 46-7, the Court of Appeal, though accepting that they were bound as a general rule to follow the *ratio decidendi* of a decision of the Privy Council, decided that where two decisions of the Board conflict, and the later decision does not purport to overrule the earlier, the Hong Kong courts could choose which *ratio* they could follow. This was following *Eaton Baker v R* [1975] AC 774.

⁹¹ Relying on *De Lasala v De Lasala* [1980] AC 546 and the *Tai Hing* case *supra*. In *Her Majesty's AG in and for the UK v South China Morning Post Ltd & Others* [1987] HKLY 495, the Court of Appeal did not follow a House of Lords decision, as a factor relied on by the House did not apply to Hong Kong.

⁹² [1993] 2 HKC 148, at 156.

⁹³ [1980] AC 546, at 558. See *supra*.

⁹⁴ *Idem* at 557.

⁹⁵ In *Chan Kai-lap v The Queen* [1969] HKLR 463 the Court of Appeal refused to follow an English Court of Appeal decision. It went on to hold that the Full Court was bound by decisions of the Privy Council and of the House of Lords. In a criticism of the judgment, and section 3 of the Application of English Law Ordinance, the author (not stated) of a note "Application of English Law (Amendment) Ordinance, (No 58 of 1971)", (1972). HKLJ 115, at 120, suggested that the matter be put beyond doubt by enacting that decisions of the House of Lords shall not be binding on Hong Kong courts, and that decisions of the Privy Council only be binding when they are on appeal from Hong Kong or when expressed to be binding on all dependent territories.

⁹⁶ In *In re an application by Chun Yuet-bun for judicial review* [1988] 1 HKLR 336, Sears J refused to follow a Hong Kong Court of Appeal decision as it had been overtaken by a number of important decisions on judicial review in the House of Lords.

⁹⁷ [1992] 1 HKLR 135, at 142, 144.

⁹⁸ [1995] 2 HKC 201.

*Development Ltd*⁹⁹ a reservation was expressed about Hong Kong's different legislative process by Findlay J.

10.45 We also have to consider whether or not the courts in Hong Kong, when applying the common law after 1997, will consider themselves bound by the decision in *Pepper v Hart*. Wesley Smith¹⁰⁰ noted that there were two arguments in relation to whether the courts would be bound by decisions of the House of Lords after 1997. The argument in favour was that the common law¹⁰¹ would be maintained in Hong Kong.¹⁰² Article 8 of the Basic Law provides that the laws previously in force in Hong Kong, including the common law, shall be maintained. Under Annex I, section III of the *Sino-British Joint Declaration on the Question of Hong Kong* the courts are expressly permitted to refer to precedent in other common law jurisdictions.¹⁰³ Also, Article 84 of the Basic Law provides that the courts of the SAR may refer to precedents of other jurisdictions.

10.46 Wesley Smith noted that decisions of the House of Lords were still regarded as binding in some jurisdictions, even after national independence.¹⁰⁴ However, when appeals to the Privy Council in Canada and Australia were abolished, their courts did decline to be bound by both House of Lords and Privy Council decisions. Wesley Smith notes the argument that "It would seem anachronistic and politically anomalous for SAR courts to continue to be bound by decisions of institutions in the former imperial power."¹⁰⁵ Thus, 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.

Reports from foreign Law Commissions

10.47 A question arises as to whether courts in Hong Kong can inspect reports from Law Reform Commissions of other jurisdictions. In *Barker v The Queen*,¹⁰⁶ a case before the enactment of the Australian legislation providing for extrinsic aids, the court noted that reports of official Committees could be consulted and went on to say:

⁹⁹ [1995] 1 HKC 605, at 610. See *supra*.

¹⁰⁰ In a seminar on "Hong Kong Legal System and Constitution" 7 March 1992.

¹⁰¹ Wesley Smith in "The Reception of English Law in Hong Kong" (1988) 18 HKLJ 183, 188 stated that "The phrase 'the common law' is notoriously ambiguous, and is defined in neither (Cap 1) nor (Cap 88)." Kaplan J, in *The Securities and Future Commission v The Stock Exchange of Hong Kong Ltd*, *op cit* at 145, agreed with Bennion in *Statutory Interpretation*, at 257, that "the interpretative criteria laid down or adopted by the courts may (except where they are statutory) be regarded as part of the common law".

¹⁰² Article 8 of the Basic Law provides that the laws previously in force in Hong Kong, including the common law, shall be maintained.

¹⁰³ The Explanatory Notes section II of Annex I state that the law of the Hong Kong SAR "will remain, as now, capable of adapting to changing conditions and will be free to take account of developments of the common law elsewhere."

¹⁰⁴ In Australia, New Zealand, Canada and Guyana.

¹⁰⁵ *Op cit*, at the seminar, (p. 3 of the handout).

¹⁰⁶ [1983] 57 ALJR 426.

"Whether this proposition should be extended to embrace the reports of English committees in cases in which Australian legislation is based on United Kingdom legislation is another question. I am willing to assume, without deciding, that the question should be answered in the affirmative."

10.48 Beckman and Phang¹⁰⁷ suggested that the courts might hold that no records of English extrinsic materials should be admissible when interpreting English statutes which were applicable to Singapore, because of the difficulties of obtaining such materials.¹⁰⁸ This should also apply to Singapore statutes which are modelled on English statutes or those of another jurisdiction.

10.49 Therefore, there is some doubt as to whether it is appropriate for the Hong Kong courts to refer to official reports from other jurisdictions unless the reports deal with legislation on which the Hong Kong legislation was modelled. The Commission has already recommended that ordinances could include a reference to a law reform report from overseas where that was its source.¹⁰⁹

10.50 It follows that when statutory provision is made for extrinsic aids,¹¹⁰ then that legislation should provide that relevant reports of Law Reform Commissions from other jurisdictions, which incorporated draft Bills that were subsequently enacted and which formed the basis for the Hong Kong legislation, could be used as extrinsic aids. Another option would be that the explanatory memorandum of an ordinance include references to the relevant law commission report of the overseas jurisdiction on which the Bill was modelled and its *Hansard*. However, this would be of lesser weight as the explanatory memorandum does not form part of the ordinance as enacted.

Treaties

10.51 The common law has long held that international agreements are not justiciable in the ordinary courts of the land unless and until they have been given the force of law in implementing legislation.¹¹¹ In *The Home Restaurant Ltd v AG*¹¹² the High Court rejected the lessee's reliance on the Sino-British Joint Declaration, on the basis that the Joint Declaration, its Annexes and accompanying Government announcements were within the

¹⁰⁷ "Beyond *Pepper v Hart*: The Legislative Reform of Statutory Interpretation in Singapore" 15 Stat LR 69, 92. (1994).

¹⁰⁸ They said that this was less than satisfactory from a theoretical perspective.

¹⁰⁹ See chapter 9.78-9 and chapter 11.71 and 72.

¹¹⁰ See chapter 11 for recommendations on treaties.

¹¹¹ See "Notes of Cases, Joint Declaration" (1987) HKLJ 247, at 248. The author (name not stated) referred to *AG of Canada v AG of Ontario* [1937] AC 326, as authority for this statement. The Court of Appeal, in *Yin Xiang Jiang & Others v Director of Immigration* [1994] HKLD, G3, held that the Convention Relating to the Status of Stateless Persons did not entitle the family to remain in Hong Kong as it had not been incorporated into Hong Kong. They rejected a submission that Hong Kong's constitutional set-up was sufficiently different from the United Kingdom to allow the incorporation of the treaty into local law.

¹¹² [1987] HKLR 237.

realm of treaties, and as such were not justiciable¹¹³ in the courts of Hong Kong. We have also seen in chapter two that a reference can only be made to a convention in order to resolve ambiguities or obscurities of language where the terms of the legislation are not clear.¹¹⁴ In the P.R.C. international agreements or treaties are treated as having the force of law without the need to pass legislation to implement them.

10.52 Draft Clause 1(c) of the United Kingdom Law Commissions Report¹¹⁵ provides that reference may be made to:

"... 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".

10.53 The Renton Committee¹¹⁶ stated that Lord Denning regarded Draft Clause 1(1)(c) as consistent with the practice of the Court of Appeal. They recommended its adoption though some witnesses pointed out the following difficulties: (1) that there was no time limit to the word "relevant"; (2) the frequent inclusion in treaties (in order to resolve international differences of policy) of ambiguities which the draftsman of the Act may have been instructed to resolve in a certain way; and (3) the difficulty in which litigants and their advisers would be placed by the words "whether or not the United Kingdom were bound by it at the time". They concluded that "in spite of the objections ..., we think that clause 1(1)(c), with clause 2(b)¹¹⁷ provides a useful restatement of those judicial attitudes."¹¹⁸

10.54 Clause 2(b) provides: "that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not". The Commissions stated¹¹⁹ that there were advantages to incorporating these judicial statements¹²⁰ into statutory form to avoid the uncertainty caused by *Ellerman Lines v Murray*.¹²¹ They also discussed the rules of interpretation of international treaties. The Vienna Convention on the Law of Treaties had not yet been finalised.

¹¹³ Mayo J said, in *Li Jin-fei and Others v Director of Immigration* [1993] 2 HKLR 256, at 264-5, that "there was ample authority for the proposition that treaties are not justiciable in municipal courts unless they were incorporated into the law." - *Blackburn v AG* [1971] 1 WLR 1037.

¹¹⁴ *Saloman v Commissioners of Customs & Excise* [1967] 2 QB 116. See further chapter 2.54 *et seq.*

¹¹⁵ "The Interpretation of Statutes" (Law Com No 21) (Scot Law Com No 11) (1969).

¹¹⁶ "The Preparation of Legislation" (1975) at paragraph. 19.16. See chapter 7.

¹¹⁷ It provides "that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not".
¹¹⁸ *Op cit* at paragraph. 19.22. The judicial attitudes referred to were those which attached a high importance, in the construction of legislation, to the terms of treaties which may be relevant to the legislation.

¹¹⁹ *Supra* at paragraph. 75.

¹²⁰ This was a statutory expression of what Diplock L.J. said in *Salomon v Commissioners of Customs and Excise*, [1967] 2 QB 116, at 143.

¹²¹ [1931] AC 126. See chapter 2 54 *et al.*

10.55 The Renton Committee also recommended that any legislation intended to implement a treaty provision should contain a clear statement that it is so intended. It should also be made clear that in such a case the courts may, in construing English legislation, take into account the relevant provisions of the treaty to which the legislation is intended to give effect. This would be enacting the Commissions Draft Clause 1(1)(c) in a wider form.¹²²

10.56 Articles 31 and 32 of the Vienna Convention on the Law of Treaties incorporated the principles of customary international law which apply to the interpretation of treaties and conventions. These Articles can be regarded as applying to Hong Kong.¹²³ Article 31 provides:

- "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.*¹²⁴
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 connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection 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;*

¹²² Paragraph 19.39.

¹²³ This Convention was ratified by the United Kingdom in 1991. Though not specifically applied to Hong Kong, the provisions are nevertheless followed because they are seen as incorporating the principles of customary international law into a Convention. See *Fothergill v Monarch Airlines* [1980] 3 WLR 209.

¹²⁴ It is interesting that section 10B of the Interpretation and General Clauses Ordinance (Cap 1) states that where a comparison of the English and Chinese texts discloses a difference of meaning, which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the purpose and object of the Ordinance shall be adopted.

(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."*

10.57 Article 32 of the Vienna Convention of the Law of Treaties provides:

"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."

10.58 *Australian statutory provisions* It is known that Articles 31 and 32 of the Vienna Convention on the Law of Treaties inspired the drafting of sections 15AA and 15AB of the Acts Interpretation Act 1901, which respectively dealt with a purposive interpretation and extrinsic aids. Section 15AB(2)(d) of the Australian Acts Interpretation Act 1901 (Cth) provides that : "any treaty or other international agreement that is referred to in the Act", is an extrinsic aid.

10.59 Beckman and Phang¹²⁵ regarded this clause, which was incorporated into the Singapore legislation, as narrow, because domestic legislation may not always refer to the treaty it is implementing. They took the view that English case law provides for greater use of extrinsic aids than this provision. Therefore, they suggested that it might be advisable for the draftsman to use subsection (f)¹²⁶ to provide in a statute implementing a treaty that the treaty and its *travaux préparatoires* are relevant documents as extrinsic aids.¹²⁷

10.60 If the Renton Committee recommendations in their paragraph 19.39 dealt with above,¹²⁸ were adopted in drafting domestic legislation implementing international agreements or treaties, then the objections raised by Beckman and Phang, to the Australian section 15AB(2)(d) would have been met.¹²⁹

¹²⁵ *Supra*, at 87.

¹²⁶ The equivalent in section 15AB(2)(g) is "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;".

¹²⁷ This was done for the UNCITRAL Model Law in the Arbitration Ordinance (Cap 341).

¹²⁸ Paragraph 19.39. For text, see *supra* at 10.55.

¹²⁹ See chapter 11.92 for recommendations.

10.61 *Chinese language* Section 10B of the Interpretation and General Clauses Ordinance (Cap 1) provides that the English language text and the Chinese language text are equally authentic. Yeung J in a recent case¹³⁰ decided that the court was entitled to refer to the Chinese language text to assist it in construing the subsidiary legislation. The court had to consider whether both texts could be reconciled, and, if so, which interpretation best reconciled the difference in the two texts, having regard to the objects and purposes of the ordinance. He held that the English text was ambiguous and the Chinese text was clear and plain.

¹³⁰ [1996] 3 HKC 606.

Chapter 11

Conclusions and Recommendations

Introduction

11.1 This chapter will deal with the conclusions and recommendations of the Law Reform Commission on the use of extrinsic materials as an aid to statutory interpretation, having considered all the submissions placed before it by those it consulted. Part I will revisit the *Pepper v Hart* criteria and focus on whether they adequately address all the issues concerning the use of extrinsic materials. Part II will deal with all of the final recommendations of the Law Reform Commission.

Part I – Issues unresolved by *Pepper v Hart* or subsequent judicial developments

11.2 *Pepper v Hart* has changed the criteria for the admissibility of extrinsic aids for the interpretation of legislation, not only for *Hansard* but for other extrinsic aids such as official reports. However, 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 lead to more uncertainty and hinder the interpretation of legislation.

*First limb of Pepper v Hart*¹

11.3 This provides that parliamentary materials may be used where legislation was ambiguous or obscure or led to absurdity.² The United Kingdom Law Commissions' report³ focused on the relevance, reliability and availability of the extrinsic aids, rather than in what circumstances they could be used. In that sense, the Commissions' report does not help us in formulating any addition to the first limb. The Commissions recommended in draft clause 1(1) that, in order to ascertain the meaning, the matters which may be considered should include the materials that they listed in clause 1(1)(a)-(e).⁴ The only proviso was the weight, and the continuing exclusion of

¹ See *supra*, at 6.10-6.38.

² This is from the headnote to *Pepper v Hart* [1992] 3 WLR 1032, at 1033.

³ "The Interpretation of Statutes", (Law Com No 21) (Scot Law Com No 11) 1969. See *supra*, at 7.2-7.18 for further discussion.

⁴ These included official reports, treaties, other documents bearing upon the subject matter, which had been presented to Parliament (special explanatory memoranda), and documents listed in an Act as being relevant. See *supra*, at 7.17 for full text.

Hansard.⁵ There have been developments of the criteria under the first limb, as some judges have allowed extrinsic materials to confirm the meaning.⁶ This pattern has also been made manifest in New Zealand.⁷ Section 15AB(1)(a) of the Australian Acts Interpretation Act 1901 (Cth) allows extrinsic materials to be used to confirm the meaning.⁸ Singapore has made similar provision.⁹

Second limb of *Pepper v Hart*¹⁰

11.4 This provided that the material which could be referred to consisted of a statement by a minister, or promoter of a bill, "together if necessary with such other parliamentary material as was necessary to understand such statements and their effect".¹¹ It is clear that the judgments since *Pepper v Hart* have focused on speeches by the minister or promoter of the Bill. In *Chief Adjudication Officer v Foster*¹² and in *Botross v London Borough of Fulham*¹³ references were made to the movers of successful amendments in the House of Lords. Lord Browne-Wilkinson, in *Melluish v BMI (No. 3) Ltd*,¹⁴ emphasised that "the only materials which can properly be introduced are clear statements made by a minister or other promoter ... directed to the very point in question in the litigation". He warned that if there was misuse of the criteria there should be appropriate orders of wasted costs.

11.5 It could be said that the criteria for the use of the other parliamentary material (ie "to understand ministerial statements and their effect") is more restrictive than the United Kingdom Law Commissions' tests of relevance, reliability and availability.¹⁵ In Australia, second reading speeches are regarded as authoritative.¹⁶ This is assisted by a specific provision for such authority, though there is a separate provision for other relevant material.¹⁷ This, in itself, ensures that the text from *Hansard* that is relied on will be relevant, reliable and available. It is "relevant", as the Minister outlines the purpose of the legislation in the second reading speech or will explain amendments at the committee stage. It is "reliable", as one would expect a minister to have obtained legal advice before speaking. In this context, the courts did not rely on an *extempore* comment by a Minister in *Doncaster Borough Council v Secretary of State for the Environment*.¹⁸

⁵ Draft clause 1(2) and (3) respectively.

⁶ See *supra*, at 6.94-6.105.

⁷ See *supra*, at 7.50 *et seq.*

⁸ See *supra*, at 8.9 for full text.

⁹ See *supra*, at 8.75.

¹⁰ See *supra*, at 6.44-6.63.

¹¹ The headnote of *Pepper v Hart* at [1992] 3 WLR 1032, at 1033.

¹² [1993] 2 WLR 1.

¹³ (1995) 16 Cr App R (S) 622.

¹⁴ [1995] 3 WLR 631, at 645.

¹⁵ See 7.2-7.19 further.

¹⁶ See *Re Bolton: Ex p Beane* [1987] 162 CLR 514.

¹⁷ Section 15AB(2)(f) and (h) of the Acts Interpretation Act 1901(Cth). The Australian position is dealt with further in chapter 8.

¹⁸ 66 P & C. R. 61. See *supra*, at 6.77 for further discussion on this case.

11.6 The limits of the material falling within the criteria are not entirely clear. Explanatory memoranda, for instance, are strictly speaking parliamentary materials, but have not been raised in the English cases since *Pepper v Hart*. In Hong Kong there have been judgments pre-dating *Pepper v Hart* which used explanatory memoranda to assist a purposive interpretation.¹⁹ An explanatory memorandum has also been referred to since that judgment.²⁰

11.7 It is not clear whether speeches made outside the legislature by politicians or ministers could be relied on. The only authority is *Churchill Falls (Labrador) Corp v Newfoundland (Attorney General)*.²¹ In that case, the court held that it could consider a government pamphlet to show the true purpose of the legislation.

11.8 There has been little analysis in the various reports from the United Kingdom as to whether the criteria in *Pepper v Hart* should be used to include reports from, or speeches in, Standing Committees. There have been few judgments in the United Kingdom since *Pepper v Hart* that have covered speeches made in Standing Committees. It would seem in principle that statements made in such committees or their reports would be admissible if they meet the criteria. This seems consistent with the practice of other jurisdictions such as New Zealand and Canada.²²

11.9 The call for greater availability of parliamentary material such as Standing Committee debates has been left to commentators since the judgment in *Pepper v Hart*.²³ The criticism of lack of availability would also apply in Hong Kong to Bills Committee deliberations.²⁴ Their minutes are not recorded in *Hansard*. A question arises whether statements by promoters, or their representatives, made in a Bills Committee come within the criteria of *Pepper v Hart*. If the statement was clear, and complied with the other two limbs of the criteria, then, in principle, a court could exercise its discretion to rely on the statement. However, it is unlikely that spontaneous responses made by a promoter or his representatives to questions put to them in a Bills Committee, would be seen as sufficiently clear, or of sufficient weight, to fall within the criteria.

11.10 However, it would seem that speeches made at the resumed second stage of a Bill, when members of a Bills Committee have indicated the results of their deliberations, have been allowed to be referred to in some cases. In *Re Chung Tu Quan & Ors*,²⁵ Keith J referred to the speech of the Chairman of the Ad Hoc Committee. In *L v C*²⁶ Barnett J referred *inter alia* to a member's

¹⁹ See *supra*, at 2.41-2.47.

²⁰ *Matheson PFC Limited v Jansen* [1994] HKLD G56.

²¹ (1984) 8 DLR (4th) 1, at 18-20. See further on Canada *supra*, at 7.80 *et seq.*

²² This is also in accordance with section 15AB(2)(h) of the Acts Interpretation Act 1901 where material "in any official record of debates ..." is included.

²³ Tunkel, "Research after *Pepper v Hart*", Gazette, 90/18, 12 May 1993, and "*Pepper v Hart* and Parliamentary Standing Committee Debates" The Law Librarian, vol. 24, no. 3, September 1993, 141. See *supra*, at 9.82 *et seq.*

²⁴ See chapter 9.58.

²⁵ [1995] 1 HKC 566, at 574.

²⁶ Unrep, 1993 MP No. 4167, 9 May 1994, High Court.

report of the meetings of the Legislative Council's Ad Hoc Group on the reasons for proposed amendments to the particular Bill before him. Reference was made in *Real Estate Developers Association v Town Planning Board*²⁷ to a statement made in the Legislative Council by the policy Secretary which seemed to have been on the resumption of the second stage as he referred to an agreement with the Ad Hoc Group.

Impact on other extrinsic aids

11.11 The courts since *Pepper v Hart* have dealt with Law Commission reports and looked at their recommendations.²⁸ These reports are particularly authoritative when they contain a draft Bill which is later incorporated into legislation.²⁹ The weight of such materials, now that the courts are prepared to look at the recommendations of such reports, has increased.

11.12 The United Kingdom Law Commissions' report sought to exercise control over the use of other aids in the documents listed in their draft clauses.³⁰ The documents in the Australian Federal legislation are also restricted to documents generated within the legislative process itself, or else official reports.³¹ The criteria in *Pepper v Hart* have not yet had an impact on treaties.³²

Administrative practices

11.13 These have not fallen within the criteria in *Pepper v Hart* unless publicly promoted by a government department. However, any submissions by a government department to an official committee³³ may come under the scrutiny of the courts and be regarded as falling under the second limb of *Pepper v Hart*. Certainly, where they amount to assurances, they may fall within the criteria, such as a press release. A press release was referred to in the judgment in *Pepper v Hart* itself. More attention needs to be paid to assurances given in such documents as briefing notes or press releases³⁴ as regards the impact of a particular Bill on a particular identifiable class of persons.

11.14 It will be interesting to see whether the notes on clauses, which Zander³⁵ says are increasingly being shown to members of parliament, will be regarded as authoritative (and thus to be judicially relied on) because they are

²⁷ (1996) 6 HKPLR 179.

²⁸ See *supra*, at Chapter 6.

²⁹ *Black-Clawson Ltd v Papierwerke AG* [1975] AC 591. See *supra*, at 2.20-2.40.

³⁰ This was contained in Appendix A of their report. See chapter 7.17.

³¹ See chapter 8 further.

³² In *R v Foreign Secretary, ex p Rees-Mogg*,³² which arose out of the United Kingdom's accession to Europe, there was reference to *Pepper v Hart*. See *supra*, at 6.72.

³³ *Wells v Police* [1987] 2 NZLR 560. See *supra*, at 7.57.

³⁴ See *supra*, at 9.63.

³⁵ Zander, *infra*, at 157.

regarded as giving an assurance that the information that they contain is correct. White papers have been relied on in subsequent judgments.³⁶ However, the New Zealand High Court refused to regard a treasury paper briefing a minister, which was for internal use, as a proper aid.³⁷ Thus, it is not clear whether Legislative Council briefs would be admissible.³⁸

11.15 None of the Australian statutes include reference to documents containing administrative practices, but New Zealand has allowed them in evidence, for example, in *Levi Strauss & Co v Kimbyr Investment Ltd*.³⁹ The Canadian court in *Harel v Deputy Minister of Revenue of Quebec*⁴⁰ also allowed reference to administrative practices. The earlier English cases such as *Wicks v Firth* allowed those that fell within a specialised area to be referred to.⁴¹

***Third limb of Pepper v Hart –
The statements relied on must be clear***⁴²

11.16 The fact that the statements relied on are usually the statements of the promoter of the Bill assists in complying with the third limb as it is expected that such statements should have more clarity than statements made in the heat of debate. There is concern as to whether clear statements of a minister amount to a legitimate expectation, though so far this has not been upheld.⁴³ One consultee suggested that any proposed statutory provision on extrinsic materials should incorporate a provision that such materials could not be relied upon to support a claim of legitimate expectation. The Commission do not think that such a provision is necessary.

Weight

11.17 The United Kingdom Law Commissions' report expressed concern about the weight to be attached to extrinsic aids. This is why they suggested an authoritative explanatory memorandum.⁴⁴ The Commissions' criteria for weight, which was what was appropriate in the circumstances,⁴⁵ gave a broad discretion. *Pepper v Hart* does not make clear the respective weight to be given to different aids other than *Hansard*, nor their weight vis a vis *Hansard*. The judgments post-*Pepper v Hart* also do not resolve this question. Section 15AB(3) of the Australian Acts Interpretation Act 1901 (Cth) sets out some guidelines for the judiciary in assessing the weight of extrinsic aids.⁴⁶

³⁶ See *supra*, at Chapter 6.

³⁷ *Alcan v Commissioner of Inland Revenue* [1993] 3 NZLR 495. See *supra*, at 7.61-62.

³⁸ See chapter 9.63.

³⁹ [1994] 1 NZLR 332. See *supra*, at 7.65.

⁴⁰ (1977) 80 DLR (3d) 556. See *supra*, at 7.84.

⁴¹ [1983] 2 AC 214. This was a taxation case. See *supra*, at 2.46.

⁴² See headnote of *Pepper v Hart* [1992] 3 WLR 1032, at 1033. See Chapter 6.

⁴³ See *supra*, at 6.112-6.114.

⁴⁴ See *supra*, at 7.8.

⁴⁵ Clause 1(2) of the draft Bill.

⁴⁶ For text see *supra*, at 8.9.

***Per incuriam* decisions**

11.18 Bates⁴⁷ raised the question as to whether parliamentary material indicating a clear parliamentary intention should be admissible in a subsequent case, where the statutory provision has already been judicially construed.⁴⁸ Zander put the issue more clearly: "The courts have not yet decided whether previous statutory interpretation decisions given in ignorance of the contents of *Hansard* can now be regarded as given *per incuriam* and therefore not be binding."⁴⁹

11.19 The scope of the *per incuriam* rule is best explained in *Morelle v Wakeling*⁵⁰ where Lord Evershed M.R. said :

*"... The only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance ... of some inconsistent statutory provision or of some authority binding on the court concerned: so that ... some part of the decision ... is found ... to be demonstrably wrong."*⁵¹

11.20 In that sense, it cannot be said that judgments pre-dating the relaxation in the exclusionary rule are *per incuriam*. It is up to a judge, on the facts, and the rules of *stare decisis*, to see whether he regards himself as bound by previous authority, or whether he chooses to distinguish that authority, in the light of the revelations from *Hansard*.

11.21 The practice of the courts regarding these type of judgments has varied. In *Crown Suppliers v Dawkins*,⁵² the Court of Appeal relied on a House of Lords judgment rather than looking at *Hansard*. A similar decision was reached in *National Rivers Authority (Southern Region) v Alfred McAlpine Homes East Limited*.⁵³ In *Sheppard v Commissioners of Inland Revenue (No 2)*⁵⁴ the court held that it could not rely on *Hansard* because the point in issue was already covered by a pre-*Pepper v Hart* decision. In *re Arrows, (No 4)*, *In re Bishopsgate Investment Management Ltd and anor*⁵⁵ the Court of Appeal rejected the deployment of Parliamentary materials as being "a damp squib". It held that it was bound by a House of Lords precedent on the issue before the court. In *CIR v Willoughby*,⁵⁶ the court decided that when Parliament re-enacted legislation in 1952, in identical terms to the original Act of

⁴⁷ "Parliamentary Materials and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*" 14 Stat LR 46, 50 (1993).

⁴⁸ This question seems to have been resolved in favour of a prior binding decision – see for example *Sheppard v Commissioners of Inland Revenue (No 2)* [1993] STC 240.

⁴⁹ Zander, *The Law Making Process* (4th ed 1994) 155.

⁵⁰ [1955] 2 QB 379.

⁵¹ At 406.

⁵² [1993] 1 CR 517. See 6.80.

⁵³ LEXIS, QBD, 26 January 1994. See 6.96.

⁵⁴ [1993] STC 240 (ChD). See 6.12.

⁵⁵ [1993] 3 WLR 513, at 539-540. See 6.82.

⁵⁶ [1995] STC 143. See Lintott and Bennett, in *The New Gazette*, February 1995, 46-7, and Lintott in *The New Gazette*, May 1995, 38-9. See chapter 6.84.

1936, it must have had in mind the interpretation placed upon it by a judgment in *Congreve v CIR*.⁵⁷ Therefore, it could not endorse the original intention expressed in the parliamentary debate in 1936.

11.22 However, the principles from old decisions have been reviewed in the light of *Hansard* when the real intention was discovered. In *Sunderland Polytechnic v Evans*,⁵⁸ the court did depart from their previous decision after looking at a Standing Committee statement by the Under Secretary for Employment, and a ministerial statement. In *Kwan Kong Co Ltd v Town Planning Board*,⁵⁹ a High Court decision called *Singway Co Ltd v Attorney General*⁶⁰ was not relied on once Judge Waung accepted the concession made by the Crown that the objects and reasons for the Building (Amendment) Ordinance 1959, and the speech of the promoter of the Bill, made clear the rationale for the amendment. This was different to the interpretation placed on the relevant section by the judge in the *Singway* case.

11.23 Brazil⁶¹ noted that an appeal should not succeed against a court's decision on the grounds that certain extrinsic materials were or were not looked at. He continued : "Section 15 AB clearly gives extrinsic materials the status of an aid to interpretation, but does not involve any rule of law". This is borne out in the judgment in *R v Bolton, ex p Beane*⁶² where the second reading speech was "available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law." Deane J, in the same judgment,⁶³ cautioned that:

"to attribute to the provisions of [section 15AB], which were first enacted in 1984, the effect of altering the correct construction of prior legislation would be to attribute to what should be seen as no more than an aid to interpretation, the effect of a substantive and retrospective amendment of the prior legislation".

11.24 **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.**

11.25 It is helpful at this juncture to see the analysis by academics and other commentators of the advantages and disadvantages of the criteria in *Pepper v Hart*.

⁵⁷ [1948] 1 ALL ER 948.

⁵⁸ [1993] ICR 392. See chapter 6.81.

⁵⁹ (1995) 5 HKPLR 261.

⁶⁰ [1974] HKLR 275.

⁶¹ "The Australian Approach", in Preliminary Paper No 8, New Zealand Law Commission "Legislation and its Interpretation" (1988) at 153.

⁶² (1987) 70 ALR 225.

⁶³ At 238.

Disadvantages of the criteria in *Pepper v Hart*

The rights of the citizen

11.26 Does the availability of *Hansard* aid or hinder the citizen? "The rule of law, as a constitutional principle, requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."⁶⁴ Bennion has argued that the judgment in *Pepper v Hart* is contrary to the principle upon which statutory interpretation rests "that the legislator puts out a text on which citizens and their advisors rely and which the judiciary interpret in the light of various accepted criteria"⁶⁵

11.27 Oliver posed the following question: does the status of the Minister's speech not now result in strengthening the power of the executive, Parliament and the civil service vis a vis the courts and the citizen?⁶⁶ 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.

11.28 It could be argued that the use of *Hansard* could shift the burden further against the litigant, by reducing the ability of the courts to find an ambiguity or absurdity, which the courts have traditionally used to protect the litigant in criminal or politically sensitive legislation. "It would be a degradation of [the court's role in interpretation] if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."⁶⁷ The duty of the court in the interpretation process is not just owed to Parliament; it is also owed to the citizens.⁶⁸

11.29 Miers⁶⁹ queried whether it is just that the citizen, who has ordered his affairs according to what the law says in the past, should now find himself prejudiced by statements which, when he took legal advice, would not have been judicially acceptable. He concluded by asking:

"Will they [the courts] give priority to the Minister's clear views over unclear legislation, whether the effect is to the advantage or disadvantage of the citizen; or will they adopt the view, that where the Minister's intentions benefit the citizen, those wishes will prevail; but that otherwise the executive is bound by the enacted law?"

⁶⁴ Lord Diplock, in the *Black-Clawson* case [1975] AC 591, at 638.

⁶⁵ "Hansard, -Help or Hindrance?" 15 Stat LR 149 at 155 (1994).

⁶⁶ Oliver, "*Pepper v Hart*", Public Law 5, at 13, (1993).

⁶⁷ Lord Wilberforce in the *Black-Clawson* case, *op cit*, at 629.

⁶⁸ J.F. Burrowes, "A New Zealand Perspective", 9th Commonwealth Law Conference, (April 1990) 285, at 289.

⁶⁹ "Taxing Perks and Interpreting Statutes ..." 56 MLR 695, at 708-710. (1993)

11.30 There is a question as to whether the result of *Pepper v Hart* is to give more power to the draftsman.⁷⁰ Miers⁷¹ has suggested that we may see carefully framed amendments at the committee stage, whenever there is a particularly difficult piece of legislation to be debated permitting ministers to clarify what kinds of conduct fall within a given clause.

11.31 Zander referred to a statement made by Jenkins, Second Parliamentary Counsel, that draftsmen may have to take a more active part in vetting briefing materials for Ministers. The draftsmen may also have to check other "Parliamentary materials", such as press releases.⁷² Finally the draftsmen and other officials will have to check what was said in the House and Standing Committees, to ensure that no additional statements or corrections are needed.

11.32 Oliver⁷³ has argued that the limits drawn by Lord Browne-Wilkinson are arbitrary and drawn for practical reasons. If the principle of purposive construction on which the relaxation of the rule is based were to be applied generally, reference to *Hansard* would be far more widely permitted.

Lawyers and Costs

11.33 Most of the academic commentators were negative in their initial reaction to *Pepper v Hart*. 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.⁷⁴ The practitioner would have to look at the opening and winding up speeches at Second Reading, the consideration of the Bill and its amendments at committee stage, and the opening and winding up speeches at the Report stage. Bates⁷⁵ argued that if an admissible statement is identified then the lawyer would have to examine subsequent parliamentary proceedings to establish whether the statement has been repeated, varied or withdrawn and whether there has been a subsequent amendment to the relevant provision. The case posed the question as to whether a solicitor would be liable in negligence for not having done such research.⁷⁶

11.34 There is a question as to how often recourse to *Hansard* can throw useful light on the interpretation of the relevant provision. Sacks⁷⁷

⁷⁰ Lord Roskill, in "Some thoughts on Statutes, New and Stale", 1981 Stat LR, 77 suggested that the answer to the question, "what is the intention of Parliament" is the intention of the draftsman, although he is the one whose subjective intention is not open to scrutiny.

⁷¹ "Taxing Perks and Interpreting Statutes", 56 MLR 695. (1993)

⁷² Lord Brown-Wilkinson in *Pepper v Hart* referred to a press release issued by the Inland Revenue.

⁷³ "*Pepper v Hart*" Public Law, 5, 9, at note 99. (1993)

⁷⁴ Miers, *op cit*, 706.

⁷⁵ "Parliamentary Materials and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*", 14 Stat LR (1993) 46, at 54.

⁷⁶ A.J. Halkyard, "*Pepper v Hart*: roadmap or minefield?" The New Gazette, (August 1993), 14. See Lord Mackay's comments in *Pepper v Hart* that "practically every question of statutory construction that comes before the courts will involve an argument that the case falls under one or more of these three heads. It follows that the parties' legal advisors will require to study *Hansard* in practically every such case to see whether or not there is any help to be gained from it. I believe this is an objection of real substance." (at 1037G).

⁷⁷ "Toward Discovering Parliamentary Intent", Stat LR (1982) 143, at 157.

concluded that in the 34 cases of her study, the disputed clause was either not debated, or received confusing replies from the Minister.⁷⁸

11.35 It would seem that not all lawyers in Hong Kong are aware of the significance of the judgment, given the paucity of comment in law journals and the number of judgments where *Pepper v Hart* has been referred to. However, from anecdotal evidence it would appear that reference is regularly made to *Pepper v Hart* in judicial review cases, though the judiciary are not necessarily relying on *Hansard* to decide the cases. There is still a lack of accessibility to the materials, though this is far less of a problem in Hong Kong.⁷⁹

The courts

11.36 There was a concern as to whether the already overburdened lower courts will be further burdened by arguments on *Hansard*. Slapper⁸⁰ has stated that both the process of giving legal advice and, in many cases, the actual resolution of disputes will be prolonged in a system already beset with delays. However, the lower courts have adapted to the use of the complex materials attached to the Bill of Rights, so this argument should not be accepted.

11.37 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.⁸¹

Advantages of the criteria in *Pepper v Hart*

11.38 In Australia, in *Re Bolton: Ex p Beane*⁸² the court refused to use the second reading speech of a Minister to derogate from the right of freedom of an individual. The court held that there must be a clear legislative intent to take away such freedom, and the Minister's speech could not supply the deficiency. Mr Justice Bryson stated that this judgment illustrates the existence

⁷⁸ Zander, *supra*, at 155, stated that since Sack's article did not disclose how the cases were selected, it is not known how representative it was of cases in the Law Reports, let alone those coming before the courts.

⁷⁹ D Miers, *supra* stated that this is less of a problem since the Official Report of Parliamentary Proceedings became available on CD-ROM. The Hong Kong Law-On-Line has a *Hansard* database from 1988-1994. Lester, *supra*, argued that the publishers of *Current Law Statutes*, legal encyclopaedia and specialist textbooks were already citing *Hansard*. See further Holborn "*Pepper v Hart* and Parliamentary Standing Committee Debates", *The Law Librarian*, vol 24, no 3, (September 1993), 141. Also see *supra*, at 9.82 *et seq*.

⁸⁰ "Statutory Interpretation: a new departure" *Business Law Review*, (March 1993), 56, 58.

⁸¹ Bates, *op cit*, 55. He stated that his concerns had not been greatly alleviated in subsequent reported cases.

⁸² [1987] 162 CLR 514. Section 15AB of the Acts Interpretation Act 1901 (Cth), was enacted in 1984 and allows the use of extrinsic aids on a broader grounds to *Pepper v Hart*. See *supra*, at 8.27-8.32 further.

of an unwritten Bill of Rights of values which are incorporated into statutory interpretation.⁸³

11.39 Lord Lester expressed the hope that if, for example, a Minister puts an administratively convenient gloss on statutory language in the course of debate, without proposing any amendment, the court can apply constitutional principles of judicial interpretation to protect basic human rights and freedoms. He continued "For this purpose they will continue to have recourse to the important extrinsic aid to statutory interpretation contained in the European Convention on Human Rights and the International Covenant on Civil and Political Rights."⁸⁴

11.40 Lord Lester⁸⁵ has pointed out that there is a general problem with the accessibility of law, for example, statutory instruments, White Papers, official committee reports, and so on. He continued:

"Indeed, one might reasonably respond to those who argue that recourse to parliamentary debates renders the law less accessible, that, on the contrary, if such recourse removes ambiguity or manifest absurdity in a manner which better reflects the intention of the legislation, and the reasonable expectation of the citizenry, then such a process actually increases the accessibility of the law in a real sense. In other words, recourse to Hansard may strengthen the rule of law."

11.41 The use of *Hansard* may lead to clearer and more careful drafting, and a clearer expression of the real government policy on the issues to be legislated on. It can be argued that the scrutiny by the courts of Parliamentary debates will lead to a more careful scrutiny of legislation while it is being processed through Parliament.⁸⁶ Jenkins, in contrast, did not think it would have a great effect on the legislative machine, nor, with one exception, would *Hansard* become an alternative way of legislating.⁸⁷

11.42 As time passes the effect of the new rule should be to prevent or curtail litigation relating to ambiguous legislation, which would otherwise be fought through the courts.⁸⁸ The Attorney General in England posed the question whether practitioners consider cases that would otherwise be fought are being settled because of *Pepper v Hart*, or whether it adds to the cost of litigation.⁸⁹ Sellar suggested that for company law practitioners the use of the

⁸³ "Statutory Interpretation, An Australian Judicial Perspective", (1992) SLR 187, at 206. See chapter 8.24 *et seq.*

⁸⁴ "*Pepper v Hart* Revisited", (1994) 15 SLR 10, at 21. See further *supra*, at 10.2-10.20.

⁸⁵ *Idem* at 16-7. He appeared as counsel for Mr Hart.

⁸⁶ Sacks, *op cit*, at 157 concluded that unintelligent legislation was being added to the statute book because the government either lacked clear objectives or had deliberately intended to confuse in order to avoid controversy.

⁸⁷ "*Pepper v Hart*: A Draftsman's perspective" 15 Stat LR 23 (1994). See *supra*, at 9.38-9.49.

⁸⁸ Lord Bridge in *Chief Adjudication v Foster*, [1993] 2 WLR 292, at 306.

⁸⁹ Sir Nicholas Lyell, "*Pepper v Hart*, the government perspective." 15 Stat LR 1, at 8-9 (1994).

criteria would save legal costs by assisting legal advisory work and so obviating the need for litigation in some cases.⁹⁰

11.43 *Hansard* may provide the correct answer. Cook⁹¹ argued that if the court had checked the Legislative Council debates in *Century Holdings Limited v Siu Tat Yin Eddie*⁹² they would have clearly seen that the legislature's intention was the opposite to the conclusion reached by the judge in that case.

11.44 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;*
 - (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.*

⁹⁰ "The relevance of *Pepper v Hart* to company practitioners", 1993 SLT 357, at 359.

⁹¹ "In-house Lawyer ousted from Labour Tribunal wins appeal", Hong Kong Lawyer, (September 1994), 30.

⁹² Labour Tribunal Appeal No. 16/1994.

- (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."

Section 19 of the Interpretation and General Clauses Ordinance (Cap 1)

11.45 The use of the criteria in *Pepper v Hart* should be facilitated by the fact that, unlike the United Kingdom, Hong Kong has a provision providing for a purposive interpretation in Section 19 of the Interpretation and General Clauses Ordinance (Cap 1). Canada and New Zealand have similar provisions,⁹³ and neither have introduced legislation encouraging a relaxation of their rules. In New Zealand, an equivalent section only became of significance when judges used extrinsic aids as a way of carrying out their obligation to adopt a purposive interpretation. The Canadian courts have also developed their own jurisprudence on extrinsic aids from a purposive interpretation.

11.46 In Hong Kong, even though section 19 is used in some judgments, it has not been used to admit extrinsic aids.⁹⁴ However, the courts seemed to be referring more to their obligation to use section 19. The Court of Appeal in *Kwan Kong Co Ltd v Town Planning Board*,⁹⁵ referred to the similarity between section 19 of the Interpretation and General Clauses Ordinance (Cap 1) and the approach to construction of Bill of Rights

⁹³ Section 11 of the Canadian Interpretation Act 1967-8, and section 5(j) of the Acts Interpretation Act 1924 respectively.

⁹⁴ See chapter 4.16.

⁹⁵ (1996) 6 HKPLR 237 at 253.

Ordinance cases. Litton VP called for a generous and purposive approach⁹⁶ which would give effect to the true intent, meaning and spirit of that ordinance. "Whether this is any different from the requirements of s19 of the Interpretation and General Clauses Ordinance (Cap 1) is academic: there the words used are 'fair, large and liberal construction'.⁹⁷ Leonard J in *Real Estate Developers Association v Town Planning Board*⁹⁸ also referred to it: "There is nothing new about giving a generous and purposive interpretation to Hong Kong legislation".⁹⁹ Despite these references, it is unlikely that the Hong Kong courts will develop their use of extrinsic aids by relying on section 19. So far, the judgments have referred to *Pepper v Hart* to justify such reliance, or else omitted their rationale for such reliance.

Part II – Recommendations

Statutory basis for extrinsic aids

11.47 *Overseas position* The New Zealand Law Commission did not support statutory intervention on the basis that the principles had been sufficiently developed by the courts.¹⁰⁰ The United Kingdom Law Commissions' report suggested that a limited degree of statutory intervention was necessary.¹⁰¹ The Renton Committee¹⁰² noted that the judicial witnesses were in favour of enacting clause 1(b)¹⁰³ of the Commissions' draft. The Renton Committee, however, did not favour its adoption. Instead, they preferred to leave it to Parliament, if it saw fit, to declare in the Act that specified material outside the Act (and not admitted by clause 1(1)(c))¹⁰⁴ should be admissible for the purpose of the Act's interpretation.¹⁰⁵ In Australia, most States and the Federal government have adopted legislation providing for extrinsic aids.¹⁰⁶ Singapore, despite *Pepper v Hart*, has enacted legislation similar to the Commonwealth of Australia provisions.¹⁰⁷

Relaxation of the exclusionary rules

11.48 *Pepper v Hart* has been regularly followed in Hong Kong and endorsed by the Court of Appeal, and thus there would seem little point in

⁹⁶ These words were used by Lord Diplock in *Attorney General of Gambia v Jobe* [1984] AC 689 at 700H as being the appropriate method of interpreting a constitutional document. They were also adopted by Keith J in *Hong Kong Polytechnic University v Next Magazine Ltd* (1996) 6 HKPLR 117 at 121-2.

⁹⁷ (1996) 6 HKPLR 237 at 253.

⁹⁸ (1996) 6 HKPLR 179.

⁹⁹ At 210.

¹⁰⁰ See *supra*, at 7.69-7.73.

¹⁰¹ See *supra*, at 7.2-7.18.

¹⁰² See *supra*, at 7.19-26.

¹⁰³ This concerned reports of a Royal Commission or other similar body. For full text see *supra*, at chapter 7.17.

¹⁰⁴ This deals with treaties.

¹⁰⁵ Paragraph 19.23

¹⁰⁶ See chapter 8.

¹⁰⁷ For text see *supra*, at 8.75.

recommending that the old exclusionary rules should still apply. The real issue is whether *Pepper v Hart* is sufficient or needs to be supplemented by legislation.

Extension of *Pepper v Hart* by legislation

Advantages

11.49 The Commission identified a number of reasons supporting legislative reform:

- (1) Despite *Pepper v Hart*, there remain unresolved areas, such as uncertainty as to the "other parliamentary materials" which may be used.
- (2) Incremental clarifications of the law would be piecemeal, slow, and incomplete, whereas legislation could provide a code which would be clear and comprehensive.
- (3) *Pepper v Hart*, by placing emphasis on the second reading speech of the Bill's promoter, is limited in scope, yet the trend in many common law jurisdictions is towards further relaxation of the exclusionary rules. By expanding the scope, legislation would give the courts the discretion to consult a wider range of materials relating to the legislative history of an ordinance, including explanatory memoranda.
- (4) Legislation would publicise the relaxation of the exclusionary rules and its benefits.
- (5) Legislation can set out extrinsic materials that are *prima facie* reliable and omit generally unreliable extrinsic materials.
- (6) Legislation could clarify the use of extrinsic materials in the interpretation of treaties and deal with other matters left unresolved, such as the problems of *per incuriam* and its application to prior legislation.
- (7) Legislation could reinforce the use of a purposive approach as mandated by section 19 of the Interpretation and General Clauses Ordinance (Cap 1), since the purpose can often be discovered only by consulting extrinsic materials.
- (8) A bilingual statute clearly explaining the use of extrinsic materials would be preferable to reliance on a number of judgments, many of which would come from overseas.

Disadvantages

11.50 Some disadvantages of confirming and extending *Pepper v Hart* through legislative reform might be listed as follows:

- (1) *Pepper v Hart* could benefit an executive-led government by encouraging deliberately ambiguous legislation accompanied by a clear Ministerial statement which would outweigh the words of the statute.
- (2) There is a philosophical difficulty with the concept of legislative "intention" in the Hong Kong context: the intention of the Government may not be equivalent to the intention of the legislature where there is no Government majority.¹⁰⁸ Further, if the intention is not discovered in the words of the statute itself one cannot infer the intention of the legislature from the intention of the government.
- (3) Developments in the law on the admissibility of extrinsic aids are continuing and it may be preferable to allow developments in the courts before imposing legislation which could lead to rigidity.
- (4) Judges tend to dislike and resist attempts by the legislature to dictate how they should carry out their distinctive function of interpreting legislation. Thus legislative reform might be ineffective.
- (5) To broaden the range of materials and the circumstances in which they can be used may result in the expenditure of more time and legal costs.

11.51 Some consultees echoed the concerns raised in this list. One consultee was worried that it "may lead to the abuse of the integrity of the legislative and judicial process and to lengthier trials". Another consultee argued that the very small number of cases in which *Pepper v Hart* had been considered showed that there were no practical problems with the interpretation of statutes that required the use of extrinsic aids.

11.52 Whilst the Commission recognised in the Consultation Paper that there might not be a pressing need for legislative reform in this area of law, they were generally of the view that the common law position concerning the use of extrinsic aids was unclear. Some consultees expressed the view that legislation would only be justified if there was a pressing need for statutory intervention. The Commission has taken note of these submissions

¹⁰⁸ See *Ngan Chor Ying v Year Trend Development Ltd* [1995] 1 HKC 605. Lord Mackey had stated in *Pepper v Hart* [1992] 3 WLR 1032 at 1038E, that the parliamentary processes of those countries that had relaxed the rule were different "in quite material respects" from the United Kingdom. Only one consultee indicated that a minority of its members agreed with Lord Mackey's views as being applicable to Hong Kong.

but does not agree that law reform should only be implemented when there is a pressing need.

11.53 Some consultees supported the introduction of legislation for some of the reasons outlined above. Practitioners noted that the trend was towards the greater use of extrinsic aids. **Having considered all the arguments, the Commission concludes that it would be desirable to codify and modify the common law principles and in the process extend and clarify the position by way of legislation.** The proposed legislation could provide comprehensive and easily understood criteria for the use of extrinsic aids.

11.54 One consultee expressed a concern that it may not be appropriate to implement the recommendations at a time of constitutional change in Hong Kong. The Commission concluded that it was a matter for the Administration to decide what was the appropriate time to introduce a Bill, taking account of the heavy schedule of the present Legislative Council.

11.55 **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). It would be most suitably included as section 19A, just after the existing guide to a purposive construction of legislation.**¹⁰⁹

Proposed Statutory Provisions

Section 15AB, Acts Interpretation Act 1901

11.56 **The Commission did not favour using the legislation from the State of Victoria as a model.**¹¹⁰ That legislation's criteria are not as comprehensive as those of the Australian Federal legislation. In any event, the Victorian judiciary have used some of the criteria used in the Federal legislation. It is also significant that Singapore has adopted the Australian Federal model. None of the consultees commented on the original preference made by the Commission for the Commonwealth model.

11.57 **On balance, the Commission recommend that the Commonwealth of Australia model of section 15AB of the Acts Interpretation Act 1901,¹¹¹ with modifications for the Hong Kong context, should be adopted as the basis for legislative reform.**

11.58 The Commission scrutinised the provisions of section 15AB(1) in detail. The section reads:

¹⁰⁹ 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.

¹¹⁰ See Chapter 8.49 for the text of the Victorian provision.

¹¹¹ This seems to have worked well in practice. See chapter 8.

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 unreasonable.*

Confirming the meaning: s 15AB(1)(a)

11.59 This provision allows extrinsic material to be used to confirm the meaning of a statutory provision, even though the meaning of that provision may be unambiguous. The arguments for and against the provision were set out in the Consultation Paper as follows:-

- (a) The arguments favour of a provision such as section 15AB(1)(a) are:
 - (1) The plain meaning of a provision is not always easy to find and practitioners and judges will in fact be tempted to look at extrinsic material to confirm an interpretation.
 - (2) It has been used in Australia in a restrained way¹¹² and since *Pepper v Hart* the English courts, including the House of Lords, have used extrinsic materials to confirm a meaning which they said had been arrived at independently.¹¹³ Up to 1990, all the New Zealand cases used *Hansard* to confirm an interpretation.¹¹⁴
 - (3) If judges found support in extrinsic material for their decisions it might deter unnecessary appeals.
- (b) The arguments against section 15AB(1)(a) are:

¹¹² See chapter 8. 21 *et seq.*

¹¹³ See chapter 6. 94 *et seq.*

¹¹⁴ Burrows "Interpretation of Legislation: A New Zealand Perspective", 9th Commonwealth Law Conference, (April 1990). See chapter 7.74.

- (1) The literal rule is valuable and citizens should be able to rely on its results without having to go to materials outside the statute.
- (2) If the natural and ordinary meaning is plain there is no need to confirm it.
- (3) Searching all the extrinsic materials to confirm a plain meaning would be expensive in time and money.

11.60 The Consultation Paper did not make any recommendation as to whether section 15AB(1)(a) should be adopted in Hong Kong. None of the consultees supported its inclusion. There was concern that it would lead to an escalation of legal costs. One consultee observed 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.**

Section 15AB(1)(b)(i) and (ii)

11.61 This provides that extrinsic material may be used to determine the meaning of a provision which is ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. It is similar to the criteria in the first limb of *Pepper v Hart* and thus would seem to be unobjectionable. The Commission considers that the word "manifestly" does not add anything to the meaning of this provision.¹¹⁵

11.62 **The Commission recommends that section 15AB(1)(b) be adopted, subject to deletion of the word "manifestly".**

Listing extrinsic materials: s 15AB(2)

11.63 The list of extrinsic aids in section 15AB(2) is not exhaustive.¹¹⁶ It might also be thought unnecessary and, by its inclusion, likely to induce lawyers to research everything on the list, however unhelpful. However, the Australian judiciary have found the list helpful and have discouraged the use of materials that are of insufficient "quality". Only one consultee referred to the details of the materials included in the proposed list.

11.64 **The Commission recommends that the legislation encompass the list of extrinsic aids, as modified, which are included in**

¹¹⁵ Lord Oliver in *Pepper v Hart* used the word "manifest absurdity".

¹¹⁶ Subsection (2) provides: "without limiting the generality of subsection (1)...".

section 15AB(2) of the Acts Interpretation Act 1901.¹¹⁷ 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).¹¹⁸

11.65 To maintain flexibility one option would be to include in a schedule the list of aids in section 15AB(2) (as amended). Power to amend the list of aids could be given to the Governor.¹¹⁹ Alternatively, this could be by resolution of the Legislative Council. **The Commission does not favour this approach, and considers it inappropriate that the list of materials should be capable of amendment by the executive alone.**

Matters not forming part of the Act: subsection 2(a)

11.66 Subsection 2(a) seems to have been intended to make clear that any material in the text of an Ordinance could be used.¹²⁰ This would include the sources of legislative history, whether it was a reprint, and other such matters. "It would also lay to rest any doubts with regard to the admissibility of long titles, preambles, and marginal notes".¹²¹ Marginal notes are not at present treated as an aid as they are not part of the legislation.¹²²

11.67 **Users of statutes do in practice use annotations, marginal notes, headings, and such materials to assist in discerning the meaning of legislation. The Commission recommends that the adoption of a provision such as section 15AB(2)(a) would be a sensible and useful development.** It may be that section 18 of the Interpretation and General Clauses Ordinance (Cap 1), which deals with marginal notes and section headings, needs to be amended consequentially.

Law reform reports: subsection 2(b)

11.68 The Commission considers it desirable to use reports of the Law Reform Commission and similar bodies as extrinsic aids. There are some consequential amendments needed to subsection 2(b) to reflect Hong Kong conditions. The requirement that such reports be laid before the legislature is contrary to practice in Hong Kong and could thus be deleted from the

¹¹⁷ For the original text of section 15 AB, see Annex I, and the draft Hong Kong section, see Annex II.

¹¹⁸ This would include the Attorney General.

¹¹⁹ Section 101 of the Interpretation and General Clauses Ordinance gives a similar power to the Governor.

¹²⁰ Beckman and Phang "Beyond *Pepper v Hart* : The Legislative Reform of Statutory Interpretation in Singapore". 15 Stat LR 69, 87, (1994).

¹²¹ *Idem*.

¹²² Section 18 of the Interpretation and General Clauses Ordinance (Cap 1) provides that marginal notes and section headings shall not have legislative effect and shall not vary, limit or extend the interpretation of any Ordinance.

provision.¹²³ **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."**

Other common law reports

11.69 Doubt has been expressed as to whether it is appropriate to refer to official reports from other jurisdictions unless they deal with legislation on which the Hong Kong legislation was modelled.¹²⁴ The Commission considered that legislation could provide that relevant reports of Law Reform Commissions from other common law jurisdictions, which incorporated draft Bills that were subsequently enacted and which formed the basis for the Hong Kong legislation, could be used as extrinsic aids.

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

"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: subsection 2(c)

11.71 The Commission did not favour reference in the list of extrinsic aids to minutes of meetings of Bills Committees, as they are not always accurate and are not included in *Hansard*.¹²⁵ In any event the Legislative Council Standing Orders refer to the deliberations of the committee, and not to a report,¹²⁶ which would seem to exclude minutes. However, the reference in subsection (2)(c) to a report of a committee of the Parliament would include the report of a Select Committee,¹²⁷ though these are rarely established in Hong Kong. There are also references to reports of other committees, such as the Public Accounts Committee,¹²⁸ and Panels¹²⁹ in the Standing Orders.

11.72 **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".

¹²³ In the United Kingdom the Bill would be annexed to the report and it would be presented to Parliament.

¹²⁴ See *supra*, at 10.38-39.

¹²⁵ See chapter 9.58.

¹²⁶ Order 60D (8 and 9).

¹²⁷ See Order 61 and 62 (10).

¹²⁸ Order 60A(5A).

¹²⁹ Order 60E(14).

Explanatory memoranda: subsection 2(e)

11.73 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. It would appear to include Legislative Council briefs.¹³⁰ The Commission consider it important that materials should be accessible and available to the public. There was a query whether the inclusion of Legislative Council briefs might be in breach of the privileges of the Council. After checking on the position, the Commission is satisfied that such inclusion would not be in breach of those privileges. **The Commission agreed to the inclusion of section 15AB(2)(e) and do not consider it necessary to refer specifically to Legislative Council briefs.**

Second reading speech: subsection 2(f)

11.74 This provision was reflected in *Pepper v Hart*. **The Commission accordingly has no difficulty in recommending the adoption of section 15AB(2)(f).**

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

11.75 This is a useful provision. An example of its use would be that where an ordinance implement a treaty, the treaty and its *travaux préparatoires* can be treated as relevant documents which are extrinsic aids.¹³¹ **The Commission recommends the adoption of section 15AB(2)(g).**

Relevant material in official record of debates: subsection 2(h)

11.76 The Commission noted the arguments both for and against the inclusion of official debates. In support of their inclusion, it is argued that it is too restrictive to allow only the policy secretary's speech made at the introduction of a Bill. This would exclude speeches made by the policy Secretary at committee stage, or on the conclusion of the debate. Much useful material would be excluded if extrinsic aids were confined to the promoter's speech. It was impractical to think that counsel would not want to stray into this related relevant material. As Viscount Dilhorne explained:¹³² "what is said by a Minister in introducing a Bill ... is no sure guide as to the intention of the enactment, for changes of intention may occur during its passage".

¹³⁰ See chapter 9.63.

¹³¹ See 11.93 *infra*.

¹³² The *Black-Clawson* case [1975] AC 591, at 623. See chapter 3.

11.77 Lord Browne-Wilkinson in *Pepper v Hart* said:¹³³ "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".

11.78 Against the admission of material from the official record of debates is a concern with burdening the courts with too much material. The second reading speech by the policy Secretary was likely to be the clearest statement of the purpose of the bill. Other materials listed in the subsection are more closely related to the ordinance itself. If the debates were not included separately, they could still be admitted under the proviso that the list is not exclusive.¹³⁴ *Pepper v Hart* only allowed limited access to relevant Parliamentary material in addition to the minister's speech.

11.79 In *Doncaster BC v Secretary of State for the Environment*,¹³⁵ the Court of Appeal rejected reliance, *inter alia*, on a Minister's *extempore*¹³⁶ responses to various points made by an opposition member as they lacked clarity. In *Melluish v B.M.I (No.3) Ltd*,¹³⁷ Lord Browne-Wilkinson stressed that the criteria are only used properly when, *inter alia*, legislation is passed on the basis of the ministerial statement. He warned that appropriate orders as to costs wasted would be made "if attempts are made to widen the category of materials that can be looked at ...".¹³⁸

11.80 One option considered by the Commission was to amend subsection 2(h) to cover speeches made by the policy Secretary at times other than the first introduction of the Bill, while still excluding speeches made by other members of the Legislative Council. The Commission did not favour that approach and concluded that there should not be a total prohibition on the use of debates in interpretation.

11.81 **The Commission accordingly 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: s 15AB(3)

11.82 This subsection states:

¹³³ [1992] 3 WLR 1032, at 1058G.

¹³⁴ Subsection (2) provides: "without limiting the generality of subsection (1) ...".

¹³⁵ 66 P & C.R. 61. See chapter 6.77.

¹³⁶ The exclusion of *extempore* remarks could be useful for encouraging a continuing frankness in discussions in Bills Committees or Select Committees.

¹³⁷ [1995] 3 WLR 631.

¹³⁸ *Ibid* at 645 F-G. The materials "were not directed to the specific statutory provision or to the problem raised by the legislation but to another provision and another problem". See 11.4 *supra*.

"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."*

11.83 The Commission believe that it is desirable that judges have the discretion to determine weight. One consultee queried the necessity to include weight in the proposed legislation as it would come within the jurisdiction of a judge in any event. On balance, the Commission still see merit in including for the avoidance of doubt a specific provision on weight which makes clear that this is a matter being left to the discretion of the judiciary. **The Commission favoured the adoption of the draft clause suggested by the English and Scottish Law Commissions, rather than section 15AB(3). 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."

Treaties

11.84 Section 15AB(2)(d) of the Australian Acts Interpretation Act 1901 (Cth) provides for the inclusion of "any treaty or other international agreement that is referred to in the Act", as an extrinsic aid. Beckman and Phang¹³⁹ regarded this clause, which was incorporated into the Singapore legislation, as narrow, because domestic legislation may not always refer to the treaty it is implementing. They took the view that English case law provided for greater use of extrinsic aids than this provision.

11.85 Draft clause 1(1)(c) appended to the report of the English and Scottish Law Commissions reads:¹⁴⁰

"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: ...

¹³⁹ Beckman and Phang "Beyond *Pepper v Hart*: The Legislative Reform of Statutory Interpretation in Singapore" 15 Stat LR 69, at 87.

¹⁴⁰ Appendix in "The Interpretation of Statutes" Report (Law Com No 21) (Scot Law Com No 11) 1969.

...

... (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."

11.86 Treaties are not laid before the Legislative Council and are often not mentioned in legislation, but there is value in referring to "relevant" treaties and other international agreements, provided they are identified in extrinsic materials. The Commission concluded that the words "whether or not [Hong Kong was] bound by it at that time" were difficult to apply in the Hong Kong context and were best omitted.¹⁴¹

11.87 **The Commission recommends that Draft clause 1(1)(c) 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."

11.88 Beckman and Phang suggested¹⁴² that it might be advisable for the draftsman to use subsection (f) of the Singaporean legislation to provide in a statute implementing a treaty that the treaty and its *travaux préparatoires* are relevant documents as extrinsic aids.¹⁴³ The equivalent in section 15AB(2)(g) is "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." **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.**

11.89 It is also necessary to see whether Clause 2(b) of the United Kingdom Law Commissions' draft Bill should be incorporated into the proposed legislation. This provides "that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not". The United Kingdom Law Commissions' report stated that there were advantages to incorporating these judicial statements¹⁴⁴ into statutory form to avoid the uncertainty caused by *Ellerman Lines v Murray*.¹⁴⁵ **However, the Hong**

¹⁴¹ The Renton Committee ("The Preparation of Legislation" (1975) at paragraph 19.16) stated that Lord Denning regarded Draft Clause 1(1)(c) as consistent with the practice of the Court of Appeal. For reservations about its adoption see chapter 10.54.

¹⁴² Beckman and Phang "Beyond *Pepper v Hart*: The Legislative Reform of Statutory Interpretation in Singapore" 15 Stat LR 69, 87. See further *supra*, at 10.59.

¹⁴³ This was done for the UNCITRAL Model Law in the Arbitration Ordinance (Cap 341).

¹⁴⁴ This was a statutory expression of what Diplock L.J. said in *Salomon v Commissioners of Customs and Excise*, [1967] 2 QB 116, at 143.

¹⁴⁵ [1931] AC 126. See chapter 2.54 *et al.*

Kong Commission thinks it unnecessary to include a clause on the lines of Clause 2(b) of the United Kingdom Law Commissions' draft Bill.

11.90 The Renton Committee recommended¹⁴⁶ that any legislation intended to implement a treaty provision should contain a clear statement to that effect. The legislation should also provide that in construing local legislation, the court may take into account the relevant provisions of the treaty to which the legislation is intended to give effect.¹⁴⁷ This would be enacting the Draft Clause 1(1)(c) in a wider form.¹⁴⁸

11.91 **The Commission recommends that where an ordinance is implementing 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.**

Subsidiary legislation¹⁴⁹

11.92 The definition of "Ordinance" in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) includes subsidiary legislation. Thus section 15AB as amended would apply also to such legislation. Whether the legislation is laid on the table of the Legislative Council¹⁵⁰ or dealt with under section 35 of the Interpretation and General Clauses Ordinance (Cap 1), members of the Legislative Council can address the Council¹⁵¹ and their speeches are available to the public through *Hansard*. In the case of a positive resolution,¹⁵² a public officer will make a speech introducing the measure and explaining the reasons for it.

Application of section 15AB to prior legislation¹⁵³

11.93 Gifford commented that section 15AB does not specifically deal with the question whether it is to apply to Acts prior to its insertion in the 1901 statute. "It would appear that extrinsic material irrelevant at the time when such Acts were passed and never expected to be used in statutory interpretation may now be looked at to determine the meaning of statutory provisions".¹⁵⁴

11.94 Despite Gifford's comments, section 2 of the Acts Interpretation Act 1984¹⁵⁵ provided that section 15AB was applicable to all Acts whether

¹⁴⁶ At paragraph 19.39.

¹⁴⁷ See *supra*, at 9.79 and 10.55. Also see recommendations at paragraph 37 of "The Format of Legislation", Report No. 27 (1993), New Zealand Law Commission.

¹⁴⁸ Paragraph 19.39. See also chapter 10.55 and 10.60.

¹⁴⁹ See 9.67 further.

¹⁵⁰ Section 34 of Cap 1.

¹⁵¹ Under standing order 14(4). See chapter 9.

¹⁵² Section 35.

¹⁵³ The judgments dealt with under the section on "*per incuriam*" *supra* are relevant to this issue.

¹⁵⁴ *Statutory Interpretation* (Australia) (1990) at 129.

¹⁵⁵ This Act inserted section 15AB into the Acts Interpretation Act 1901.

passed before or after the commencement of the Act. It reads: "Except as otherwise provided by this Act, the amendments made by this Act apply in relation to all Acts whether passed before or after the commencement of this Act".¹⁵⁶

11.95 The common law presumes that procedural statutes "are intended to be fully retrospective in their operation, that is to say, are intended to apply not merely to future actions in respect of existing causes, but equally to proceedings instituted before their commencement".¹⁵⁷ The Commission accepts that, being procedural (an aid to interpretation), the proposed legislation could be regarded as relating to prior legislation and its interpretation by the courts. This is the same situation as exists now under *Pepper v Hart* and would exist under further judicial relaxations of the exclusionary rules. Prospective legislation would lead to asymmetry in the law of statutory interpretation.

11.96 There is also an argument that no specific provision needs to be made as section 2(1) of the Interpretation and General Clauses Ordinance (Cap 1) provides:

"Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance..., the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such other Ordinance came or comes into operation before or after the commencement of this Ordinance...."

11.97 However, to avoid any doubt, **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."

Interaction between the legislation and the common law

11.98 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.

11.99 There is very little reference to the issue of whether the common law continues to run parallel to the legislation on extrinsic aids in the texts on

¹⁵⁶ There is a similar provision in section 4(1) of the Interpretation of Legislation Act 1984 (Victoria).

¹⁵⁷ Bewley J in *Wong Yu Hing v Tong Pak Wing* [1995] 1 HKC 160.

the Australian or Singaporean legislation. Pearce and Geddes, the authors of *Statutory Interpretation in Australia*,¹⁵⁸ merely state that the legislation on extrinsic aids substantially altered the common law rules. Section 15AB only applies to the interpretation of Federal legislation. The common law still governs other statutes and judicial aids to interpretation that are not included in the legislation, such as the use of textbooks. The common law continues to govern those States or territories not covered by legislation. Only South Australia and the Northern Territory retain the exclusively common law position.

11.100 The Australian position is different because of its Federal composition but, despite the potential for confusion, the courts seem to have adapted well to the necessity to interpret some legislation in accordance with section 15AB and other legislation by the common law rules.¹⁵⁹

11.101 Scutt¹⁶⁰ states that one of the reasons for not including a reference to ambiguity was that:

"the Acts are read against the appropriate common law background and ... the provision should be interpreted in accordance with accepted practice, namely that resort is had to extrinsic aids only where ambiguity occurs."

11.102 The issue of the interaction between the common law and the statutory provisions was dealt with in *Raffles City Pte Ltd v The Attorney General, Singapore*.¹⁶¹ LP Thean J proceeded to say that if he were wrong in his decision that the new legislation was retrospective, there was a parallel rule at common law. He referred to the Court of Appeal judgment of *Tam Boon Yong v Comptroller of Income Tax*,¹⁶² which had followed *Pepper v Hart*. It seems that his hesitation as to whether he could follow the new statute arose more out of the fact that the proceedings had been issued before the new legislation.

11.103 The Commission noted that Draft Clause 1 of the United Kingdom Law Commissions' Report had proposed that the reference to extrinsic aids was "in addition to those which may be considered for that purpose apart from that section".¹⁶³

11.104 Although there is a risk of confusion if common law principles continue to run parallel with the legislation, there is an advantage in the common law providing for matters not covered by the legislature. Lest it be held that the legislation excluded further judicial developments, **the Commission favour a saving provision such as the following:**

¹⁵⁸ Pearce & Geddes, (3rd ed, 1988), at 3.1 and 3.17.

¹⁵⁹ See chapter 8.52 and 8.62 for some comments by the judiciary.

¹⁶⁰ "Statutory Interpretation and Recourse to Extrinsic Aids" 58 ALJ 483, at 494 (1984). See chapter 8.48 for the Victorian position.

¹⁶¹ [1993] 3 SLR 580.

¹⁶² [1993] 2 SLR 48.

¹⁶³ See chapter 7.17 for full text.

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

The rights of the individual

11.105 The Court in *R v Hallstrom, ex p W (No. 2)*¹⁶⁴ confirmed the common law rule that there is a canon of construction 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. Any ambiguity had 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). This provides that all "pre-existing legislation" that can be construed consistently with the Bill of Rights Ordinance shall be given such a construction. For legislation enacted after the Bill of Rights Ordinance, section 4 provides that it shall be construed so as to be consistent with the ICCPR as applied to Hong Kong. It could be argued that protection of rights comes from the substantive law (section 3(2) of the Ordinance or Article VII(5) of the Letters Patent) and not from legislation dealing with rules of interpretation.

11.106 So, on one view the extrinsic aids will make no difference, as the courts cannot take away rights unless there is clear, unambiguous language expressed in the ordinance. Where extrinsic aids are used to confirm the meaning, the court should not be restricted from looking at materials, whether or not the materials convey an intention to restrict rights. If the intention of the legislation was to clearly take away rights, then there would be no need to confirm that meaning by the use of such aids.

11.107 It was held in *R v Bolton ex p Beane*¹⁶⁵ that a clear legislative intent would be necessary to derogate from fundamental principles concerning the liberty of the individual. If such intention was not found in the Act itself, then "notwithstanding section 15AB of the Acts Interpretation Act,¹⁶⁶ the second reading speech of the responsible Minister cannot supply the deficiency". Thus the court would interpret the penal statute in favour of the person whose rights are affected.

11.108 In *Botross v London Borough of Fulham*,¹⁶⁷ the respondent relied on the rule of construction and argued that the decision in *Pepper v Hart* was inapplicable. The applicant was contending that a criminal offence was created by the provision in reliance on an explanation of that provision in Parliament. Beldam LJ refused the respondent's submission. The court did not dispute that there was "uncertainty"¹⁶⁸ and resolved the ambiguity by the explanation given in Parliament, not by the language of the provision itself.¹⁶⁹ The parliamentary

¹⁶⁴ [1986] QB 1090, at 1104.

¹⁶⁵ (1987) 61 ALJR 190.

¹⁶⁶ 1901 (Cwealth). See further chapter 8.

¹⁶⁷ (1995) 16 Cr. App. R (S.) 622

¹⁶⁸ *Ibid* at 628.

¹⁶⁹ See chapter 6. 86-88.

intention was that a statutory nuisance was a criminal offence enabling the court to award compensation. Whether or not a court would ignore the canon of construction on the interpretation of penal statutes in a more serious criminal case is a matter of conjecture.

11.109 However, in *R v Law Chi-wai*,¹⁷⁰ the Court of Appeal held that an offence of possession of explosive substances was an absolute one. "That that was the intention of the legislature is shown by the report of the proceedings of the Legislative Council when the Bill was read".¹⁷¹ The court rejected the argument that the Bill of Rights Ordinance (Cap 383) invalidated legislation providing for an absolute offence.

11.110 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). **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"

11.111 One consultee suggested that this proposed subsection would reduce the court's ability to find an ambiguity or absurdity "which they have traditionally used to protect the litigant in criminal sensitive legislation". The Commission does not accept this submission and indeed takes the view that the provision is designed to protect the individual's common law rights in this regard.

Additional and non-statutory reform

Drafting

11.112 Some of the changes proposed (for example, in relation to explanatory memoranda) will not need statutory intervention, but a change in the practices of the legislative process and administration. 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. The Commission considered the argument that incorporating objects clauses¹⁷² might reflect more clearly the purpose of legislation.¹⁷³ This might also be more in keeping with the spirit of section 19 of the Interpretation and General Clauses Ordinance (Cap 1). **However, on**

¹⁷⁰ Unrep. Cr App No. 260/1995, 7 September 1995 (CA).

¹⁷¹ At 3. Ching J.

¹⁷² See 9.23.

¹⁷³ 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).

balance the Commission considers that mandatory objects clauses would cause practical difficulties and impose strictures on the draftsman.

Specially prepared explanatory memoranda

11.113 Some members of the Commission thought that a specially prepared explanatory memorandum, which included the object and purposes of legislation and its background, and which was amended to reflect changes as the Bill went through the Legislative Council, merited further consideration. This was as an alternative to legislation along the lines of section 15AB and was also suggested by the United Kingdom Law Reform Commissions.¹⁷⁴ Such an explanatory memorandum could expand the objects and reasons format of the old explanatory document and might include a schedule of aids that could be referred to. A memorandum would avoid the need to consult *Hansard*, though if in a particular case the memorandum did not assist, it would be possible to fall back on *Pepper v Hart*.

11.114 There would be disadvantages, however, in relying on a specially prepared explanatory memorandum. It would be prepared by the executive (although one option would be to require its approval by the Legislative Council); it might well suffer from the same lack of comprehensibility as the ordinance; it might deflect attention from the ordinance itself; and there might be inconsistency between the purpose set out in the memorandum and what was achieved in the ordinance. Two practitioner consultees supported the idea of a specially prepared explanatory memorandum as being of practical assistance to lawyers advising their clients. One suggested that the memorandum should provide in a schedule a list of aids that could be referred to. However, it was accepted that there may be problems with such a memorandum when there are subsequent amendments to the ordinance. In those circumstances, the memorandum would need to be updated.

11.115 **After considering the arguments for and against the use of specially prepared explanatory memoranda, the Commission does not recommend their adoption.**

Explanatory material

11.116 The United Kingdom Law Commissions note on descriptive, motivating and expounding texts is useful for this purpose.¹⁷⁵ In deciding on what type of explanatory material should be attached to a Bill, departments should bear in mind the helpful criteria set out of credibility, contemporaneity, proximity, and context.¹⁷⁶

¹⁷⁴ See *supra*, at 7.8 *et seq.*

¹⁷⁵ See 7.9 *supra*.

¹⁷⁶ See 7.97 *supra*.

11.117 The suggestion, by the *Hansard* Commission on the Legislative Process¹⁷⁷ of providing explanatory notes on sections was examined by the Commission. A similar suggestion had been made by the New Zealand Law Commission.¹⁷⁸ **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.**

11.118 **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.**¹⁷⁹ **This should include overseas legislation where that was the source of the Hong Kong provision.**

11.119 **The Commission believes that an explanatory memorandum for amendments at the committee stage of complicated and sensitive Bills would be of considerable assistance.**¹⁸⁰ **is would partly implement a Renton Committee recommendation that the practice should be developed of making available notes on clauses and similar additional explanatory material for Committee stage debates in both Houses.**¹⁸¹ **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.**¹⁸²

11.120 **The Commission does not recommend that an ordinance should incorporate a final version of an explanatory memorandum, revised to reflect all amendments passed.**¹⁸³

11.121 **The Commission considers that it may be appropriate in complex legislation, ordinances implementing a report of a law reform body and legislation with an international element to refer to the extrinsic materials in a schedule.**¹⁸⁴ **This would be similar to the practice adopted in the Arbitration Ordinance (Cap 341),**¹⁸⁵ **where a schedule of extrinsic materials is inserted which facilitates tracing the relevant documents.**

11.122 In Australia, there is a practice of inserting the date of the Second Reading speech in the Act. The proposals of the New Zealand Law Commission were that the date of the second reading speech; the name of the Bill as introduced; the date of other parliamentary stages; the number of

¹⁷⁷ See *supra*, at 7.37 and 9.44-9.45. 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.

¹⁷⁸ See *supra*, at 9.77.

¹⁷⁹ See *supra*, at 9.78.

¹⁸⁰ See chapter 9.32.

¹⁸¹ Paragraph 15.10 of the report.

¹⁸² See chapter 9.31.

¹⁸³ See chapter 9.33-34.

¹⁸⁴ See chapter 9.80.

¹⁸⁵ Sixth Schedule. It also included a report of UNCITRAL and of the Secretary General.

the Bill and of its later versions and of any relevant supplementary order paper; and a reference to any printed report on the Bill should be included in any ordinance.¹⁸⁶ There are practical difficulties in implementing these recommendations in Hong Kong.¹⁸⁷ It may be confusing if more than the date of the Second Reading Speech was inserted, especially where a long Ordinance with numerous amendments is concerned. A compromise would be to insert the information in each ordinance as originally printed but to omit it in the revised edition.

11.123 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.¹⁸⁸

11.124 The Commission recommend that where legislation implements a law reform report the legislation should refer to any relevant law reform publications.¹⁸⁹

11.125 One consultee stated that a specially prepared explanatory memorandum should "give[s] an explanation as to the background of the legislation and why it is necessary and what it is trying to do". No doubt this should be the aim of an ordinary explanatory memorandum.

11.126 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.

11.127 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."¹⁹⁰ There is no direct equivalent of the Australian section in Hong Kong.¹⁹¹ **For the removal of doubt, the Commission recommends that a provision similar to section 7(1) of the Evidence Act 1905, allowing the proof of extrinsic materials by their production, ought to be inserted in reforming legislation.**

¹⁸⁶ Paragraph 115 of the Report No 17, *op cit* at paragraph 37.

¹⁸⁷ See chapter 9.74.

¹⁸⁸ See chapter 9.75.

¹⁸⁹ This was done in the Sixth Schedule to the Arbitration Ordinance (Cap. 341). This was recommended by the New Zealand Law Commission "The Format of Legislation". See further *supra*, at 9.79.

¹⁹⁰ Brazil "Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials" (1988) 62 ALJ 510.

¹⁹¹ The only relevant Hong Kong provision is section 21 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) which provides that journals printed by order of Legislative Council. Legislative Council can be admitted as evidence in an inquiry touching its privileges, immunities and powers.

Accessibility

11.128 The question of availability and accessibility is a matter for government and the legislature, and does not require statutory intervention.¹⁹² It is hoped that extra resources can be provided to shorten the time gap in the availability of *Hansard* and its index.

11.129 The list of extrinsic aids set out in section 15AB(2) of the Acts Interpretation Act 1901 does not include government circulars or other explanatory materials issued after the enactment of the legislation. **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.**¹⁹³ This should ensure that the legal and factual accuracy of, and the accuracy of assurances given in, such documents would be vetted before they become public.¹⁹⁴

Practice Direction

11.130 The recommendation by the United Kingdom Law Commissions that there be Rules of Court requiring notice of intention to use materials¹⁹⁵ has now been answered in Practice Directions in England.¹⁹⁶ These apply throughout the Supreme Court, including the Crown Court and the County courts. They must be complied with for both final and interlocutory hearings. Available materials are confined to the official reports contained in *Hansard*: "No other report of parliamentary proceedings was to be cited". The party relying on either *Pepper v Hart* or *Pickstone v Freemans plc*¹⁹⁷ must serve copies of the relevant extract from *Hansard*, together with a brief summary of the argument intended to be based upon such report, on the court and all other parties. There must be no less than five clear days before the hearing, unless the judge otherwise directs. If any party fails to comply with this Practice Direction the court may make such order, relating to costs and otherwise, as is in all the circumstances appropriate.

11.131 The Commission had considered in the Consultation Paper that a Practice Direction would be useful. There was support from practitioners for such a Practice Direction to guide what materials could be put before the court, and to put the other party and the court on notice. The Commission notes that the English Practice Direction makes provision for an order of costs in default of compliance with its terms. Such a power may help allay concerns that there would be some practitioners who would seek to introduce extrinsic aids unnecessarily.

¹⁹² See *supra*, at 9.70 *et seq.*

¹⁹³ If it is for internal use then this briefing document should not itself come within the criteria. See 9.66 further.

¹⁹⁴ See Jenkins, "*Pepper v Hart: A Draftsman's Perspective*", 15 Stat LR, No.1, 23, 25 (1994).

¹⁹⁵ Paragraph 59 of the Working Paper. See *supra*, at 7.7.

¹⁹⁶ [1993] 1 WLR 303, for the House of Lords. There has also been a Practice Direction for all the other courts in "Practice Direction: (*Hansard* : Citation)", [1995] 1 WLR 192.

¹⁹⁷ [1989] AC 66. See *supra*, at 2.95 for a discussion of *Pickstone v Freemans plc*.

11.132 **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.**

Other extrinsic aids

11.133 The other extrinsic aids, referred to in Chapter two, such as historical setting, textbooks, other statutes, conveyancing practice, and uniform court decisions, are rarely of relevance. The Australian provisions have worked well without the need to incorporate these type of aids into their statute. **The Commission does not recommend that these other extrinsic aids be included in a statutory provision.**

11.134 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 ...".¹⁹⁸ It seems that this section will not be applicable after 1 July 1997, given its jurisdictional parameters.¹⁹⁹ Such a section is one way to obtain expert evidence of Chinese extrinsic aids for the interpretation of Chinese law. 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.²⁰⁰ This may be an area that needs some further consideration.²⁰¹

Conclusion

11.135 The Consultation Paper was issued for consultation to the Bar, the Law Society, the Judiciary, the Universities and the Legislative Council Secretariat, particularly their legal advisers, and the members of the Legislative Council's Panel on Legal Services. On balance, the Commission, having considered the submissions from those consulted, is in favour of legislative reform. 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.

¹⁹⁸ It is submitted that post-1997, this could not be interpreted to regard China as being "a country ... outside" Hong Kong.

¹⁹⁹ See 10.36

²⁰⁰ See *Li Jin- fei and Others v Director of Immigration* [1993] HKLR 256, at 264-5.

²⁰¹ 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.

11.136 **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. The Commission believes that its recommendations should provide a practical and workable solution to the use of extrinsic materials as an aid to statutory interpretation.

Chapter 12

Summary of Report on Extrinsic Materials as an aid to Statutory Interpretation

Part I

Introduction

12.1 This chapter 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?

12.2 "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".¹ 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.²

12.3 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.³

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

² *Ibid* at 177-178.

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

12.4 The United Kingdom Law Commissions in their joint Report stressed the importance of rules of interpretation of legislation being workable rules of communication between the legislator and the legislative audience as a whole.⁴ This consideration is particularly important in any assessment of the value of the aids to interpretation extraneous to the statute itself.⁵

What are extrinsic aids to interpretation?

12.5 Briefly, they are as follows:⁶

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

12.6 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*,⁹ where the House of Lords held that the rules excluding reference to parliamentary materials should be relaxed on certain conditions.¹⁰

Background : constitutional theory¹¹

12.7 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.¹²

⁴ *Idem.*

⁵ *Idem.*

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

⁷ Parliamentary debates are recorded in *Hansard*.

⁸ 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.
[1992] 3 WLR 1032.

⁹ See *infra* in paragraph 12.20.

¹⁰ See chapter 1.2-1.6.

¹¹ Miers and Page, *"Legislation"* (1982), 180.

Parliamentary intention¹³

12.8 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.¹⁴ Lord Diplock in *Fothergill v Monarch Airlines Ltd*¹⁵ 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".

12.9 Lord Roskill¹⁶ queried Lord Reid's statement on parliamentary intention¹⁷ 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.¹⁸ Burrowes argues that this view reflects the constitutional convention that the courts and the legislature should not inquire into each other's internal processes.¹⁹ 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".²⁰

Rules of construction

12.10 The courts developed various rules for the interpretation of legislation. These were the mischief rule,²¹ the literal rule²² and the golden rule.²³ 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:

"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will

¹³ See chapter 3.7-3.10.

¹⁴ See *Salomon v Salomon* [1897] AC 22, 38.

¹⁵ [1981] AC 251, at 279.

¹⁶ *Infra*.

¹⁷ "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.

¹⁸ *Supra* at 80.

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

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

²¹ 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.

²² 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.

²³ 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.

best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit".²⁴

Purpose of extrinsic aids

12.11 The context for looking at the purpose of extrinsic aids to statutory interpretation has been described thus:-²⁵

"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".

12.12 The United Kingdom Law Commissions classified the sources of extrinsic aids by reference to the purpose for which they might be used in interpretation:²⁶

- (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

12.13 The courts held in the pre-*Pepper v Hart*²⁷ 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.²⁸ In deliberating on the admissibility of extrinsic aids, the Commissions²⁹ considered how far the material admitted might be relevant to the interpretative task of the courts, how far it would afford them reliable guidance, and how far it would be sufficiently available to those to whom the statute is addressed.³⁰

²⁴ 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.

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

²⁶ *Idem*.

²⁷ [1992] 3 WLR 1032.

²⁸ 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.

²⁹ *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.

³⁰ See chapter 2.3.

Rationale of the courts in excluding extrinsic aids³¹

12.14 Various reasons have been given for excluding extrinsic aids:- that it would upset the constitutional balance between parliament and the courts,³² that it breaches the conventions concerning parliamentary intention,³³ that it is in breach of the traditional rule of parliamentary privilege,³⁴ 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,³⁵ and the need for legal certainty.³⁶ 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.³⁷

12.15 Lord Diplock in *Black-Clawson Ltd v Papierwerke Waldhof-Aschaffenberg AG*³⁸ 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"....*³⁹

Rationale of the courts in allowing extrinsic aids⁴⁰

Official reports

12.16 In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg A-G*⁴¹ it was held that the court was entitled to have regard to statements of the mischief aimed at contained in an official report,⁴² but not to the report's recommendations, nor to its comments on the draft Bill contained in the report. Viscount Dilhorne criticised this distinction as artificial and serving

³¹ See chapter 3.

³² See chapter 3.6.

³³ Chapter 3.7-3.10.

³⁴ See chapter 3.11-3.13.

³⁵ See chapter 3.14-15.

³⁶ See chapter 3.16-3.18.

³⁷ See chapter 3.19-3.23.

³⁸ [1975] AC 591, 614.

³⁹ *Ibid* at 638.

⁴⁰ See chapter 4.

⁴¹ [1975] AC 591. See chapter 4.4-4.11.

⁴² 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 the draft Bill, their notes on the clauses of the Bill and the draft conventions annexed to the report (at 623).

no useful purpose.⁴³ 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.

12.17 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*⁴⁴ 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

12.18 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.⁴⁵ 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."⁴⁶ In New Zealand and Australia the courts have justified recourse to extrinsic aids by reference to statutory provisions for a purposive construction.⁴⁷

12.19 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*.⁴⁸

Pepper v Hart⁴⁹

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

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

⁴⁴ [1969] 2 AC 256, at 279, per Lord Reid, dissenting.

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

⁴⁶ [1992] 3 WLR 1032, 1040 D.

⁴⁷ 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.

⁴⁸ *Pepper v Hart* [1992] 3 WLR 1032.

⁴⁹ 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

12.21 Lord Browne-Wilkinson set out the arguments for allowing parliamentary materials as extrinsic aids as follows:⁵⁰

- (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.⁵¹
- (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.

⁵⁰
⁵¹

At 1056-1061. See chapter 5.19.

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).

- (9) A number of judges have admitted in judgements that they have looked at *Hansard* to seek the intention of Parliament.⁵²

Arguments against admissibility

12.22 Lord Browne-Wilkinson set out the arguments against the use of *Hansard*, based on the objections of the Attorney General, as follows:⁵³

- (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.⁵⁴
- (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

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

- (1) It is possible to obtain Parliamentary materials. No one suggests that Statutory Instruments⁵⁵ should not be referred to, and they are not available in an indexed form for a year after they are passed.

⁵² 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).

⁵³ 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.

⁵⁴ 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).

⁵⁵ 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.⁵⁶
- (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,⁵⁷ 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.⁵⁸

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

12.24 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.⁵⁹ Despite the differences between the legislative process here and in the United Kingdom, only in *Ngan Chor Ying v Year Trend Development Ltd*⁶⁰ was a reservation expressed as to this fact by Findlay J. In *Matheson PFC Limited v Jansen*⁶¹ Penlington J regarded a statement in the explanatory memorandum by the Attorney General as "a clear statement from the equivalent of a Minister...".

12.25 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*

⁵⁶ 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.

⁵⁷ See headnote which summarises the criteria.

⁵⁸ 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.

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

⁶⁰ [1995] 1 HKC 605, 610. See *supra*.

⁶¹ (1994) Civil Appeal No. 72 of 1994, (CA) 26 July 1994.

Limited v Attorney General,⁶² 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,⁶³ Lord Oliver⁶⁴ and Lord Browne-Wilkinson.⁶⁵

Draft Clauses⁶⁶

12.26 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;⁶⁷*
 - (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.*

⁶² [1995] 2 HKC 201(CA). See chapter 6.19.

⁶³ [1995] 3 WLR 1032, at 1039H.

⁶⁴ *Ibid* at 1042H.

⁶⁵ *Ibid* at 1056B.

⁶⁶ See chapter 7.17-7.18.

⁶⁷ 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".

- (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 purpose for which they could not be considered apart from this section".*⁶⁸

New Zealand

12.27 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.⁶⁹ 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).⁷⁰ "No doubt if left to themselves, the courts will work out such criteria on a case by case basis, but it will take time."⁷¹

North America

12.28 The Canadian courts have developed their own rules about the admissibility of extrinsic aids without recourse to legislation.⁷² 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.⁷³ However, the situation in the United States is unlikely to arise in our more controlled legislative process.⁷⁴

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

⁶⁹ "Legislation and its Interpretation", Preliminary Paper No 8, Paragraph 61. (December 1988) See further chapter 7.50-7.75.

⁷⁰ 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."

⁷¹ At 140.

⁷² See chapter 7.76-7.86.

⁷³ [1993] 3 WLR 1032, at 1059.

⁷⁴ Chapter 7.88-102.

Australia⁷⁵

12.29 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,⁷⁶ which had been interpreted as providing a mandatory preference for a purposive interpretation.⁷⁷

12.30 Despite section 15AB, and similar provisions in other Australian States allowing reference to reports of official bodies,⁷⁸ 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.

12.31 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.⁷⁹ Such alteration can only be effected if the conditions in subsection (1)(b) are satisfied.⁸⁰

12.32 Some of the fears expressed by commentators in the United Kingdom after the judgement in *Pepper v Hart* have not been realized in Australia.⁸¹ Indeed, Lord Browne-Wilkinson in that judgement⁸² 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.

⁷⁵ See chapter 8.

⁷⁶ This had been inserted into the 1901 Act in 1981.

⁷⁷ "Current Topics Statutory guidelines for interpreting Commonwealth statutes", (1981) 55 ALJ 711.

⁷⁸ 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.

⁷⁹ 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) 66ALR 377.

⁸⁰ See Annex II.

⁸¹ See chapter 6.

⁸² [1992] 3 WLR 1032, at 1059.

Singapore

12.33 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 1993⁸³ has a provision which is similar to section 15AB of the Australian Acts Interpretation Act 1901 (Cth).

The drafting process⁸⁴

12.34 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 to say.⁸⁵ 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.

Sources of law post handover 1997

12.35 There are significant differences between the systems of statutory interpretation in the PRC and Hong Kong.⁸⁶ 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.

12.36 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 ...".⁸⁷ 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

⁸³ 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.

⁸⁴ See chapter 9.3 *et al.*

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

⁸⁶ See chapter 10.33.

⁸⁷ 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.

do at present.⁸⁸ This may be an area that needs some further consideration.⁸⁹

12.37 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 1997.⁹⁰

Part II

Recommendations⁹¹

*Per incuriam*⁹²

12.38 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*.⁹³ This principle means that decisions were given in ignorance of some inconsistent statutory provision or of some authority binding on the court concerned, thus making them non-binding.⁹⁴

12.39 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*.⁹⁵ **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.**

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

⁸⁹ 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.

⁹⁰ See Wesley Smith's arguments in chapter 10.45.

⁹¹ See chapter 11, Part II for more on the recommendations.

⁹² See chapter 11.18 *et al.*

⁹³ 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.

⁹⁴ *Morelle v Wakeling* [1955] 2 QB 379

⁹⁵ The doctrine of binding precedent or previous judgments of the courts.

Legislating for extrinsic aids

Advantages

12.40 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.⁹⁶ 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*.

12.41 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;*
 - (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,*

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

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

12.42 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.⁹⁷ Most of the academic commentators were negative in their initial reaction to *Pepper v Hart*. 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.⁹⁸ 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

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

⁹⁸ Miers, "Taxing Perks and Interpreting Statutes: *Pepper v Hart*", (1993) 56 MLR 695 at, 706.

procedure, and the implications for the existing constitutional relationship of the legislature and the judiciary.⁹⁹

12.43 **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.**

12.44 **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).¹⁰⁰ These would most suitably be included as section 19A, just after section 19, which is the existing guide to a purposive construction of legislation.¹⁰¹**

Federal Australian model

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

Confirming the meaning

12.46 The Consultation Paper did not make any recommendation as to whether section 15AB(1)(a) should be adopted in Hong Kong.¹⁰⁵ 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.**

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

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

¹⁰⁰ See chapter 11.55.

¹⁰¹ 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.

¹⁰² See Chapter 8.49 for the text of the Victorian provision. See chapter 11.56.

¹⁰³ This seems to have worked well in practice. See chapters 8 and 11.56.

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

¹⁰⁵ See chapter 11.62.

¹⁰⁶ See chapter 11.64.

List of extrinsic aids

12.48 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 1901.¹⁰⁷ 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).¹⁰⁸

12.49 To maintain flexibility, one option would be to include in a schedule the list of aids in section 15AB(2) (as amended).¹⁰⁹ Power to amend the list of aids could be given to the Governor.¹¹⁰ 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

12.50 Users of statutes do in practice use annotations, marginal notes, headings, and similar materials to assist in discerning the meaning of legislation.¹¹¹ 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

12.51 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."¹¹²

*Other common law reports*¹¹³

12.52 The Commission recommend the adoption of a provision along the following lines:

¹⁰⁷ See Annex 1 and chapter 11.66.

¹⁰⁸ This would include the Attorney General.

¹⁰⁹ See chapter 11.67.

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

¹¹¹ See chapter 11.69.

¹¹² See chapter 11.70.

¹¹³ 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

12.53 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*.¹¹⁴ However, subsection (2)(c) is broad enough to include the report of a Select Committee,¹¹⁵ 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,¹¹⁶ and Panels.¹¹⁷

12.54 **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

12.55 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.¹¹⁸ It would appear to include Legislative Council briefs.¹¹⁹ 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*.¹²⁰

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

¹¹⁴ See chapters 9.58 and 11.74.

¹¹⁵ See Order 61 and 62 (10).

¹¹⁶ Order 60A(5A).

¹¹⁷ Order 60E(14).

¹¹⁸ See chapter 11.75.

¹¹⁹ See chapter 9.63.

¹²⁰ This states "such other Parliamentary material as was necessary to understand such statements and their effect".

Second reading speech: subsection 2(f)

12.57 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).**¹²¹

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

12.58 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.¹²²

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

Relevant material in official record of debates: subsection 2(h)¹²³

12.60 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

12.61 The Commission favoured the adoption of the draft clause suggested by the United Kingdom Law Commissions, rather than section 15AB(3).¹²⁴ 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."¹²⁵

Treaties¹²⁶

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

¹²¹ See chapter 11.76.

¹²² See chapter 11.77 and 11.93.

¹²³ See chapter 11.83.

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

¹²⁵ See chapter 11.85.

¹²⁶ See chapter 10.51 *et al* and 11.89 *et al*.

"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."

12.63 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.

12.64 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.¹²⁷

12.65 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

12.66 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).¹²⁸ **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."¹²⁹

Interaction between the legislation and the common law

12.67 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.¹³⁰ 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."

¹²⁷ For text see *supra* at paragraph 12.26.

¹²⁸ For text see chapter 11.98.

¹²⁹ See chapter 11.99.

¹³⁰ See chapter 11.100.

Rights of the individual

12.68 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.¹³¹ 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).¹³²

12.69 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). 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.¹³³ **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

12.70 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.¹³⁴ The *Hansard* Commission on the Legislative Process¹³⁵ 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 clauses¹³⁶ might reflect more clearly the purpose of legislation.¹³⁷ 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**

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

¹³² See chapter 10.2 for text.

¹³³ See chapter 8.28-8.31.

¹³⁴ 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).

¹³⁵ *(Making the Law)* (1992). See chapter 7.

¹³⁶ See chapters 9.23 and 11.114.

¹³⁷ 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).

considers that mandatory objects clauses would cause practical difficulties and impose strictures on the draftsman.

Specially prepared explanatory memoranda¹³⁸

12.71 The explanatory memoranda of Hong Kong Bills¹³⁹ are not very detailed. The only requirement is that they should state the contents and objects in non-technical language.¹⁴⁰ The United Kingdom Law Commissions recommended specially prepared explanatory materials to accompany Bills.¹⁴¹ Zander described their proposal as a mixture of the preamble, the existing explanatory memorandum and notes on clauses.¹⁴²

12.72 The Commission gave serious consideration as to whether to recommend a specially prepared explanatory memorandum,¹⁴³ 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.¹⁴⁴

12.73 However, there would be disadvantages in relying on such an explanatory memorandum.¹⁴⁵ 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

12.74 The Hansard Commission on the Legislative Process,¹⁴⁶ 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.¹⁴⁷ They recommended that explanatory notes on sections, based on Notes on Clauses,¹⁴⁸ 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.¹⁴⁹ They also recommended that the courts should be allowed to make use of explanatory notes on sections of

¹³⁸ See chapters 7.8, 9.35 and 11.115-117.

¹³⁹ 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.

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

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

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

¹⁴³ See chapter 7.8 *et seq.*

¹⁴⁴ Chapter 9.35-37

¹⁴⁵ See chapter 9.36 and 11.117.

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

¹⁴⁷ *Ibid* at paragraph 7.

¹⁴⁸ 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.

¹⁴⁹ Paragraph 250, at 63.

Acts and statutory instruments.¹⁵⁰ A similar suggestion had been made by the New Zealand Law Commission.¹⁵¹

12.75 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.

12.76 The New Zealand Law Commission in their more recent report¹⁵² 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).

12.77 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

12.78 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.¹⁵³ The Commission consider that an authoritative memorandum with the Bill at the initial stages would be sufficient.

12.79 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.¹⁵⁴

12.80 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.¹⁵⁵

12.81 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.¹⁵⁶ This would be similar to the Arbitration

¹⁵⁰ See chapters 7.37, 9.45 and 11.119.

¹⁵¹ See chapter 9.76 and 77.

¹⁵² "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.

¹⁵³ Paragraph 15.10 of the report, *supra*.

¹⁵⁴ See chapters 9.31-9.32, 9.78 and 11.120.

¹⁵⁵ See chapters 9.33-4, and 11.122.

¹⁵⁶ See chapters 9.80 and 11.123.

Ordinance (Cap 341),¹⁵⁷ where a schedule of extrinsic materials was inserted which facilitates tracing the relevant documents.

12.82 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.¹⁵⁸

12.83 There are practical difficulties in implementing these recommendations in Hong Kong.¹⁵⁹ 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.

12.84 **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.**¹⁶⁰

12.85 The New Zealand Law Commission suggested that a brief summary of the Act's legislative history could include references to any relevant law reform publications.¹⁶¹ This information could not just be inserted into the explanatory memorandum as it is not part of the ordinance.

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

12.87 **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.**¹⁶⁴

12.88 Section 35 of the Evidence Ordinance provides that in civil proceedings the *Gazette* may be proved by the production thereof.¹⁶⁵ This

¹⁵⁷ Sixth Schedule. It also included a report of UNCITRAL and of the Secretary General.

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

¹⁵⁹ See chapter 9.74.

¹⁶⁰ See chapter 9.75.

¹⁶¹ "The Format of Legislation" report, *op cit* at paragraph 37. See further chapters 9.79 and 11.126.

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

¹⁶³ 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.

¹⁶⁴ See chapters 9.100 and 11.128.

¹⁶⁵ See chapters 9.72 and 11.129.

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."¹⁶⁶ This provision facilitates the proof of *Hansard* in court.

12.89 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

12.90 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.¹⁶⁷

Status of government circulars

12.91 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*¹⁶⁸ the 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.¹⁶⁹ 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 committee¹⁷⁰ 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.¹⁷¹

12.92 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

¹⁶⁶ This is a Federal Australian provision. See Brazil "Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials" (1988) 62 ALJ 510.
¹⁶⁷ Chapters 9.96 and 11.130.

¹⁶⁸ [1992] 3 WLR 1032/

¹⁶⁹ "*Pepper v Hart*: A Draftsman's Perspective" 15 Stat LR 23 (1994).

¹⁷⁰ *Wells v Police* [1987] 2 NZLR 560. See chapter 7.57.

¹⁷¹ Jenkins, *op cit*. See also chapters 9.18, 9.65 and 11.131.

assurances given in such documents as regards the consequences of a particular Bill to a particular identifiable class of persons.¹⁷²

12.93 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.¹⁷³

Practice Direction

12.94 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.¹⁷⁴

Other extrinsic aids

12.95 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.¹⁷⁵

12.96 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 ...".¹⁷⁶ It seems that this section will not be applicable after 1 July 1997, given its jurisdictional parameters.¹⁷⁷ Such a section is one way to obtain expert evidence of Chinese extrinsic aids for the interpretation of Chinese law. 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.¹⁷⁸ This may be an area that needs some further consideration.¹⁷⁹

¹⁷² See chapter 9.63.

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

¹⁷⁴ See chapters 9.97-99 and 11.134.

¹⁷⁵ These are dealt with in chapter 2.

¹⁷⁶ It is submitted that post-1997, this could not be interpreted to regard China as being "a country ... outside" Hong Kong.

¹⁷⁷ See chapters 10.36 and 11.136.

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

¹⁷⁹ 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.

Conclusion

12.97 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.¹⁸⁰

12.98 **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.

¹⁸⁰ 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.