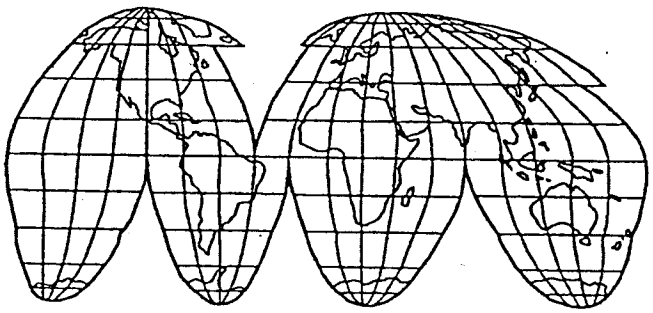
THE LOOPHOLE

The Newsletter of the Commonwealth Association of Legislative Counsel (C A L C)

Please ensure that a copy of this issue is circulated to each CALC member in your jurisdiction



JULY 1995

"The Loophole" is the newsletter of the Commonwealth Association of Legislative Counsel established on 21 September 1983 in the course of the 7th Commonwealth Law Conference held in Hong Kong.

The constitution of the Association provides for an elected Council. The present Council consists of:

Mrs V S Rama Devi *President*	India
Mr Dennis R Murphy, QC *Vice-President*	Australia
Mr D L Mendis *Caribbean Member*	St Kitts-Nevis
Mr Walter Iles, QC *Pacific Member*	New Zealand
Mr N J Abeyesekere *Asian Member*	Sri Lanka
Mr Peter J Pagano, QC *Member of the Council*	Canada
Mr Edward Caldwell *Secretary*	United Kingdom
(To be appointed) *African Member*	.....

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SECRETARY'S NOTES

Members of the Association will have been wondering whether it was such a good idea as it seemed at the time to transfer the Secretariat to London. This issue of *The Loophole* has been a long time coming and for that I must apologise.

One of my problems has been trying to establish the extent to which our membership records are up-to-date. I am afraid that the nature of the Association, membership of which is open to all Commonwealth drafters without payment of a subscription, inevitably makes it difficult to keep an accurate list of members. In the end, I have decided to produce this issue of *The Loophole* without waiting any longer, in the hope that our readers will tell me of errors and omissions in the list of members which is part of this issue.

Mr Arthur Buluma

I am very sad to have to inform members of the Association that Mr Arthur Buluma, who was Chief Parliamentary Counsel in the State Law Office of Kenya and a member of the Council of our Association died last year after a period of illness. He was survived by his widow, Mrs Melisa Buluma and their five children, the youngest of whom was just a few months old when Arthur died. The Council and members of the Association express their sympathy to Mrs Buluma and the other members of his family and their sadness at the loss of a much respected member of our profession.

Arthur Buluma, who was born on 6th June 1953, studied law at the University of Nairobi where he graduated with an LL.B (Hons). He joined the State Law Office as a State Counsel in August 1976.

The Attorney General of Kenya, the Hon. S Amos Wako said of Arthur Buluma "as an Office we have lost a colleague that was humane, suave and pleasant to associate with. Arthur was liked by all in my Chambers because of his unique qualities of patience, understanding and preparedness to give assistance at any time". I am sure that those warm feelings towards Arthur will be shared by all who knew him.

Mr Lionel Levert QC

Readers of Lionel Levert's stimulating paper which was given at the Association's general meeting and which is published in this issue will be delighted to learn that he has been appointed Chief Legislative Counsel for the Federal Government of Canada. He replaces Peter Johnson QC, who will be retiring soon.

The Internet

One of the problems facing an association such as ours, with a world-wide membership and no funds, is how best to distribute material, including in particular *The Loophole*. I am proposing to join the Internet and would be interested to know how many of our members are either connected themselves or have access to a connection. I hope to have more to say about the Internet in the next issue of *The Loophole*.

The next issue

I plan to produce another issue of *The Loophole* before the end of this year and would be grateful both for contributions and for information which will enable me to bring our membership list up-to-date.

cont ...

Finally

Colleagues may be amused by this (non-government) amendment to one of my Bills which was tabled in the House of Lords a few weeks ago. It was published in the form of a new subsection to be added to one of the Bill's early clauses:

Page 5, line 32, at end insert—

( ) For the avoidance of doubt, it is hereby declared that the *eiusdem generis* rule applies to this subsection.

EGC
36 Whitehall
London SW1A 2AY

17th July 1995

COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

MINUTES OF GENERAL MEETING HELD ON MAY 5, 1993

(PHILOXENIA HOTEL, NICOSIA, CYPRUS)

Introduction

1. Mr Petros Clerides, from the Law Office of the Republic of Cyprus, in Nicosia, made a few opening remarks and welcomed the members of the Association to Cyprus.

2. Mr Justice P B Bhagwati, introduced by Mrs. V S Rama Devi as the "Lord Denning of India", made a few remarks about the importance of drafting legislation in the simplest language possible. He extended his best wishes for a fruitful meeting.

3. The President of the Association, Mrs V S Rama Devi, welcomed the members of the Association attending the fourth general meeting of the Association.

Regrets

4. The President informed the meeting that she had received written regrets from the Secretary of the Association, Mr Peter J Pagano, QC.

Introduction of Council Members and Acting Secretary

5. The President then introduced to the meeting the members of the Council, including Mr Lionel A Levert, QC, who acted as Secretary of the Association in the absence of Mr Peter J Pagano, QC.

PRESENTATION OF PAPERS AND OPEN DISCUSSION

6. The following papers were presented to the meeting:

   (a) "The Importance of Legislative Drafters" (Mrs V S Rama Devi, President, CALC).

   (b) "Hansard — Help or Hindrance? A Draftsman's View of *Pepper v Hart*" (Mr Francis Bennion).

   (c) "Plain Language and Drafting in General Principles" (Mr Ian Turnbull, QC. In the absence of Mr Turnbull, the paper was delivered by Mr Paul Lanspeary).

   (d) "Bilingual Drafting in Canada" (Mr Lionel A Levert, QC).

7. Mr Patrick Guiton, Senior Program Officer with the Commonwealth of Learning, based in Vancouver, Canada, presented the meeting with an update on distance training for legislative drafters. It was stressed that the initiative is not meant to supersede existing forms of legislative drafting courses. It was suggested that *The Loophole* be used as a means of keeping people abreast of this initiative.

8. **Open Discussion on Legislative Drafting and other Matters of Common Interest** — There were discussions on a number of matters, including:

(a) **Exchanges of legislative drafters** — Botswana, Canada (Federal Government), Hong Kong, Kenya and Sri Lanka expressed their interest in this regard.

(b) **Training of legislative drafters** — Members discussed the issue of how to train drafters to draft in another official language.

They also discussed the issue of distance training for legislative drafters. The initiative is based on tutorship or mentoring on a regional basis. Practicing mentors will be sought wherever possible. It was suggested that distance training would have some value even where no mentors are available.

(c) **Canada's Bilingual and Bijuridical Drafting Experience** — Representatives from the UK felt that Canada's experience in drafting bilingual and bijuridical legislation could assist the European Community in preparing better translations. Representatives from Hong Kong also appeared to be very interested in Canada's experience in co-drafting.

(d) **Copyright** — There were discussions on the issue of whether and how copyright should apply to legislation. Members agreed that governments have copyright on their legislation. However, the question remained: To what extent should that right be waived?

There appeared to be a consensus that freedom to reproduce previously published legislation should be the general rule. Most of the problems identified related to access to electronic data. It was felt that publishing enterprises and the public should not be provided those data free of charge, governments not being in the business of funding access to their data bases as a free service. User fees would appear to be fully justified.

Members were reminded that the **Hansard Report** and the recent (1988) UK legislation on copyright could provide very useful information on the matter.

BUSINESS PART OF THE MEETING

Proxies

9. The President reported to the meeting that she had received from Mr Peter J Pagano, QC, the Secretary of the Association, a fax setting out the proxies that had been delivered to him before the meeting as required by clause 12 of the Constitution. The President read out particulars of the proxies.

Approval of Minutes

10. The meeting approved the minutes of the general meeting of CALC held on April 19, 1990 at the Sheraton Hotel, Auckland, New Zealand.

THE IMPORTANCE OF LEGISLATIVE DRAFTERS

In Modern Welfare States, administration is run by the rule of law. As such law is the instrument through which social engineering is expected to be achieved. So the importance and the role of the legislative drafter is enormous as he becomes instrumental in shaping the developmental process in a country by framing laws for the purpose. In such a state of affairs even the worst critics of legislative drafters will have to put up with them, much as they may detest their presence, as a necessary evil.

In India even from ancient times law-givers or drafters like Manu, Yajnavalkya and others were called upon from time to time to reduce the rules of law prevalent in the society as customs or usages into writing in a formal way. We also cannot forget the oldest code of Hammurabi of Babylonian law and in later times the French code which owes its birth to Napoleon. Mr G R Rajgopal in his book on "The Drafting of Laws" says that we see in these early law givers the birth of the modern legal drafters. However, the modern legislative drafters owe their existence, in India and elsewhere, to Jeremy Bentham who propounded the theory that legislation is a science and also conceived the idea that codification of law is meant for utility, that is to say, for the promotion of the greatest happiness of the greatest number.

Though some intellectuals were influenced by Bentham's views in England, it appears that mainly common law principles prevailed. Acts of Parliament were also being drafted by judges. Later it appears that Privy Council committees started preparing Bills. Acts which dealt with legal subjects appear to have been drafted by eminent lawyers.

While commenting on the defects inherent in such haphazard legislation, Arthur Symonds observed that "if the laws to be passed were submitted to the draftsmen employed by the Government it would not be difficult with the help of their respective experience to frame a systematic plan of writing laws, so as to render them at once intelligible to laymen from their greater plainness and style, and more satisfactory to lawyers themselves from their greater accuracy and completeness and from their affording a recognised standard for the expression of legislative matters. " However, the prejudice towards systematic legal drafting amongst the Jurists and those concerned was so acute that until the year 1883, the code of criminal law and procedure was introduced seven times and withdrawn an equal number of times.

It is in relation to India that Bentham's ideas were transformed into reality. Lord Macaulay who was the Chairman of the first Law Commission for India drafted in the modern sense the Indian Penal Code which was almost adopted not only in all other British colonies but even in Britain itself. I have the greatest regard for him as an ace drafter and have yet to come across a greater drafter. About the principles which the Law Commission followed in the codification of laws, he stated that "our principle is simply this: uniformity where you can have it - diversity where you must have it - but in all cases certainty." (Hansard Debates, Third series, Vol. XIX531). With certainty, precision also gained importance. Debate ensued about legislative drafting. While Bentham and others felt that it is a science, certain others viewed it as an art and some others felt it to be an applied art. By whatever name it was called it remained to stay.

Everybody is aware that there cannot be a perfect draft, nor have there been any. Even Bentham talks in terms of imperfections of the first order and of the second order. According to him, ambiguity, obscurity and over-bulkiness belong to the first category and unsteadiness in expression, unsteadiness in import, redundancy, longwindedness, entanglement, disorderliness etc. belong to the second category.

Besides Bentham, rules were laid down for legislative drafters by Montesquieu and others. It shows that the importance of legislative drafters was getting recognised day by day. Credit goes

to Lord Thring who by 1854 brought many improvements in the form of legislative drafting by way of breaking up a statute into Parts, sections, sub-sections etc.

Reed Dickerson, in his book "Legislative Drafting", says that "legal drafting is not for children, amateurs or drafters. It is a highly technical discipline, the most rigorous form of writing outside mathematics. The draftsman is like an architect and he should fill it up according to the needs of the client without any legal flop. Form and substance go together in legislative drafting. Though substance is foremost, form is very important since ambiguity will defeat the whole legislation. Clarity and simplicity begin with straightforward thinking and end with straightforward expression. Though the draftsman does not have much role in policy making, it would be better if he were associated for greater understanding of the policy, to know the problem in detail, foresee the pitfalls, bring these to the client's attention and present the relevant choices that the client must sooner or later make. But he must not forget that he is a legislative midwife. He is not having the baby himself.

In the modern day most of the legislative measures which a drafter is called upon to tackle are complicated and also new. So, unless the drafter is skilful, babies can be still-born and remain without force, or born with defects leading to enormous litigation. So there lies the skill and the importance of the drafter, though termed a mid wife. As, for example, very recently in a National Seminar on Atrocities against Women arranged by the National Commission for Women in India, a parliamentarian described the legislative drafter (who was my humble self) as the skilful midwife who brought the law into existence for the constitution of the National Commission which was formed to look after the interests of the entire womanhood in the country. I must say these are the moments, though very rare, which a drafter may like to preserve as rewards.

In India many a time a drafter is involved or invited to take a significant role in policy making too, depending upon the wisdom and the capacity of the drafter. Very often the officers of the Administrative Ministries who sit with the drafters while their proposals are being given a shape end up saying "thank god ... we are not legislative drafters ... we could never imagine drafting involves so much pain and skill." Of course some who do not witness the drafting of a bill would say that it is only copying and drafters are only copy cats.

The importance of the drafter can be measured from the vulnerability and onerous nature of the job of drafting. In the words of a highly acclaimed speaker of the Indian House of the People "drafting a Bill is not as easy a matter as it may appear at first sight. It requires men who are not only well conversant with law and are besides Jurists, but men who have an amount of experience in drafting. It is necessary that they should not only possess thorough mastery of the requisite technique but must have knowledge of judicial precedents and legal principles as well as important statutory provisions, for they have to understand and weigh the implications of every word used in a Bill. Above all, they should have enough time to digest their own drafts and consider the implications of what they have drafted." — what a tall order.

The late Shri R V S Perisastry, one of the founder members of the Commonwealth Association of Legislative Counsel (CALC), said that the drafting of legislation is an exacting occupation which demands a high degree of intellectual ability, a sound knowledge of the law and not merely the law but constitutional law also, the ability to write good English and an unlimited capacity for hard work.

The Renton Committee on the preparation of legislation says that if a person has all these attributes why would he slog for a pittance in the Law Department of a State or at the Central Government and suffer all the indignities at the hands of so many categories of persons who if given a chance may not have done much better.

In spite of all his attributes see how a drafter is ridiculed in a satire–

"I am the parliamentary Draftsman,
I compose the country's laws,
And of half the litigation.
I'm undoubtedly the cause,
I employ a kind of English
Which is hard to understand
Though the purists do not like it,
All the lawyers think it's grand."

It is often advised that the draftsman has to develop a thick skin to swallow such uncharitable criticism and ridicule. I would say thick skin is not sufficient, he has to develop a hide in the present day atmosphere. Justice Goyal, a legislative drafter who was elevated to the Bench said that a judge in a court is assisted by two opposing counsel who are expected to place before him all the statute law and case law bearing on the subject. The judge can then protect himself by recording in his Judgment that no other point was urged or pressed before him. No such alibi is available to a drafter.

The judiciary normally does not lose a chance to make fun of drafters. There are of course judges like Lord Denning in whom drafters can find some comfort. He observed that "people who draw Acts of Parliament ... are very commonly found fault with by those who never draw an Act themselves. I suppose it is impossible to foresee all the difficulties that will arise, and to use exactly precise words to say nothing of the difficulties under which Acts are drawn up." Of late the tendency has changed in India too. The Indian Supreme Court, in *Lakshmi Kant Pandey v Union of India*, paid compliments and congratulated the drafter on a bill on "Adoptions" pending in the House of the Parliament and recommended that the provisions of the Bill be treated as general instructions to the court for the purposes of inter-country adoptions. Though of course it is the rarest of the rare cases.

In this context I have to relate an interesting incident that occurred. In a recent case of the *Supreme Court Employees Association v Union of India*, the rules made by the Chief Justice of India relating to salaries and allowances of the employees of the Supreme Court were declared defective as the President of India's approval (which stamps them as legally made subordinate legislation under article 146 of the Indian Constitution) was not obtained . The former Chief Justice of India, Hon'ble Mr Venkataramaiah, while inaugurating a refresher training course for legislative drafters, lamented by saying that had only my learned brother judges had associated a legislative drafter with the task, they would not have met with such a sorry state of affairs of denouncing their own Act, for a drafter would have taken care of all the legal formalities.

The importance of drafters goes up during the parliamentary sessions and even during the off sessions, for the purposes of assisting the parliamentary committees and drafting Ordinances. Whenever the Government does not want any economic or political issue to be discussed, the official drafters would be much sought after for Bills to keep Parliament engaged. Though it is unfair to the drafter, he will be called upon to draft legislative bills overnight and may sometimes have to perform miracles. In this context I would like to share one of my experiences with you. One day I went home around 9.00 p.m. and went for a walk. A staff car chased me on my walk and took me back to the official gallery of Parliament. The scene there was that the ex-Prime Minister was challenging the then Prime Minister to come forward with a bill to amend the constitution the very next morning for ending presidential rule in a federal unit and starting election process therein. So I was called to ascertain whether I would be able to perform that feat. Could there be any way out for me? I still remember the way the ex-Prime Minister remarked with a glint in his eye, "I know you will accept my challenge even if it kills your drafter".

When coalition ministries with more than one political party are formed, the drafter may have to face explosive situations. In the recent past one of the constituent parties threatened to bring down the Government unless a Bill consisting of more than 60 clauses was drafted to convert a union territory into a fully-fledged federal unit within hours. I was given this information at 11.00 a.m. and had to produce the Bill by 5.00 p.m. for consideration by that party. Don't ask me how I managed it. The Law Minister was so upset that day that he took his cudgels with the Prime Minister stating that they should rather have let the government fall than have the drafter killed. These are the very rare precious moments a drafter likes to cherish, for normally no one bothers about the drafter once the work is over.

There is one area where the importance of the legislative drafter is still not recognised; that is convention and treaty drafting. They lack uniformity of expression and precision. Just reading them, they may seem satisfactory, but when a drafter is asked to assimilate them into the municipal laws justiciable in his country, it becomes very difficult. He can neither make changes in them nor assimilate them in a precise manner. I strongly feel that international agencies like the United Nations Organisation, the International Labour Organisation, the Commonwealth Lawyers' Association and the South-east Association of Regional Cooperation must involve trained legislative drafters for drafting conventions, treaties and resolutions.

Nowadays it has become fashionable to denounce the drafter and his systematic drafting as too technical. They always make fun of nonobstante clauses. What can he do when he is asked to frame law which conflicts with other law? Specially with reference to the laws which would benefit certain weaker sections of the people and the general public, various voluntary organisations and parliamentarians want them to be so simple and loose that they may not be able to stand the test in the court because of their looseness and vagueness. Of late there has been a tendency to pass judgment that the Anglo Saxon method of drafting is not suitable for welfare and social legislation; and it is better to adopt the continental method. All sorts of attempts are being made to get the laws drafted at university level etc. as a reform measure. But ultimately they are turning again to retired trained drafters for finalisation. So dear colleagues the importance of the legislative drafter is still intact whether in service or out of service.

Whatever may be that importance, there is total agreement on the fact that drafting is a thankless job. The drafter very rarely gets the credit for his work. For no fault of his, the choicest abuse will be showered on him for his bad drafting by opposition members whenever they want to embarrass the Government. The late Mr Hiranandani, acclaimed as an ace drafter, advised the drafter that "if you have a choice to become a draftsman or take up any other job, take up the other job." In spite of the great soundness of that advice, I would not entirely agree with it. As for myself, when there was a choice to be either an adviser or a drafter, I chose to be a drafter. There is a challenge in the job. There is a sort of pleasure in giving birth to a Bill however strenuous or painful the process may be. No creation can be painless, but the ultimate result may be wonderful. The very formidable nature of the job throws up a challenge with a deadly attraction. So the drafter turns to it as a moth to the flame.

"Communication is the essence of every society. The regulation of society is the field in which the legislative draftsman toils, his task is to frame the communication of policy decisions having legal consequences to members of society" says G C Thornton in his book on legislative drafting. So as long as organised societies exist, the importance of legislative drafters cannot be undermined and it remains undaunted. If nothing else, the presence of the legislative drafters shall be sought at least to perform the priests' job of sanctifying the introduction or the birth of the Bill or the repeal or the death of the Act!

(V S Rama Devi)
President, CALC

HANSARD - HELP OR HINDRANCE?

A Draftsman's View of *Pepper v Hart*

by Francis Bennion

Paper delivered to the conference of the Commonwealth Association of Legislative Counsel held in Cyprus, May 1993.

It is just forty years since I entered the Parliamentary Counsel Office in London, then situated in a remnant of the medieval Palace of Westminster known as Old Palace Yard. Throughout that period, and for some two centuries previously, a United Kingdom legislative drafter worked under the assumption that Hansard could not be looked at by courts when construing his or her compositions. Now, this has changed. By its decision in *Pepper (Inspector of Taxes) v Hart [1992]* 3 WLR 1032 the House of Lords overturned what is known as the exclusionary rule. In this paper I examine the decision and discuss some of its consequences for drafters and others.

Drafters, at least in the common law tradition, strive to lay down clear, comprehensive rules. Legislators expect them to do this. Especially, legislators expect them wherever possible to be comprehensive, that is to cover all the ground by express provisions. But of course it is seldom practicable to achieve this aim within the four corners of a parliamentary Bill. So what does the drafter do? There are three possible expedients. Power may be given to lay down the detail in delegated legislation. Implication may be relied on. A broad term may be used. I want to concentrate on the third possibility.

The broad term will cover a multitude of possible situations. It is then left to officials administering the Act, or the court on appeal or review, to work out how by the exercise of judgment or discretion the broad term is to be applied in particular types of situation. This was the case in *Pepper v Hart* itself, where the broad term was "a proper proportion" (used in relation to a certain kind of expenditure).

Just what do I mean here by judgment or discretion"? These are commonplace terms, which we are apt to hurry over. For once, let us take a little time to consider them. I would say that *judgment* is needed where a court or official is given the task of determining whether a specified criterion is satisfied, for example whether a certain thing is "necessary" or "reasonable". On the other hand *discretion* is to be applied where it is left to the court or official to make a determination at any point within a given range, for example in fixing the sentence following conviction of an offence. Deciding on what is "a proper proportion" of certain expenditure is a matter of judgment.

So in the enactment with which *Pepper v Hart* was concerned the drafter, having gone as far in the direction of particularity as seemed possible, left the rest to be dealt with as a matter of judgment. This is not an analysis any of the judges in the case thought fit to make, probably because it was not the way counsel presented the argument to them, but I submit it is the correct one.

There enters now a complicating factor. Because MPs wish to know exactly how a provision they are asked to pass is going to work in practice, they sometimes jump the gun. They are not content to wait and see how officials and courts will exercise their judgment or discretion in applying a broad term. They want the answer now. And sometimes a Minister is cajoled into giving them the answer now. That again is what happened in *Pepper v Hart.*

So far, at least in the United Kingdom, it has not mattered. The court of construction, always the ultimate arbiter, would take no notice of what the Minister had said. It would construe the Act according to its wording within the overall context (apart from Hansard). In other words it would

approach its task of exercising judgment or discretion uninfluenced by what the Act's promoter told Parliament in order to get it passed. *Pepper v Hart* changes all that.

I shall return to the facts and speeches in *Pepper v Hart*. I shall argue that the House of Lords, and indeed the courts below, failed to grasp the essentials of the case and so produced a flawed ruling. First however it is necessary, in order to grasp the significance of that ruling, to consider the reasons which over two and a half centuries were advanced for the exclusionary rule.

Reasons for the exclusionary rule

In precluding recourse to Hansard, the exclusionary rule is an exception to another rule, known as the informed interpretation rule. For the sake of brevity I will simply state this in the form in which it is set out in the second edition of my book *Statutory Interpretation.*[1]

> (1) It is a rule of law (the "informed interpretation rule") that the interpreter is to infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result).
>
> (2) Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of an enactment (and if so how to resolve it) until the court has first discerned and considered, in the light of the guides to legislative intention, the *context* of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.
>
> (3) For this purpose Parliament intends the court to permit the citation of any publicly-available material which, in accordance with the interpretative criteria, the court considers it proper to admit (whether unconditionally or *de bene esse).*

The exclusionary rule makes Hansard reports an exception to the informed interpretation rule. Why should it do so? I find that nine different reasons have been given.

Not known to other House or Sovereign The exclusionary rule was probably first stated by Willes J in *Millar v Taylor (1769)* 4 Burr. 2303 at 2332.[2] The sole reason he gave was that the history of the changes undergone in the first House by the Bill which on passing became the Act in question "is not known to the other house, or to the sovereign". This reason no longer applies, since parliamentary debates are now fully and accurately reported.

Parole evidence rule In an 1859 case Byles J said: "I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the Act; for, that would be to admit parole evidence to construe a record".[3] The term record has a technical

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[1]Code s 201. For the reasons underlying the rule see pp 427-429.

[2]T R F Plucknett *A Concise History of the Common Law (5th edn, 1956) p.335; Viscountess Rhondda's Claim [1922]* 2 AC 339 at 383; *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 at 1052.

[3]*Earl of Shrewsbury v Scott (1859)* 6 CBNS *l at 213.*

meaning, and includes Acts of Parliament.[1] "Records are the memorials of the legislature, and of the courts of justice, which are authentic beyond all matter of contradiction".[2] Historically they could not be contradicted by parol evidence, which includes, in addition to its literal meaning of oral evidence, writing not consisting of a specialty or record.[3] An Act of Parliament is both a specialty and a record.[4] In a valuable discussion of the point, the Canadian academic D G Kilgour says there can be little doubt that, in its basic form of not admitting oral evidence to contradict a written formulation, the parol evidence rule had a direct influence upon the development of the exclusionary rule because judges felt that statutes were to be construed in the same manner and by the same techniques as other writings.[5]

Parliamentary privilege In relation to proceedings on bills, parliamentary privilege is largely, if not entirely, codified in article 9 of the Bill of Rights (1689)[6]. This provision, which still applies in most Commonwealth countries, states that Parliament resolves: "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."[7] It is declaratory of the law of Parliament, which may in fact go wider.[8] It is also part of the general statute law binding on the courts. Article 9 is badly drafted and ambiguous, since "freedom" may qualify only "speech" or it may also qualify "debates and proceedings in parliament". Is it merely the *freedom* of parliamentary debates and proceedings that ought not to be impeached or questioned or is it the debates and proceedings in their entirety?[9] Authority up

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[1] "Thay to abide enacted as thinges of recorde": Rolls of Parliament IV (1433) 424/1. See *Sadlers' Company Case (1588)* 4 Co Rep 54b, Blackstone, 2 *Commentaries* (1766 edn) 344.

[2] Jowitt, *Dictionary of English Law* (1st edn, 1959) p 1487.

[3] *Rann v Hughes* (1764) 7 TR 350-35 ln; *Gibson v Kirk* (1841) 1 QB 586.

[4] *Cork & Bandon Railway Co v Goode* (1853) 22 LJCP 198; *Collin v Duke of Westminster'* [1985] QB 581.

[5] D G Kilgour, 'The Rule against the Use of Legislative History: "Canon of Construction or Counsel of Caution?'" 30 Can Bar Rev (1952) 769 at pp 787-789.

[6] The short title "Bill of Rights" was given by the Short Titles Act 1896 s 1 and Sch 1. Although the year 1688 is often appended, royal assent was actually given in December 1689.

[7] This is the wording and punctuation of Article 9 as set out in 9 Statutes at Large (1764 edn) 69.

[8] Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament* 21st edn, (1989), p 90. In *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 at 1067 Lord Browne-Wilkinson held that nothing cited in that case had "identified or specified the nature of any privilege extending beyond that protected by [article 9 of] the Bill of Rights".

[9] As to what are proceedings in Parliament for this purpose see *In re Parliamentary Privilege Act 1770* [1958] AC 331, from which it appears that actions taking place outside the precincts of the Palace of Westminster, e.g. the sending of a letter to a Minister by an MP, may be included.

to the decision in *Pepper v Hart* shows the latter proposition to be the correct one.[1] Thus to question what is said in Parliament, e.g by the sponsor of a Bill, in a "court or place" out of Parliament is to contravene article 9.

This seems to apply to such an act as is rendered permissible by the ruling in *Pepper v Hart*. To allow an advocate to cite in court, as an indication of the intended legal meaning of an Act, a statement made in Parliament by the minister sponsoring the Bill for the Act, surely must involve "questioning" the ministerial statement in the court. This questioning will inevitably take place when the advocate explains to the court how the statement helps his case, when his opponent puts to the court a contrary view, and when the judge joins in the exchanges and ultimately gives his own verdict on the argument.

The House of Lords decided otherwise in *Pepper v Hart,* though only Lord Browne-Wilkinson gave full reasons for their view.[2] He did not discuss the argument as to the narrower and wider interpretation, but assumed the narrower was correct. The only gesture he made in the direction of the earlier authorities was to say "No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the minister's statements or his reasoning".[3] The main ground for Lord Browne-Wilkinson's decision on this point was that in judicial review cases "Hansard has 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". He instanced *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696. The difficulty here is that no objection appears to have keen made to the citation of Hansard in *Brind*. It is not usual to treat a case as authority for a point that was never raised in it.

The other point Lord Browne-Wilkinson relied on was that if the opposing argument were correct "any comment in the media or elsewhere on what was said in Parliament would constitute "questioning" since all Members of Parliament must speak and act taking into account what political commentators and other *(sic)* will say". This overlooks the limiting effect of the words "any court or place" in article 9. It is submitted that the *ejusdem generis* principle applies here to limit the word "place" to places, such as tribunals, which are of the same genus as "court".[4]

Comity between courts and Parliament There is held to be a requirement of comity, meaning mutual respect, between courts and legislature as two branches of the constitution. Lord Hailsham of St Marylebone LC said-

> "From the constitutional viewpoint, I do not think it appropriate with a view to the comity between the different branches of Government, and their independence of each from the other, that the actual proceedings in Parliament should be the subject of discussion (and

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[1]Blackstone *Commentaries* (17th edn, 1830) I p 163; *Stockdale v Hansard* (1839) 9 Ad. & El. 1 at 114, 209; *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275; *In re Parliamentary Privilege Act 1770* [1958] AC 331 at 350; *Church of Scientology of California v Johnson Smith* [1972] 1 QB 522 at 529; *Pickin v British Railways Board* [1974] 2 WLR 208 at 228; *R v Secretary of State for Trade, ex p Anderson Strathclyde Plc* [1983] 2 All ER 233 at 239 (concurred in the Australian case of *R v Jackson* (1987) 8 NSWLR 116 at 120). See also Lord Denning in *Public Law* (1985) 80 at 87.

[2]Pp 1059-1061.

[3]P 1061.

[4]It was so held in the Australian case of *R v Murphy* (1986) 64 ALR 498.

thereby inevitably criticism) in the courts both from the Bench and by counsel . . . [It] would be constitutionally most undesirable."[1]

In *Pepper v Hart* it seems that Lord Browne-Wilkinson, who delivered the leading speech, did not distinguish comity from parliamentary privilege.[2]

Difficulties for practitioners As Lord Mackay LC said in his dissenting speech in *Pepper v Hart* "the only way in which it could be discovered whether help was to be given [by parliamentary materials] is by considering Hansard itself".[3] Clearly the legal adviser or advocate has a duty in every case to find out whether "help is to be given" (that is whether help is available). To carry out effective and reliable research in Hansard on a particular point of interpretation requires time and skilled effort. In a 1968 case 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, and it would often be impracticable..."[4]

Increasing the costs of litigation Lord Simon of Glaisdale said "in interpretation of all written material the law in this country has set great pragmatic store on limiting the material available for forensic scrutiny: society generally thereby enjoys the advantages of economy in forensic manpower and time".[5] In *Pepper v Hart* there was much debate on the increase of costs that would result from allowing recourse to Hansard. Lord Mackay LC said in his dissenting judgment-

> "Your Lordships are well aware that the costs of litigation are a subject of general public concern and I personally would not wish to be a party to changing a well established rule which could have a substantial effect in increasing these costs against the advice of the Law Commissions and the Renton Committee unless and until a new inquiry demonstrated that that advice was no longer valid".[6]

Unreliability of Parliamentary material What is said in Parliament is manifestly unreliable as a guide to the legal meaning of an enactment. In a 1906 case Farwell LJ said of reference to parliamentary debates to interpret legislation "they would be quite untrustworthy".[7] In 1975 Lord Reid said of recourse to Hansard: "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

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[1]1983 Hamlyn lectures. See also (1980) 405 HL Deb cols 303-4 and *R v HM Treasury: ex p Smedley* [1985] QB 657.

[2][1992] 3 WLR 1032 at 1061.

[3][1992] 3 WLR 1032 at 1038.

[4]*Beswick v Beswick* [1968] AC 58 at 74 (emphasis added).

[5]*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 645.

[6][1992] 3 WLR 1032 at 1038. The Law Commissions' report is "The Interpretation of Statutes" (1969) LAW COM No 21, SCOT LAW COM No 11. The Renton Report is the Report on The Preparation of Legislation (1975) (Cmnd 6053).

[7]*R v West Riding of Yorkshire County Council* [1906] 2 KB 676 at 716.

thought about the matter..."[1] In the same case Viscount Dilhorne, who knew what he was talking about having served 20 years as an MP, said: "In the course of the passage of a Bill through both Houses there may be many statements by Ministers, and 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."[2] In 1979 Lord Scarman said of Hansard "such material is an unreliable guide to the meaning of what is enacted".[3]

Undermining statute book The objection that recourse to parliamentary materials for the purpose of statutory interpretation tends to undermine "the reliability of the statute book" is made by Jim Evans.[4] It becomes less possible to rely on the apparent meaning of an Act if there is a suspicion that this might be displaced on reference to the enacting history.

Contrary to principle Perhaps the most potent reason for the exclusionary rule is that reliance on the promoter's intention as ascertained through the parliamentary history is contrary to the principle upon which statutory interpretation by the court rests. This is that the legislator puts out a text on which citizens and their advisers rely and which the judiciary interpret in the light of various accepted criteria. These may in some cases bear against the actual intention of the promoters of the Bill: for example after the passage of years the enactment may require an updating construction. When asked in 1975 to look at an Irish Hansard to construe an Act passed in 1939, Lord Widgery CJ said that its value would be "minimal when one is considering the situation in the 1970s".[5]

Lord Wilberforce expressed the constitutional principle by saying it would be a "degradation" of the interpretative process if the courts were to make themselves merely a reflecting mirror of what some other agency might say the Act meant. He added "to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning ... would be a stunting of the law and not a healthy development".[6]

Collectively, these may be thought strong, if not conclusive, reasons in favour of the exclusionary rule. However it is necessary to note that the House of Lords in *Pepper v Hart* was following a lead set elsewhere in the Commonwealth. I have not space to go into this aspect very fully, and must content myself with the following brief remarks on the situation as I understand it to be in Australia, Canada and New Zealand.

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[1] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 614-615.

[2] P 623. It smacks of breach of privilege to hold one House bound by what is said in the other.

[3] *Davis v Johnson* [1979] AC 264 at 349-350.

[4] *Statutory Interpretation: Problems of Communication* (1988-1989) p 288.

[5] *R v Governor of Winson Green Prison, Birmingham, ex p Littlejohn* [1975] 1 WLR 893 at 900.

[6] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 629-630.

Exclusionary rule in other Commonwealth countries

Australia Australia abolished the exclusionary rule in 1984 for Commonwealth Acts. This was done by a provision adding a new section 15AB to the Acts Interpretation Act 1901(Cth).[1] Subsection (2) of this states that the material that may be considered in the interpretation of a provision of an Act includes "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".[2] The remarkable narrowness of this provision is alleviated by a later provision which allows reference to "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 in either House of the Parliament.[3] Both provisions are cut down by s 15AB(3), which enacts that in applying them regard must be had 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.[4]

Section 15 AB(1) limits the occasions when it is legitimate to refer to parliamentary materials. It can be done only-

> "(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."

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[1]Acts Interpretation Amendment Act 1984 (Cth) s 7. The amendment applies to past Acts also (s 2). In his book on statutory interpretation in Australia, Donald Gifford says the wisdom of this provision is "highly controversial": *Statutory Interpretation* (1990), p 130. He suggests that the Australian judiciary 'is seriously divided internally on the subject' (p 139). The full text of s 15AB is set out in *Statute Law Review*, Winter 1992, pp 207-208.

[2]S 15AB(2)(f).

[3]S 15AB(2)(h). This does not allow recourse to a report of a speech in Parliament made in relation to a later Bill intended to amend the Act in question: *Commissioner of Taxation v Bill Wissler (Agencies) Pty Ltd* (1986) 81 FLR 471.

[4]This derives from clause 5(3) of the draft Processing Bill set out in my book *Statute Law* (3rd edn, 1990) at pp 343-345. For a comment by Bryson J see *Statute Law Review,* Winter 1992, pp 187-208.

Paragraph (a) of this raises the question what is to happen when the parliamentary material confirms that the meaning of the provision is *not* the ordinary meaning. Presumably it cannot then be referred to (except of course under paragraph (b)).[1] Paragraph (b) seems to derive from the Vienna Convention on the Law of Treaties, art 32. Although it is not so stated in *Pepper v Hart,* s 15AB(l) is obviously the source of the limiting conditions for the relaxation of the exclusionary rule imposed by the House of Lords in that case. Some of the Australian States have passed legislation corresponding to s 15AB.[2]

Writing in 1988, Pearce and Geddes said that, at that early stage in the history of s 15AB, there appeared to be little evidence to support the claims that had been made that it would greatly add to the work of litigation lawyers.[3] In the same year Patrick Brazil, secretary of the Commonwealth Attorney-General's Department, wrote that it was noteworthy, having regard to the many previous misgivings expressed about s 15AB, "that these reforms have been readily accepted and used". He added that the worst apprehensions that the ability to rely on extrinsic materials might cause substantially longer proceedings as well as significantly longer preparation of cases, leading to significantly greater costs, seemed not to have been realised.[4] In a 1991 paper Bryson J said that s 15AB was not intended to make any deep change and has had a "cautious" reception. It "seems to have been devised with a view to pleasing everybody ... but any clear underlying idea which it expresses is hard to find". He went on: "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 ... the subject-matter under consideration remains the text as enacted".[5]

Canada Broadly the exclusionary rule is retained in Canada.[6] The locus classicus is *Attorney General of Canada v The Reader's Digest Association (Canada) Ltd* [1961] SCR 775[7] However it

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[1]The point is discussed by Bryson J in *Statute Law Review,* Winter 1992, pp 187-208 at p 202. See also *ibid.,* pp 214-215.

[2]See Interpretation Act 1987 (NS) s 34; Interpretation Act 1984 (WA) s 19; Interpretation Ordinance 1967 (ACT) s 11B. In Victoria the relevant provision (the Interpretation of Legislation Act 1984 s 35) merely says that in the interpretation of a provision of an Act or subordinate instrument "consideration may be given to any matter or document that is relevant including but not limited to ... reports of proceedings in any House of Parliament". In South Australia it has been held that s 15AB should be applied by analogy to State enactments: *Commonwealth Scientific and Industrial Research Organisation v Perry (No 2)* (1988) 53 SASR 538 at 546.

[3]D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd edn), p 49.

[4]P Brazil, "Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials: with a Postscript on Simpler Drafting", 62 ALJ (1988) 503 at 512.

[5]Reprinted in *Statute Law Review,* Winter 1992, pp 202-204.

[6]E A Driedger, *Construction of Statutes* (2nd edn, 1983) pp 156-158; Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd edn) pp 350 et seq; Edward G Hudon 55 Can Bar Rev (1977) 370 at 372.

[7]See also *Gosselin v The King* (1903) 33 SCR 255 at 264.

has been noted that the courts "are increasingly ignoring or implicitly distinguishing the *Reader's Digest* decision and taking a peep at *Hansard*"[1]

The classic Canadian justification of the exclusionary rule was given by J A Corry in 1954.[2] It is chiefly based on the unreliability of parliamentary materials. The opposition is more concerned to belittle the Bill and undermine the popularity of the government than accurately expound the Bill. Even ministers are not immune from the temptation to falsify.

> "From the point of view of the government, the purpose of debate on a bill is to secure consent to the precise terms of the bill and to explain its intent and meaning only in so far as that will aid in getting consent. The process of enacting new legislation is not an intellectual exercise in pursuit of truth; it is an essay in persuasion, or perhaps almost seduction! The debate on a bill is a battle of wits often carried out under extreme pressure and excitement where much more than the passage of this bill may be at stake. The ministers supporting it cannot be expected to act as if they were under oath in a court of law. It is always sensible to appeal from Philip drunk to Philip sober. But to appeal from the carefully pondered terms of the statute to the hurly-burly of parliamentary debate is more like appealing from Philip sober to Philip drunk."[3]

Later Corry points out that "not least of the dangers of reference to legislative history is its tendency to draw interpreters away from hard thinking about the context and the general scheme embodied in the act in search of an easy road to learning in the legislative history". He adds: "The frequent reliance of the federal courts in the United States on legislative history has prompted the jibe that the court will not look at the act unless the legislative history is obscure!"[4]

New Zealand According to the New Zealand Law Commission, the exclusionary rule has never been clearly established in New Zealand.[5] Jim Evans presents a different emphasis in saying that in 1985, without any legislative change, the New Zealand Court of Appeal began to allow counsel to use material from parliamentary debates in arguing cases.[6] Burrows, writing earlier, says "It is

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[1]Graham Parker, 60 Can Bar Rev (1982) 502 at 503-504.

[2]J A Corry, "The Use of Legislative History in the Interpretation of Statutes" 32 *Can Bar Rev* (1954) p 624.

[3]*Loc. cit.*, pp 632-633.

[4]Ibid., p 636. Corry's article contains a useful analysis of the differences, from the viewpoint of use of legislative history, between the US system of legislation and that prevailing in Canada (and also the UK). On this see also Wald, "The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court" (1990) 39 Amer Univ LR 227; G B Born, "Making Law with Hansard" (1993) *90 Law Society's Gazette 2.*

[5]Law Commission Report No 17 (1990) p 50. To confirm this statement they cite *Re AB* (1905) 25 NZLR 299; *Monk v Mowlem* [1933] NZLR 1255 at 1256-1257; *Police v Thomas* [1977] 1 NZLR 109 at 119; *Levave v Immigration Department* [1979] 2 NZLR 74 at 79.

[6]Jim Evans, *Statutory Interpretation: Problems of Communication* (1988-1989) p 280. Evans cites as the cases in which this new trend developed: *Proprietors of Atihau-Wanganui v Malpas* [1985] 2 NZLR 468 at 478; *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5086; *Howley v Lawrence*

generally accepted in New Zealand that the Bill, and reports of debates in Parliament, may not be referred to for purposes of interpretation, although the New Zealand authority is surprisingly slight".[1]

To show the flavour of the way New Zealand courts apparently regard the use of Hansard I give two recent extracts. In a 1986 case Cooke J said-

> "A Government 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 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".[2]

In a 1987 case the court stated-

> "While we have been prepared to look at reports of Parliamentary debates in some cases, this development is certainly not intended to encourage constant references to *Hansard* and indirect arguments therefrom. Only material of obvious and direct importance is at all likely to be considered; and the court will not allow such references to be imported into and to lengthen arguments as a matter of course."[3]

In its 1990 proposals for a new Interpretation Act the New Zealand Law Commission did not recommend including provisions comparable to the Australian s 15AB. They said-

> "... the signal that parliamentary material can be used has already been clearly given by the courts themselves, and it has been extensively discussed. The uncertainty which was a significant factor seven years ago in the Australian decisions to enact the liberating legislation has now been dispelled - to the extent that it existed here ... the legislative answers do not appear to provide any significant assistance to the courts. Rather, the courts themselves have been developing and will no doubt continue to develop rules and practices about relevance and significance..."[4]

This shows sensitivity to the fact that since the middle ages common law jurisdictions have regarded the interpretative function as belonging to the courts rather than the legislature. On the other hand an Interpretation Act, in order to achieve maximum utility, really ought to codify all clearly worked out judicial rules regarding the construction of enactments. That is surely the whole object and purpose of codification, though we have not been very good at realising it in practical terms.

Publishing Co Ltd CA 77/84 1 May 1986; *Maori Council v Attorney General* (1987) 6 NZAR 364.

[1]J F Burrows in *New Zealand Commentary on Halsbury's Laws of England* tit. Statutes C901. Burrows cites as authority for this proposition *Hamilton Gas Co v Mayor of Hamilton* (1908) 27 NZLR 1020 at 1030-1031; *Otago Land Board v Higgins* (1884) NZLR 3 CA at 80.

[2]*Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5086 at 5093.

[3]*Attorney General v Whangarei City Council* [1987] BCL paragraph 1587.

[4]*Loc. cit.* pp 50-51.

Facts and law in Pepper v Hart

I turn now to the facts and law in *Pepper v Hart* itself. The taxpayers were nine masters and the bursar of Malvern College, a public school for boys. Under a concessionary scheme their twelve sons were educated at the school on payment of an amount, namely one-fifth of the ordinary fees, which in each case more than covered the extra actual cost to the school of the son's presence (the "marginal cost"). As the school was not full, the scheme did not deprive it of any full fees from ordinary pupils.

The case concerned rival interpretations of income tax enactments contained in the Finance Act 1976 ss 61(1) and 63(1) and (2).[1] These provisions subjected such staff benefits to income tax. Tax was levied on the notional value of the benefit, after the amount paid by the staff member had been taken into account. The provisions lay down a precise three-stage definition of the notional benefit, intended by the drafter to be precisely applied stage by stage. In relation to each taxpayer, tax is levied on the *cash equivalent* of the benefit. This is defined as the *cost* less anything paid by the taxpayer. The cost is defined as the *expense* incurred by the employer, including "a proper proportion" of expenses partly related to other matters, such as the education of the other boys at the school. Since most of the expenditure was of this type, the broad term "a proper proportion" was crucial.

As we have seen, "a proper proportion" is one of those phrases by which the drafter signals that he is leaving the matter to the judgment of the administering agency (in this case the Board of Inland Revenue) without giving it any further guidance. It will then be for the agency to consider whether it needs to formulate guidelines indicating how judgment is to be exercised by its staff so as to ensure consistency. If the matter comes before a court or tribunal on appeal or review it will be for it to determine whether to approve such guidelines or lay down guidelines of its own. Use of such a phrase as "a proper proportion" in the *Pepper v Hart* enactment also indicated, contrary to the view taken by all the judges in that case that the drafter did not intend one simple uniform test to be applied invariably. If that were so, he would have specified the test in the legislation.

In the circumstances of *Pepper v Hart* it could be thought "proper" to treat the benefit as attracting the same proportion of the expenses as fell to be allocated to the share of the school amenities enjoyed by ordinary pupils (the "average cost"). Or it could be thought "proper" to allow staff some advantage by charging them only the marginal cost. A refinement would be to treat it as "proper" to apply the average cost but reduce this by appropriate amounts in certain cases. This could reflect the fact that staff receiving a benefit may not be in as good a position vis-a-vis the employer as an independent member of the public. Staff may be expected to help out, or accept a lower standard of service. Where the employer was operating at a loss, so that the price charged to the public was less than the aliquot share of expenses, this approach would again allow a suitable reduction. It would ensure that the object of the legislation was realised by taxing employees on a fair and reasonable quantification of the benefit they actually received.

None of the judges in the case (including the Law Lords, except perhaps Lord Mackay) appreciated the elasticity of the word "proper" or the fact that it required the interpreter to arrive at whatever apportionment was fair on facts within a particular category. In allowing the initial appeal against assessment the Special Commissioner applied the marginal cost basis.[2] In reversing the Special Commissioner Vinelott J said, without discussing the point, that the proper proportion was the

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[1]See now the Income and Corporation Taxes Act 1988 ss 154(1) and 156(1) and (2).

[2][1990] STC 12.

average cost, which he described as "a rateable proportion of the facilities afforded to them all" The Court of Appeal agreed that in all cases a rateable proportion of costs was the "proper proportion.[2] Slade LJ was troubled by the fact that where a facility was provided at a loss (as i the case of a municipal swimming bath) the rateable proportion of costs attributable to sta enjoying the facility without charge might work out at considerably more than a member of th public would pay.[3] The point that the term "proper" would enable, even require, an adjustmen to be made in such cases was not taken.

Lord Browne-Wilkinson traced the history of the provisions back to the Finance Act 1948 s 39(1 and (6), where the wording was virtually identical. From the commencement of the 1948 Act unti that of the Finance (No 2) Act 1975 s 36(1), which made similar provision, the Inland Revenu charged tax on the basis not of the average cost or the true "proper" cost but the marginal cost. In the debate on the Bill for the 1976 Act the Minister said that its effect would be to tax sucl benefits in the same way as under the existing law. By this he appeared to mean the marginal cos basis, though his statements quoted by Lord Browne-Wilkinson (at pp 1047-1052) are far from clear and do not use this expression. What the Minister said apparently amounted to this. The Revenu would go on interpreting the phrase "a proper proportion", which in reality called for the exercis of judgment in different categories of circumstances, in one uniform way, namely by applying th marginal cost basis.

Like the other Law Lords, Lord Browne-Wilkinson did not see the phrase "a proper proportion" a calling for the exercise of judgment, but as having a fixed "meaning". He concluded that th arguments for this "meaning" to be the marginal or the average basis were "nicely balanced", an that there was therefore "an ambiguity or obscurity".[5] He resolved this by applying what th Minister had said, as reported in Hansard.

I submit that the Minister had not in reality made a clear statement about the "meaning" of th provision. He had said how the Revenue would exercise its power of judgment as to what was "a proper proportion". If the matter is seen in this way it is apparent how improper the finding of th House of Lords was. I submit that it was not for the court meekly to accept and apply thi statement by the Minister. It was for the court itself, using its own judgment, to arrive at th proper proportion of expenses on the facts of the Malvern College scheme.

Conclusions

What conclusions can we draw from all this? I offer the following.

Legislative drafters should carry on as before, undeterred by the possibility that some uncomprehending Minister may put an unfortunate gloss on their work.

Courts and practitioners should be better educated in the techniques and practices of legislative drafting. Then they would better understand the nature of the task they have to carry out when enactments fall to be construed.

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[1][1990] 1 WLR 204 at 209.

[2][1991] Ch 203.

[3]*Loc. cit.*, pp 216-217.

[4]P 1047.

[5]P 1062.

Courts should use Hansard sparingly. Most, if not all, of the nine reasons I have given against using it are valid. Moreover, as T St J N Bates has pointed out in detail, admission of Hansard reports raises more problems than it is likely to solve.[1]

Civil servants in departments promoting legislation should resist the temptation to "plant" in their Ministers' briefs statements about what they want the Act to mean. These are likely to rebound on them. Whether they do or not, the practice will feed what I believe to be an unhealthy and undesirable constitutional development, though doubtless well-intentioned.

Let us keep Hansard where it belongs.

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[1]T St J N Bates, "Parliamentary Material and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*", *Statute Law Review,* Spring 1993, pp 46-54.

PLAIN LANGUAGE AND DRAFTING IN GENERAL PRINCIPLES

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A SPECTRUM OF STYLES

1. We are used to hearing about 3 different styles of drafting - traditional drafting, plain language (also called "plain English"), and drafting in general principles (also called the "European style"). It is easy to think that these are completely distinct styles, and that laws fall clearly into one group or the other.

2. However, I think this view over-simplifies the position. In the complexity or simplicity of the language, these styles are segments of a continuous spectrum. They have names because in their typical form each is easily recognisable, but in practice they can merge into each other. A law may fall anywhere within this spectrum, and indeed different provisions of the same law may have aspects of all three styles.

3. This might be regarded as purely academic, or merely obvious. But I think it is useful to recognise this fact because it helps to clear up some misunderstandings, particularly about plain language and general principles drafting. Most importantly, it has serious implications for the role of the drafter vis à vis the policy-makers.

4. The three styles can be regarded as on a continuous spectrum if one looks only at the actual writing: the use of words. The traditional style is at one end. Plain language is in the middle. General principles drafting is at the other end. At one end are long, complex provisions, long words and traditional legal expressions. Along the spectrum the sentences and the words become shorter and simpler, and at the other end are extreme brevity and simplicity. Another way of describing this is a continuous progression in readability.

5. However, the legal precision (sometimes called "certainty") of these styles also differs, but not on a continuous spectrum, and therefore not in strict relationship to the simplicity of the language. The main purpose of this paper is to discuss this fact and its implications for drafters.

THE DIFFERENT STYLES DESCRIBED

Traditional drafting

It is unnecessarily complex

6. Most drafting offices in the English-speaking world inherited the traditional style of legislative language used in the United Kingdom in the 19th century. Not only were drafters trained in this style, but they were influenced by the language of existing statutes. Drafters learn their art from studying and amending existing laws, and in this way the language of the 19th century continued its influence into the 20th century.

7. The judiciary are not above criticising the complex language of statutes, but they are partly responsible. All lawyers learn the law from studying judgments, so they are imbued with the language of the judiciary. This too is a mechanism for perpetuating the formal style of the 19th century. With few exceptions, even today the language of judgments is full of excessively long sentences, interspersed with parenthetical phrases and qualifications.

8. Another, very important, factor in the development of the traditional style is the need for precision. Drafters formed the habit of drafting with extreme caution, in the attempt to leave no room for misunderstanding or deliberate distortion of the meaning. They tried to avoid all possible ambiguity. This was often carried to extreme lengths.

9. These factors have resulted in a style that uses long, involved sentences, archaic legal expressions, latinisms, and pompous language considered suitable for use in Parliamentary procedures. Not surprisingly, it is often very difficult to read and understand.

10. Modern drafting in some jurisdictions still shows the strong influence of the traditional style. It is very difficult for drafters to shake off the bad habits gained from constantly studying and amending laws expressed in the traditional style, and many traditional expressions are still being used when there are simpler forms available.

It is precise

11. Despite its bad features, the traditional style has one clear virtue: it can be, and usually is, very precise. A law drafted in this way gives effect to the wishes of the policy-makers. If they want it to do A, B and C, it does so. It does not also do E, F or G. It is also intended to have this effect from its terms, not from reliance on the courts or some other authority to flesh out the details.

Plain language drafting

The goal of simplicity

12. There is nothing new about writing in plain language. It was the style of Mark Twain, George Orwell, Ernest Hemingway, Winston Churchill and many others. Notable judicial writers of this style have been Justice Oliver Wendell Holmes and Lord Denning.

13. Rules for plain language were laid down at least as long ago as 1931, in the 3rd edition of Fowler's *The King's English,* as follows:

> Prefer the familiar word to the far-fetched.
>
> Prefer the concrete word to the abstract.
>
> Prefer the single word to the circumlocution.
>
> Prefer the short word to the long.
>
> Prefer the Saxon word to the Romance.

14. More recently, writers in the United States of America, Canada, Great Britain and Australia have laid down rules along similar lines for good style in official documents and legal writing.

15. These rules are excellent in themselves, but for legislative drafters they seldom go far enough. Drafters have a particular difficulty in avoiding the bad features of the traditional style, and at the same time keeping the right level of precision. Also, the policy of legislation is often extremely complex.

16. Laws are usually written for a variety of users, and they are also read by administrators, members of Parliament, lawyers and the judiciary. Legislative drafters are possibly the only people who habitually write highly technical documents for such a wide range of readers. This makes their task all the more difficult.

A four-fold strategy

17. The strategy of the Australian Commonwealth drafters[1] is to focus on four aspects of drafting style.

First, to plan the draft properly. This includes:

- identifying all the main goals and principles as early as possible, and leaving the details till the main structure is worked out;
- reducing the number and complexity of the concepts in the scheme;
- constructing the scheme clearly, using diagrams and flow-charts if necessary, before beginning to express it in legislative form.

Second, to use the well-known rules of simple writing. These include:

- using short, well constructed sentences;
- avoiding jargon and unfamiliar words;
- using short words;
- avoiding double and triple negatives;
- using the positive rather than the negative;
- using the active voice instead of the passive voice;
- keeping related words as close together as possible: for example, not separating subject from verb, or auxiliary verb from main verb;
- using parallel structures to express similar ideas in a similar form: for example, not mixing conditions and exceptions, and not mixing "if" and "unless" clauses.

Third, to avoid traditional legal forms of expression if simpler expressions can be used instead. These are a few examples:

- avoiding the traditional habit of constantly referring back from one subsection to the previous one, by simply saying "The application" instead of saying "An application made by a corporation under subsection (1)";
- avoiding the expression "Notwithstanding anything to the contrary contained in the XYZ Act" by simply saying "Despite the XYZ Act";
- avoiding the expression "An appointment shall not be called in question on the ground that ..." by simply saying "An appointment is not invalid merely because";

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[1]This paper is written in my capacity as head of the Office of Parliamentary Counsel. However, I should make it clear that the Office of Legislative Drafting in Canberra (responsible for drafting delegated legislation) shares our views.

- avoiding the traditional form "A person who has attained the age of 18 years" by simply saying "A person who is 18 or over";

- avoiding the traditional practice of spelling out internal references in the form "section 5 *of this Act*" (or the more modern version "section 5 *above*") by simply saying "section 5".

(There are so many of these types of traditional expression that there is not enough space to list a representative number of examples.)

Fourth, to use aids to understanding which are not merely linguistic. These are based on the perception that making a text easy to understand is not just a matter of language. Many other factors can help the reader. Some examples of these aids used by our office are:

- using graphics, like a flowchart showing the steps in applying for a patent, an illustration of licence aggregation under the broadcasting law, or flowcharts showing how various transactions are affected by the sales tax laws;

- using "Reader's Guides" to explain how to read very long Acts;

- using examples to illustrate how a law applies in particular cases;

- using purpose clauses, not only at the beginning of Acts, but also at the beginning of Parts, Divisions and Subdivisions[2];

- expressing calculations by directing the reader to take a series of steps, instead of just stating a formula;

- using "road map" clauses which tell the reader how the Act is structured and which are the key provisions;

- using short sections, to concentrate on the main purpose of each section and also increase the number of section headings;

- using explanatory notes in the text to draw attention to important definitions and other key provisions;

- making algebraic formulas "user-friendly" by using words instead of the traditional a, b, c, symbols;

- avoiding long slabs of unbroken text by breaking them up into smaller units. The New South Wales Parliamentary Counsel have a "5 line" rule which we are trying to emulate.

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[2]The Renton Committee recommended these (*The Preparation of Legislation,* Report of a Committee appointed by the Lord President of the Council, chaired by the Rt Hon Sir David Renton, May 1975, Cmnd 6053, para 11.8). On the other hand, the Hansard Society Commission recommended against them, because of the risk of conflict with the detailed text. (Pp.60-61, recommendations 239-242. This Commission is more fully described in paragraph 35 below). We think that they are so helpful to the reader in assembling the detailed provisions that the risk is worth taking.

It is precise

18. All these rules and practices are designed to achieve a single purpose. That is, to make the law easier to understand, but without changing its meaning. Writers on plain language may suggest different techniques and approaches, but they agree on one thing — that the application of the rules does not change the substance of the text. It just makes the text leaner and cleaner, and therefore easier to read and understand.

19. This means that plain language drafting does not differ from traditional drafting in its legal effect. It is intended to be just as precise as traditional drafting.

Loose plain language drafting

What it is

20. Further along the spectrum from plain language drafting is what I might call "loose plain language drafting". This is more difficult to define than the others, but I think it should be identified, because it should be avoided.

21. In one sense it is plain language, and people who use this style call it plain language. However, it arises from emphasising simplicity at the expense of precision. In attempting to keep the text as simple as possible, drafters take a more liberal view as to the words that can be dispensed with, so that the remaining words become unclear. It is not precise, so it is not true plain language drafting.

How it happens

22. The style resembles general principles drafting, in that general expressions are used and details are left out. However the important difference between this style and general principles drafting is that in loose plain language there is no conscious intention to leave matters of detail to be determined elsewhere. The drafter intends the draft to be as precise as plain language, but the draft is not precise. The drafter inadvertently drifts into general principles drafting.

23. Reasons for this style are:

Concentrating too much on style and not enough on the legal effect.

Mistaken decisions as to how much detail is necessary to give precision.

Lack of experience in legislative drafting, for example when exponents of plain language writing try their hand at legislation.

An example

24. To explain this fully it is necessary to give a real example. An Act defined an acquisition of shares in a particular company by referring to a person acquiring an interest in the shares as a result of "a transaction ... in relation to those shares, in relation to any other securities of that company, or in relation to securities of any other corporation". The word "transaction" therefore had 3 qualifiers.

25. Some exponents of plain language writing (not professional drafters) produced a redraft of the Act. The redraft of this provision used the word "transaction" but without any qualifiers. The writers thought that the qualifiers were unnecessary.

26. The unqualified word "transaction" was certainly wide enough. However it was far wider than the qualified word in the original. The policy was therefore changed. On the other hand, a court might have come to the conclusion that the word was so wide that it had to be construed narrowly.

The court might have construed it as acquiring an interest in the shares concerned (the first qualifier). This would have been far narrower than the original.

The court might have construed it as acquiring an interest in the shares concerned or an interest in any shares of the company concerned (the first and second qualifiers). This would still have been considerably narrower than the original.

Of course, the court might have construed it as meaning exactly what the original meant. However, this would have been only one of several options confronting the court.

In the result, although the "plain language redraft" was much simpler and shorter than the original, the meaning was unclear.

Its dangers

27. Loose plain language drafting is dangerous, for two reasons. First, although it looks like plain language drafting, it is not precise. Secondly, although it resembles general principles drafting in its effect, it is not drafted under the safeguards that should apply to that style. These safeguards are dealt with below.

General principles drafting

What it is

28. By this term I mean the style used when the drafter deliberately states the law in general principles and leaves the details to be filled in by the courts, by subordinate legislation or in some other way. This has also been described as the "European style" of drafting.

29. The distinction between this style and the traditional English style was summarised by the Renton Committee in the following terms[3]:

> ... the traditional approach in Europe has been to express the law in general principles, relying upon the courts and the executive to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation where detail is omitted, but equally it lacks the greater certainty which a detailed legislative application of the principles would provide. Here [Great Britain] on the other hand the traditional approach has been to spell out in the statutes themselves the precise way in which the law is to apply in differing circumstances. This gives greater certainty in respect of the circumstances provided for, and it is not necessary to wait for rulings by the courts on particular applications; but it leads to more complex legislation which is less clear to the ordinary reader.

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[3] *Ibid,* para 9.14.

Is it really the European style?

30. It is not the purpose of this paper to go into the question whether the continental Europeans really draft in general principles. The question is dealt with thoroughly by Sir William Dale in a comparison between English and continental drafting styles[4]. He is clearly of the view that continental statutes are better drafted than English statutes, but he points out that some are very detailed. On the question of general principles drafting, he concludes "... the common idea, that continental legislation is drafted only in terms of principle, is demonstrably mistaken."[5]

31. This conclusion was supported (as regards French law) at a Franco-British Conference on British and French Statutory Drafting, held in London in April 1986. One expert on the French system explained the French drafting process. He said this[6]:

> I ... think that this examination is going to have a few surprises for us. We shall probably find that, contrary to what we expect, there is in the [Acts] in France very often a great deal of substance, and sometimes almost as much as in British Acts.

He then went on to explain that the French system relies heavily on regulations to apply the principles laid down by Acts. Indeed, under the constitution, in certain areas of law such as defence, education and social security, Parliament is to lay down the fundamental principles only, while the regulations apply those principles[7].

He then said[8]:

> I should like to add here that our laws in France are very often too detailed. In 1958 we had imagined a system, particularly under the second part of article 34 of the Constitution, of laws and decrees under which the law would fix the principles and the details would be in the implementary decrees. However, in reality the Parliament, and even the Government itself when it proposes laws, tend to put a great deal into the law. That is why I said just now that when we compare French laws and British statutes we very often find there is less difference than one might have expected. I think that since 1958 the trend has been to put an increasing number of rules into the laws, which of course poses problems.

Does it fit the common law tradition?

32. Leaving aside the question to what extent the continentals use general principles drafting, it is useful to consider the style in the context of the common law tradition.

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[4] *Legislative Drafting: A New Approach,* London, Butterworths, 1977.

[5] *Ibid,* p.333.

[6] M. Jean-Paul Costa, Rapporteur-General du Section des Rapports et des Etudes, Conseil d'Etat. Report of Proceedings, published by the Institute of Advanced Legal Studies, London, p.3.

[7] *Ibid,* pp.6-7

[8] *Ibid,* p.8

The Renton Committee

33. The Renton Committee's recommendation on general principles drafting reflects the difficulty of balancing the aims of simplicity and precision[9]:

> The adoption of the "general principle" approach in the drafting of our statutes would lead to greater simplicity and clarity. We would, therefore, like to see it adopted wherever possible. We accept, however, that this approach to a large extent sacrifices immediate - though not eventual - certainty and places upon the courts a heavier responsibility in identifying the intention of the legislature when applying legislation to particular circumstances. We recognise that this is unlikely to be acceptable to the executive and the legislature in certain types of legislation, particularly fiscal and other public law which defines the rights and obligations of individuals in relation to the State, and we consider that it would in any event be unreasonable to draft in principles so broad that the effect of the statute could not be assessed without incurring the expense of litigation to determine an issue.

Sir William Dale

34. Sir William Dale does not recommend it specifically in his book. He is more concerned with the total process of law-making on the continent, and makes a number of recommendations to bring British drafting closer to that process[10].

The Hansard Society Commission

35. A Commission appointed by the Hansard Society for Parliamentary Government in 1991 reported on the legislative process in Great Britain. On the question of general principles drafting, its recommendations were as follows[11]:

> We begin by rejecting the idea that the European style of drafting should be generally adopted in this country ... we would be strongly opposed - as we believe most Members of Parliament would be - to making statute law as general as it often is in other European countries, with the almost certain consequence that there would have to be much more recourse to the courts to settle disputed interpretations of Acts. Court proceedings are expensive for all concerned and the need for people to go to court should not be expanded ... We firmly believe that certainty in the law must be the paramount aim in the drafting of statutes.

Users of the law

36. Turning to users of the law, it is not surprising that they like to know their rights and obligations. In Australia, the industry often insists on detailed statements. In the Broadcasting Act the expression "commercially viable" was used in the early 1980's. At the request of the industry,

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[9] *The Preparation of Legislation,* para 10.13.

[10] *Op. cit.,* pp. 331-341.

[11] *Making the Law,* Report of the Hansard Society Commission on the Legislative Process, chaired by the Rt Hon Lord Rippon of Hexham. Published by the Hansard Society for Parliamentary Government, London, November 1992. P.60, recommendations 238-9.

this two-word expression was defined in 1991 in a provision 13 lines long. As the result of a further request, another definition was drafted - at first 33 lines long, it has now shrunk to a mere 17 lines.

37. The Fringe Benefits Tax Assessment Act 1986 of the Australian Commonwealth was originally criticised for its extreme length and complexity. However, in the March 1991 edition of "Taxation in Australia" it was stated that employers and their executives are praising the Act because it has brought certainty and openness into the issue of tax liability on fringe benefits. The article also suggested one of the reasons why there is little legal activity on the Act is that while the legislation is of daunting length, its application is relatively straight-forward.

38. In the context of corporations law, speaking at a Conference held in Parliament House in Canberra on 6 March 1992, the Attorney-General of Australia said this:

> The law is already too general for some practitioners. They want the law spelt out, and not left to bureaucrats or courts to interpret. For example, when I exposed the insider trading provisions for public comment a little over 12 months ago, although a few submissions called for simpler drafting, a majority sought greater detail in the provisions in order to clarify whether particular factual situations did or did not come within the provisions ...

Legislators

39. Legislators in the common law countries expect to be able to know the exact legal effect of a proposed law. Under the drafting tradition in the common law countries, even if a Bill is extremely complex, there should be a definite answer to most questions, and the responsible Minister should be able to give explanations. On the other hand, with general principles drafting there would be areas where it would be anyone's guess how the courts would interpret a provision. There would be many questions that nobody could answer until they had been settled by the courts.

40. Moreover, politicians often make deals in Parliament to get legislation passed, and these often require provisions to be worded with great precision.

The courts

41. The courts have to take the laws as they find them. However, I suspect that they would not like having a legislative role added to their existing duties. This would be a fundamental change in the traditional role of our judiciary. Although the judiciary often criticise complex legislation, judicial statements in Australia suggest a lack of enthusiasm for such a change.

42. At the Australian Legal Convention held in Canberra in 1975, Sir Ninian Stephen, then a Justice of the High Court of Australia, said that he was not disposed to favour the judges performing the law-making role that the continental legislative system would seem to impose on them[12].

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[12]Quoted by Geoffrey Kolts, O.B.E., "Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries", *Statute Law Review,* Autumn 1990, p. 148.

43. In construing a Victorian Act, the Victorian Supreme Court said[13]:

> ... the legislation is couched in general terms which omit to make Parliament's intention clear and thus greatly increase the work of the courts. If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow.[14]
>
> In drawing attention to the problems created by legislation of this kind we do not wish to be understood as being critical of the draftsman of the legislation. We recognise the difficulties involved: but we do wish to draw attention to the consequences of drafting in general terms. No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should be answered and when dealing with legislation the court's only task is to interpret and apply the law laid down by Parliament. The courts cannot be legislators.[15]

44. The court was considering the Penalties and Sentences Act 1985 of Victoria. This Act was drafted in accordance with the views of certain plain language writers and was not a deliberate attempt to draft in general principles. However, it can be inferred from the judgment that the drafter had drifted inadvertently into general principles drafting, and the views of the court are relevant to that style.

45. Another judicial comment in Australia was made by the Chief Justice of Australia, Sir Anthony Mason. In an address[16] in 1992, he made a number of remarks about the complexity of Commonwealth statute law, and the corporations law in particular. He criticised the corporations law because of its complexity, mainly on the ground that there was an over-insistence on detail. However he said:

> ... I am by no means convinced that recourse to ... drafting techniques - sketching the broad outlines and leaving the courts to fill in the large interstices and concentrating on plain English - will solve the problem, though I acknowledge that these techniques offer some scope for improvement. The ... techniques may create as much uncertainty of a different kind until the courts spell out the detail and may generate a greater need for recourse to the courts in order to fill in the interstices.

The Ten Commandments: an illustration

46. The advantages and disadvantages of general principles drafting are epitomised by the Ten Commandments. Take two of them - "Thou shalt not kill", and "Thou shalt not steal". They are so simple that everybody thinks he or she understands what they mean. But consider how the courts

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[13]*R v O'Connor* [1987] V.R.496.

[14]P.499.

[15]P.500

[16]Given at a dinner following the 1992 National Corporate Law Teachers' Workshop on 3 February 1992.

have developed these statements of principle. They are still finding new things to say about murder, and they made the law of theft so elaborate that the English Parliament had to pass a series of statutes to sort it out, and we have similar statutes in Australia.

WHICH STYLE SHOULD WE USE?

Plain language drafting

Plain language: simple and precise

47. The first duty of the drafter is to give effect to the policy of the sponsors of the law. Almost as important is the duty to make the law as simple and as clear as possible. Plain language drafting undoubtedly makes the law simpler, and when done properly it is just as precise as the traditional style. The case for drafting in plain language is overwhelming.

48. Of course no sensible drafter maintains that it is possible to achieve complete certainty. This is inherent in the nature of language. However, drafters try to achieve as much certainty as they reasonably can[17]. By this I mean that if a draft clearly covers A, B and C, but is not clear about D, and the policy-makers want to cover D, the drafter tries to find words that clearly include D.

The drafter's role

49. How this is done, and to what extent, is the responsibility of the drafter. It often requires delicate judgment to decide whether a particular phrase is sufficient to have the right effect, or whether additional words are necessary to give the right degree of precision.

50. The obvious excesses of the traditional style must be avoided, but over-emphasis on plain language techniques, without sufficient regard to precision, can sometimes result in the law being unclear. These questions must be decided by the drafter alone. The policy-makers have no significant role in this, for the purpose of the draft is to give precise effect to their policy.

General principles drafting

Policy too complex for simplicity and precision

51. However, plain language drafting is not the complete solution. Sometimes the policy is so complex, and there are so many detailed rules, exceptions and qualifications, that even a plain language rendering of the policy results in the law being extremely complex or inordinately long. Then general principles drafting should be considered.

Australian developments

52. In spite of the disadvantages of general principles drafting, the sheer volume and complexity of Australian Commonwealth statutes, particularly in the areas of tax and corporations law, have given rise to suggestions that there should be fewer rules. The Commonwealth Parliament passes

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[17]The Renton Committee gave an excellent description of the levels of certainty aimed at by traditional drafters and modern drafters: *The Preparation of Legislation,* para 11.4.

an enormous quantity of legislation. For example, in 1991 it passed 7,000 pages, and although the exact number for 1992 is not yet available, it is likely to be of the same order.

53. Many of these laws are long in themselves. The Corporations Law, passed in 1989 and heavily amended in 1990 and 1991, is over 1200 pages long. It was amended again late in 1992 by an Act 238 pages long. The Taxation Laws Amendment (Foreign Income) Act 1990, which amended the income tax law, was 236 pages long. Obviously, laws of this length contain hundreds of rules, and they are extremely hard to master as a whole. In addition, the corporations law and the tax laws are amended so often that users do not have time to master one set of amendments before they are deluged by the next.

54. These facts have resulted in significant moves in Australia towards general principles drafting. In 1990 the Australian Taxation Office began to discuss with our office the possibility of drafting in more general statements. Some progress has been made in this direction already, and the two offices are exploring further opportunities for using this approach.

55. This may be illustrated by two examples:

- Section 69 of the Income Tax Assessment Act allows a deduction for expenditure in respect of *"the management or administration of the income tax affairs of the taxpayer"*.

- Subsections 102AAN(2),(3)and (4) of that Act provide for a rebate of tax *"of such an amount (if any) as is necessary to ensure that the rate of tax on [a specified amount] does not exceed 10%"*.

In both cases the phrases quoted would have required very long and detailed provisions if they had been drafted in a style intended to give certainty.

56. These, and other general principles provisions, were drafted with the approval of the Taxation Office. However, other suggestions made by the drafters for using general purpose statements in the tax law have been rejected by the Taxation Office because they did not wish to accept the uncertainty in those particular areas.

57. In the area of corporations law, Mr John Green, a Sydney solicitor, argued at a number of recent conferences that the law is far too detailed and over-specific. He criticised in particular a Part of the Corporate Law Reform Bill 1992 that dealt with the duties of directors. He strongly recommended that a different approach be adopted, namely, to draft in general principles and leave the details to be worked out by the courts. Although he recognised that this was not a new proposal, he gave it a new name, "fuzzy law". This caught the public's attention and helped gain support for his arguments.

58. In response to public concern, the Attorney-General appointed a working party to explore the possibility of redrafting that Part of the Bill in more general statements of principle. The working party simplified the policy, and the drafter used general statements where the working party agreed that they were appropriate. The result, now known colloquially as the "Related Parties" provisions, was a much shorter and simpler draft. It was passed at the end of 1992. Mr John Green generously complimented the drafter.

59. An illustration of the brevity of that draft is the definition of the phrase "giving a financial benefit", which takes up 13 lines. It is followed by 6 examples, which together take up 14 lines. The corresponding provisions in the earlier version took up 170 lines, and had no examples.

The policy-makers decide

60. These experiences have helped our office work out rules for the use of this style of drafting. The most important rule is that the drafter should not impose this style on the policy-makers. The drafter's role is to advise, but the policy-makers must decide. Although the drafter may be attracted to the simplicity of a particular general statement, the policy-makers have to decide whether they accept the lack of certainty in its effect.

61. The next rule is that each provision should be considered separately for this treatment. The policy-makers may accept uncertainty in some cases, but not in others. The question is not simply whether a Bill should be a "general principles" Bill or not. A Bill may contain as many, or as few, general principles provisions as the policy-makers decide.

62. The next rule is that the degree of generality of each provision must be decided. Here again, the policy-makers must make the decision. There is a huge range of levels of generality. For example, the whole of the liability provisions of the Australian income tax law could be expressed in 2 subsections - one for residents, the other for nonresidents. However this would create uncertainty and inequity to a wholly unacceptable degree.

The drafter's role

63. The drafter has an essential role in all these decisions, even though they are made by the policy-makers. The drafter needs to be on the lookout for cases where this style might be used, because the policy-makers seldom have the expertise to recognise them. Then the drafter has to explain the options and get the policy-makers to decide.

64. Having found a suitable case, the drafter has these responsibilities:

- To tell the policy-makers how complex the detailed form is likely to be and how it could be drafted in a simpler form.
- To tell them about the areas of uncertainty with the simpler form.
- To make sure they fully understand the likely effect of the uncertainty.
- To discuss with them the degree of generality to be used.
- To discuss with them whether the details should be filled in by subordinate legislation or administrative rulings, or whether they should just be left to be interpreted by the courts.
- To remind them that just relying on the courts may be unacceptable in some cases. For example, people should not have to go to court to find out their pension entitlements.

Conclusion

65. Plain language drafting should be the fundamental style in all laws. It can make laws very much easier to understand. Done in the proper way, it can maintain the high standards of precision aimed at by the traditional style.

66. However, if the policy is so complex that it is impossible to keep the law simple and also precise, drafters should invite the policy-makers to consider expressing it in statements of general principle. This can reduce detailed, specific provisions to very simple statements, but results in less certainty. The policy-makers must decide in each case whether the lack of certainty is acceptable. They must also decide the degree of generality to be used.

67. If drafters take this approach, it is unnecessary to resolve the dispute whether general principles drafting should be adopted or rejected as a whole. A Bill might be wholly in plain language terms, or it might combine plain language with general principles, or in a rare case it might be entirely in general principles. But, so far as it is drafted in general principles, it will have the considered approval of the policy-makers.

Office of Parliamentary Counsel
Canberra
April 1993

BILINGUAL DRAFTING IN CANADA

Bilingual Legislation

Bilingual legislation is not new to Canada. By virtue of section 133 of the Constitution Act, 1867 (30-31 Vict., c. 3, U.K.), the Parliament of Canada and the Legislature of Quebec have been enacting their legislation in both English and French ever since Confederation in 1867. Since Confederation, and especially in recent years, Ottawa and Quebec have been joined in this regard by several other Canadian jurisdictions: the provinces of Manitoba, New Brunswick, Ontario and, to a lesser extent, Saskatchewan, and the Northwest Territories and Yukon Territory.

Bilingual Drafting (Federal Laws)

The preparation of bilingual legislation in Canada does not necessarily entail a bilingual drafting process. Most of the Canadian jurisdictions that enact their legislation in two official languages draft their bills in one language and then have them translated into the other. The Federal Government, however, after using this "unilingual drafting / translation" approach for over a century, opted, in the late 1970's, for an approach that it considered to be more respectful of the legal equality of status of its two official languages: bilingual drafting. The Province of New Brunswick has also devised a similar system for the drafting of its legislation. In all of the other "bilingual" Canadian jurisdictions, bills are prepared in one official language and translated into the other, although there are important differences in drafting procedure from one jurisdiction to another.

Overview - Federal Practices

My purpose in preparing this paper is to provide you with an overview of the important changes that have taken place in Canada since 1978 with respect to the way in which Federal legislation is prepared in both English and French. Being myself directly involved in the preparation of bills for the Federal Government, I will dwell solely on the Federal practices in this regard, even though I have no doubt that the provincial and territorial practices would also be of great interest to this group of legislative counsel.

Task Force on Bilingual Drafting

In the mid-1970's, the Department of Justice of Canada set up a task force to examine the legislative drafting practices of other countries where legislation is enacted in more than one official language. In 1978, the Department decided to do away with the "unilingual drafting / translation" approach that had been used in Ottawa since Confederation. Since that date, the two language versions of all government bills (the preparation of which is the responsibility of the Legislation Section of the Department of Justice) have been drafted by a team of two drafters: an anglophone lawyer assigned to the drafting of the English version and a francophone lawyer put in charge of the French version.

Co-drafting - Dual Responsibility

When this new system, which we call co-drafting, was put into place, another important change occurred in the Legislation Section: the position of Deputy Chief Legislative Counsel (my current position) was created. It was felt that the ultimate responsibility for the two official language versions of the bills prepared by the Legislation Section should lie in the hands of two senior officials, each of whom represents one of the official linguistic groups and one of the two Canadian legal systems (i.e., common law and civil law). Whenever the Chief Legislative Counsel is an anglophone, the deputy will be a francophone, and vice versa. One of them will always be a lawyer trained in common law, while the other will be a civil law graduate.

Workload Assignments

The way the system works is fairly straightforward. When Cabinet drafting authority is received by the Chief Legislative Counsel, we jointly decide which two drafters the file will be assigned to. In making that decision, we normally take into consideration the workload of the drafters, the urgency and complexity of the file and, in some rare instances, the area of the law involved (we normally try to avoid specialization). As a training measure, we try, in as far as possible, to match an experienced drafter with a less experienced drafter.

Coordination of Files

One of the drafters is assigned the primary responsibility for the file. This entails coordinating the file and being the main contact for the sponsoring department. The two drafters are expected to consult and to cooperate with one another to the fullest extent, and no decision is to be taken in isolation on any aspect of the file. The first drafter has no authority to impose his or her views on the second drafter. If both drafters cannot agree on any given aspect of the bill they are drafting, they must seek advice from more senior drafters or, if the disagreement persists, call upon the Chief Legislative Counsel to make a decision on the matter. If the difficulty relates to linguistic aspects of the bill, the Chief Legislative Counsel will consult with the Deputy Chief Legislative Counsel before making any decision. Subject to special circumstances, the role of first drafter is assigned to anglophone drafters and francophone drafters on an equal basis.

Full Participation of both Drafters

The first drafter will make the initial contact with the sponsoring department with a view to obtaining the name of the person (or persons) who will be instructing the drafters on behalf of that department (we insist that, wherever possible, the instructing officer be bilingual, or else that there be two instructing officers: one anglophone and one francophone) and to organizing the first meeting. The first drafter always consults with the second drafter before setting a date for a meeting. Indeed, we want to make sure that, as a general rule, both drafters are in attendance at every meeting. Our view is that, if only the first drafter attends the meetings, the second drafter will be in no better position than any of the translators who, prior to 1978, used to translate the English version of our bills into French in complete isolation. Ensuring that the two drafters are fully involved in every step of the preparation of the bill is, in our opinion, an essential part of our bilingual drafting process. We want the two drafters to have the fullest understanding of the sponsoring department's views, concerns and policy considerations.

Drafts

When the drafters have received sufficient information from the instructing officer(s) to start drafting the bill, it would be utterly unrealistic to think that they could both go back to their offices immediately and start drafting simultaneously. What happens in most cases is that the first drafter prepares a first draft and submits it to the second drafter for comments. The first drafter may produce several drafts before the second drafter even produces his or her first one. In the meantime, the second drafter will be working on other bills and most probably on bills that he or she is drafting as first drafter. Each drafter is expected to read thoroughly, and to comment on, every draft produced by his or her colleague. This interaction is considered by our office to be one of the important features of bilingual drafting: each language version benefits greatly from the input of the two drafters. As a general rule, both versions of our drafts are sent out to the sponsoring departments at the same time, even if, as is usually the case, the first drafter's version is ready well in advance of the second drafter's version. The purpose of this practice is to incite sponsoring

departments to read and compare the two versions, and also to avoid giving them the impression that the second drafter's version is only a translation of the first drafter's version.

Special Situations

Procedures can vary in special circumstances. Some of our drafters will, especially when it comes to preparing very urgent legislation, share their responsibility as first drafters with their second drafters. They may agree, for instance, that the first part of the bill will be drafted by the first drafter, at the same time as the second part is being drafted by the second drafter, each drafter preparing his or her part of the bill in his or her own official language. This way, the sponsoring department can have a "complete" bill to comment on very quickly. Once the sponsoring department has approved the content of the draft, each drafter can then prepare his or her language version of the part that was initially drafted by the other colleague.

Single Drafter Approach

Would it not be more expeditious and cost-efficient to have our bills drafted by fluently bilingual drafters who could handle both language versions? When we first started implementing our bilingual drafting approach, some of our drafters thought that the idea would solve many of our problems (e.g., shortage of drafters, inconsistencies between the two versions, etc.). We did at that time, to a certain extent, experiment with that approach. Our experience was not particularly conclusive, however. We rapidly drew the conclusion that it is virtually impossible for any person to be fluent enough in a language other than his or her mother tongue to be completely comfortable in drafting, with all the necessary nuances, a bill in that language. Another important disadvantage of such a drafting system is the fact that it is almost impossible for the drafter to be completely objective in his or her preparation of the second language version. There is a tremendous advantage in having a second person consider and criticize the first language version. Therefore we do not recommend that the "single drafter approach" be used for the bilingual drafting of legislation.

Two Genuine Language Versions

Our ultimate goal is to produce, with the same level of care and attention, two quality language versions, neither of which can be considered to be a mere translation of the other. In order to achieve that goal, our drafters benefit from the support of a group of highly skilled language specialists (jurilinguists and legislative editors) who have a major role to play throughout the drafting process, reviewing the drafts to ensure textual consistency and logic and accuracy of terminology. In the final stages of the process, all bills are also reviewed by the Chief Legislative Counsel, the Deputy Chief Legislative Counsel and a review committee composed of both anglophone and francophone drafters and chaired by a senior drafter. Before any bill goes to print, it is also carefully reviewed by a revisor, whose sole role is to compare the two versions in order to identify, and bring to the attention of the drafters, any apparent inconsistency or discrepancy between the two versions that may persist despite the extensive analysis the bill has already undergone during the drafting process.

Role of the Sponsoring Departments

Bilingual drafting is not, and cannot possibly be, the sole responsibility of the drafters. The sponsoring departments have a key role to play in this regard. Firstly, they are required to appoint instructing officers who have the capability of instructing the drafters in both official languages. Secondly, they must realize the importance of reading, and commenting on, both language versions. Finally, they must satisfy themselves that the bill meets their needs and expectations in both of its official language versions. In other words, the sponsoring departments have to bear in mind, in

practice as well as in theory, the fact that the two versions, once enacted, will be equally authoritative.

Bi-juridical Drafting

Drafting bilingual legislation is a difficult task -- drafting bilingually in a country with two co-existing legal systems is an even greater challenge. Our drafters are asked to produce two language versions that are not only linguistically correct, but also reflect the two legal systems -- common law and civil law -- that prevail in our country. Neither language version must reflect one legal system only. The legislation must be meaningful to Canadians in all parts of the country, regardless of the legal system that prevails in the place in which they live and regardless of whether they are reading the English version or the French version.

CONCLUSION

Bilingual drafting of legislation has proven to be a very challenging and rewarding experience for Canadian legislative drafters. We remain convinced that it has greatly assisted us in producing better quality legislation. If our expertise in this area can be of assistance to those of you from other bilingual or multilingual Commonwealth countries, we would be more than happy to share with you the experience and knowledge we have acquired in co-drafting bilingual legislation for the past fifteen years.

Lionel A. Levert
Chief Legislative Counsel
for the Federal Government of Canada

CONSTITUTION OF THE COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

Establishment and headquarters

1(1) The Commonwealth Association of Legislative Counsel (hereinafter called "the Association") is hereby established.

(2) The headquarters of the Association shall be at Canberra in Australia, or at such other place as is from time to time determined by a general meeting of the Association.

Object

2(1) The object of the Association is to promote co-operation in matters of professional interest between persons in the Commonwealth who are or have been engaged in legislative drafting or in the training of persons to engage in legislative drafting.

(2) For the purpose of carrying out the object of the Association, the activities of the Association may include

(a) encouraging the sharing of information between members of the Association with respect to -

(i) the preparation and publication of legislation, and

(ii) the recruitment and training of persons to engage in legislative drafting and the retention of persons engaged in legislative drafting;

(b) encouraging the sharing between members of the Association of comparative legal materials and precedents;

(c) dealing with requests by members of the Association for information and assistance; and

(d) co-operating with appropriate organizations on matters of common interest.

Membership

3(1) All persons in the Commonwealth who are or have been engaged in legislative drafting or in the training of persons to engage in legislative drafting are eligible for membership of the Association.

(2) Every person eligible for membership of the Association who, whether or not present at the meeting at which the Association is established, causes it to be made known at that meeting that he or she wishes to become a member of the Association becomes, by force of this sub-clause, a member of the Association.

(3) A person who desires to become a member of the Association may apply in writing to the Secretary for membership of the Association.

(4) Where an application for membership of the Association is made to the Secretary in accordance with sub-clause (3), the Secretary shall refer the application to the Council, which, if it is satisfied that the applicant is eligible for membership of the Association, shall grant the application but, if it is not so satisfied, shall refuse the application, and the Secretary shall advise the applicant of the Council's decision.
(N.B.) At the General meeting in Jamaica the following resolution was passed:

The Council may, if it thinks fit, authorise the Secretary to grant on the Council's behalf, without referring it to the Council, any application for membership as to which the Secretary is satisfied that the applicant is clearly eligible for membership of the Association; and any authorisation given pursuant to this resolution shall, while it remains in force, apply to the Secretary for the time being.

The Council delegated the authority to the Secretary at its meeting following the General Meeting in Jamaica.

(5) A member of the Association may at any time, by notice in writing to the Secretary, resign from membership of the Association.

(6) If a resolution that a subscription is to be payable in respect of membership of the Association is passed at a general meeting of the Association by a majority of not less than two-thirds of the members of the Association, each member of the Association is liable to pay the subscription within the period, and in the manner, specified in the resolution, and a member who fails so to pay the subscription ceases to be a member of the Association.

The Council

4(1) There shall be a Council, which shall manage the affairs of the Association subject to any directions or guidelines given by a general meeting of the Association.

(2) The Council has power to do all things necessary or convenient to be done for or in connection with the carrying out of the object of the Association and the management of the affairs of the Association.

(3) The Council shall consist of a President or Chairman of the Association, a Vice-President or Vice-Chairman of the Association, a Secretary of the Association and 5 other members.

(4) Except in the case of a casual vacancy, the members of the Council shall be elected from the membership of the Association at an ordinary general meeting of the Association.

(5) In electing members of the Council, a general meeting of the Association shall, so far as practicable, endeavour to ensure that the membership of the Council reflects the nature of the Commonwealth and the diversity of the peoples of the Commonwealth.

(6) Members of the Council elected in accordance with sub-clause (4) hold office until the next ordinary general meeting of the Association, but are eligible for re-election.

(7) A member of the Council may at any time -

(a) in the case of the Secretary - by notice in writing to the President; or

(b) in any other case - by notice in writing to the Secretary,

resign from office as a member of the Council.

(8) In the event of a casual vacancy in the membership of the Council, the remaining members of the Council may appoint a member of the Association to hold the vacant office and a member so appointed holds office until the next ordinary general meeting of the Association.

(9) A member of the Council ceases to hold office as such a member on ceasing to be a member of the Association.

Meetings of the Council

5(1) The Council shall, if practicable, meet on the occasion of each general meeting of the Association and may hold such other meetings as it thinks necessary or desirable.

(2) At a meeting of the Council, the President or, in the absence of the President, the Vice-President shall preside or, in the absence of both the President and the Vice-President, the members of the Council present shall elect one of their number to preside.

(3) At a meeting of the Council -

(a) a quorum is constituted by 4 members of the Council;

(b) questions arising shall be decided by consensus but, if necessary, a question may be decided by a resolution passed by a majority of the members of the Council present and voting; and

(c) each member of the Council present has one vote.

(4) The Council may, if it thinks fit, transact any business by circulation of papers, and a proposal agreed to in writing by a majority of the members of the Council has the same effect as if it were a decision of the Council made at a meeting of the Council.

(5) The Council shall

(a) present to each general meeting of the Association a report reviewing the activities of the Association since the last preceding general meeting; and

(b) circulate to members of the Association such other reports on the activities of the Association as it thinks fit or as are required by a resolution of a general meeting of the Association.

Functions of Officers

6(1) The President or, if the President is unable to do so, the Vice-President shall arrange for the Secretary to convene meetings of the Council and shall represent the Association in its dealings with the Commonwealth Secretariat or any other organization.

(2) The Secretary -

(a) shall administer the day to day business of the Association;

(b) shall convene general meetings of the Association in accordance with this Constitution;

(c) when requested to do so by the President or the Vice-President pursuant to sub-clause (1), shall convene meetings of the Council;

(d) shall send to all members of the Association minutes of general meetings of the Association, minutes of meetings of the Council and notices of decisions made by the Council under sub-clause 5(4);

(e) shall maintain a list of the names and addresses of the members of the Association;

(f) shall take all such steps as are reasonably practicable to deal with requests for information

(b) subject to sub-clause 3(6) and clauses 9 and 10, questions arising shall be decided by consensus but, if necessary, a question may be decided by a resolution passed by a majority of the members present, in person or by proxy, and voting; and

(c) each member of the Association has one vote.

Finances

8(1) If at any time the Association has any funds, those funds shall be expended only in connection with the affairs of the Association, and the Council shall -

(a) take such steps as it thinks proper for the holding in a bank, for the temporary investment, and for the expenditure, of those funds; and

(b) keep proper accounts and records of its transactions and financial affairs.

(2) The Council shall include in its report to each ordinary general meeting of the Association a statement whether the Association had any funds at any time during a financial year that ended after the last preceding ordinary general meeting and, if so, an audited statement of the income and expenditure of the Association for that financial year and of its assets and liabilities as at the end of that financial year.

(3) The Council shall not enter into a commitment to expend any funds of the Association unless the Council is satisfied that the Association will have sufficient funds available to meet each payment by the Council under the commitment as and when the payment becomes due.

(4) A financial year of the Association is a period of 12 months ending on 30 June or on such other day as a general meeting of the Association determines.

Amendment

9 This Constitution may be amended by a resolution that is passed at a general meeting of the Association by a majority of not less than two-thirds of the members of the Association.

Dissolution

10 The Association may be dissolved by a resolution that is passed at a general meeting of the Association by a majority of not less than two-thirds of the members of the Association and any assets of the Association shall be dealt with as directed by that resolution.

Notice of certain resolutions

11(1) A resolution referred to in sub-clause 3(6) that is passed at a meeting other than the first general meeting of the Association, or a resolution referred to in clause 9 or 10, does not have any force unless it is passed pursuant to -

(a) a motion that is proposed at the general meeting concerned by a member of the Council in accordance with a resolution of the Council notice of the terms of which was sent to all members of the Association not less than 3 months before that general meeting; or

(b) a motion that is proposed at the general meeting concerned by a member of the Association in accordance with a notice that was signed by not less than 10 members of the Association and was given to the Secretary of the Association not less than 5 months before that general

meeting, being a notice a copy of which was sent by the Secretary to all members of the Association not less than 3 months before that general meeting.

(2) Where the Council passes a resolution referred to in paragraph (1)(a), the Secretary shall, as soon as practicable thereafter, send notice of the terms of the resolution to all members of the Association.

(3) Where the Secretary receives a notice referred to in paragraph (1)(b), the Secretary shall, as soon as practicable thereafter, send copies of the notice to all members of the Association.

Proxies

12 A member of the Association may, by instrument in writing signed by the member, appoint another member as a proxy to attend and vote instead of the member at a general meeting of the Association, but the appointment is not effective unless the instrument of appointment is filed with the Secretary before the commencement of the meeting for which the appointment was made.

Sending of documents

13 For the purposes of this Constitution, a notice or other document is deemed to be sent or circulated to a member of the Association if the Secretary sends the notice or other document -

(a) to the member's last address as shown on the list of names and addresses of members maintained by the Secretary; or

(b) to another member who the Secretary reasonably believes is readily able to send or give the notice to the member.

Interpretation

14 In accordance with sub-clause 4(3), references in any provision of this Constitution, other than that sub-clause or this clause to the President or Vice-President of the Association include a person holding office as Chairman or Vice-Chairman of the Association, as the case may be.