

Opening Address

The Hon John Doyle AC, Chief Justice of South Australia

I welcome all of you to Adelaide.

I hope that those of you who are visitors here will enjoy your stay with us.

The topic that Richard assigned to me, “The importance of the work of a Parliamentary Counsel”, makes two assumptions. The first is that the work of a Parliamentary Counsel is important. I do not think anyone here will challenge that.

The second is that I am best placed to assess how important that work is. I come from a group, the legal profession, that is closely involved with your work. But it is only one of a number of groups closely affected by your work. Other groups will have their own perspective on the importance of your work.

Nevertheless, I do have an understanding of how important your work is. Executive government relies on you to convert its policies into laws that will give effect to its policies. Those laws have to be drafted in a manner that accords with our constitutional and legal conventions. Courts and others rely on you to express your drafting instructions in laws that can be understood without undue difficulty and applied consistently. The people whose conduct is regulated by the laws that you draft rely on you to think of all the ins and outs of your subject matter, and to draft laws that are not riddled with oversights or nasty surprises for those who apply your laws in their work and daily life.

An overall assessment of the importance of the work of parliamentary counsel is an interesting topic. But it is too big a topic for today.

In the short time that I have I propose to share two reflections with you.

The first reflection arises from the volume of statute law. The sheer volume of legislation and delegated legislation speaks for itself. Legislation plays an increasing part in our lives, and a major part in the work of the courts. There must be few civil cases these days that do not involve issues of statutory interpretation. The role of statutes in the criminal jurisdiction is increasing steadily. Some statutes generate their own self-sustaining industry. Think of the legal, accounting and business activity that is associated with the income tax legislation, with the legislation for GST, and that no doubt will be associated with the legislation relating to a tax on carbon emissions. One can readily find other examples of legislation that sustain their own industry of legal practitioners and others.

The long and the short of it is that much of my time is spent interpreting statutes, and much of the time of legal practitioners is spent arguing about that interpretation, or advising clients about it.

We have to tackle the meaning of the words that you use. You draft legislation on the assumption that we will approach its understanding in accordance with established principles of statutory interpretation. We in turn read and interpret the legislation in the light of those principles. Or at least, that is how it should be.

The relationship between the courts and the legislature is an interesting one. The volume of legislation, and frequently the breadth of its operation, means that of necessity legislation is often written in fairly general terms. I suspect that often there is insufficient time to do much else. Moreover, to be specific in most situations would result in legislation of excessive length. The result is that statutes are often expressed in terms of a general concept with a clear core of meaning, but plenty of shade at the edges. And then, in the shaded areas, the courts must spell out the legislative command. Parliament, and you, put considerable trust in the courts to interpret legislation, to fill gaps which inevitably are left, to join the dots.

When you think about the amount of time that lawyers and judges spend on statutory interpretation, the social importance of that legislation, and the social importance of drafters getting the drafting right, and of the courts getting the interpretation right, you realise how important your work and the principles of statutory interpretation are.

A casual observer might expect that the teaching of law at university would involve a heavy emphasis on statutory interpretation. A casual observer might expect statutory interpretation to be a compulsory subject, and perhaps one that would be a double or triple weight subject.

The same casual observer might expect that lawyers would spend a lot of time at conferences and in their professional development activities discussing techniques of statutory interpretation. That casual observer might think that people like you and people like me, and legal practitioners, regularly meet and discuss techniques of drafting and interpretation.

But as you know, that is not how it is, at least as far as I am aware.

Over the last year or so a number of bodies concerned with the content of law degrees, and with academic requirements for admission to practice, have been considering whether statutory interpretation should be a compulsory subject. That has raised the question of whether it should be a stand alone subject at all or, as some argue, should be integrated into all substantive legal topics such as contract, tort and the like. The issue is still under consideration. It is surprising that in a legal system like ours, in which statutory interpretation is so important those questions remain unresolved.

And, as I think you know, judges and lawyers are not enthusiastic about discussions on the techniques of statutory interpretation. I want to emphasise here that I mean the techniques. I do not mean that judges and lawyers do not talk about matters that are regulated by statute. But it is one thing to do that, and another thing to reflect on, to study and to apply the techniques by which one should interpret that legislation.

My experience suggests that more attention should be given to techniques of statutory interpretation in the teaching of law and in professional development programs, I believe that you as a group are well placed to encourage that development.

It is my experience that arguments on statutory interpretation usually follow a predictable course. The section in question is usually capable of more than one meaning, otherwise there would be no dispute. It is difficult for a drafter to avoid that possibility. Most counsel start from there, identify a purpose that they argue the legislation is intended to pursue, and then conclude that their preferred interpretation is the correct interpretation because it will advance what is usually a rather vaguely identified statutory purpose. That is it. Sometimes the argument will be embellished by a reference to the Second Reading Speech by the Minister. Usually the submission on statutory interpretation is surprisingly brief.

I often ask counsel which principle of statutory interpretation they rely on to get from the words of the section to the desired result. The reaction often suggests that this is seen as a rather unfair question. The answer is obvious, they say. It is the purpose of the Act, a bit of commonsense and what seems like a fair thing. Such arguments conjure up memories of the courtroom scenes in the well known film "The Castle". There might be an element of caricature here, but what I am describing is not far removed from what happens in plenty of cases.

In fact, it surprises me that we jog along as well as we do, bearing this in mind. Perhaps you, as drafters, are content with the outcomes in court by and large. But I have to say that to me it seems that there is plenty of room for improvement in the use of interpretative techniques in practice.

I urge you, as the group who in Australia probably have most expertise in this area, to reflect on how courts and the legal profession might improve their skills in the area of statutory interpretation. One possibility would be to include in the program for a conference like this a session or sessions aimed at involving the legal profession in discussion with you of techniques of statutory interpretation. I am not sure there is anything we can teach you, but I am sure there are things you could teach us.

That would require someone to tackle the question of how one teaches statutory interpretation. Making a speech about the rules is not the way, of that I am sure. I believe that one reason for the limited attention given to statutory interpretation in legal education is the unresolved issue of how best to teach it.

So that is the first point I thought I would share with you. I believe that the level of skill in statutory interpretation is not as good as it should be, and that professional drafters are well placed to encourage an improvement in this respect. Your work is important enough for you to tackle the problem.

The second reflection arises from session 14C, in which you will be discussing issues of drafting in the area of the criminal law.

In the last 10 years or so we have seen a lot of legislation, all around Australia, aimed at aspects of criminal law and criminal procedure. By criminal procedure I mean the law of evidence, which is closely enmeshed with substantive criminal law, and criminal law trial practice, which is also closely enmeshed with the substance of the criminal law. More and more legislation is redefining offences, spelling out policies and procedures for sentencing, affecting trial practice, and in particular improving the treatment in court of victims and vulnerable witnesses.

Reading such legislation as I often do, and sitting on cases in which its application arises, I have come to realise that this is a problem area.

It is not too difficult to redefine an offence. But when it is done, it is often done these days, with the aim of more closely regulating the content of the offence and creating gradations of seriousness. I have no objection at all to this. That is the role of Parliament. But often change of this kind makes the law more complex because it involves a more prescriptive approach, and gradations or division of seriousness. This creates real difficulties when a trial judge tries to explain the law to a jury. Quite apart from its impact on juries, the more complex legislation is, the greater are the difficulties in applying it.

Similarly, legislation relating to trial practice gives rise to plenty of problems. The law of evidence, in its application to criminal cases, and the law of criminal procedure, are flexible bodies of principle and practice, as they need to be. They set a boundary to what a judge can do in the course of a criminal trial, and sometimes impose minimum procedural requirements. Such rules and laws are usually flexible in their application because they are intended to adjust to a wide variety of situations that arise in the course of a trial. They are no more than general signposts. The trial judge or magistrate has to decide which signpost to follow, and even then will have a choice of several different paths to follow to reach the desired destination.

What happens in a criminal trial is often a complex mix of substantive law, evidentiary law and trial practice.

Legislation in this area often gives rise to problems for trial courts. I have mentioned the first one, increasing complexity which makes it difficult to explain the law to juries and difficult to apply the law. That is mainly a reflection of Government policy. The other one is not so easy to describe, but I think you will know what I mean. Legislation of necessity tends to be categorical, even when it is expressed in fairly broad terms. But a lot of what happens in the course of a criminal trial is situation specific, and requires a judicial officer not to apply a rule, but to make the best choice. The application of legislation to the management of a criminal trial often causes significant problems. First, as I said, it tends to be more categorical. Second, I suspect the drafters are not familiar with the legal environment in which it operates. We have difficulty integrating statutory reform into an existing set of rules of some complexity and flexibility, but which do allow a trial judge to achieve a just result.

This is an area in which more contact between parliamentary counsel and judges and practitioners is desirable in the public interest. This is an area where I think we could help you.

It seems that Governments will continue to legislate in this area. I suggest that better legislation would result from more interaction about criminal trial management and sentencing between the practising profession and drafters.

I leave you with those thoughts. If what I have said results in increased constructive interaction between drafters and those who interpret and apply their legislation, that would be a good outcome.

I hope that your deliberations over the next three days are productive. Your program raises a number of interesting topics, and I am sure that your discussions will be fruitful.