

Pepper v Hart, parliamentary privilege, parliamentary intention and the preparation of explanatory material for legislation

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Introduction

This paper discusses the 1992 decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart*,¹ initially as a reflection of the fact that I don't think I've previously properly understood the decision (which I'd always regarded as being just a decision about parliamentary privilege) but also as a vehicle for re-examining the use, by the courts, of parliamentary materials in interpreting legislation. The paper also discusses differences in the approach of the Australian and United Kingdom courts. Finally, the paper sets out material that outlines the United Kingdom approach to preparing explanatory material, which might be seen to provide a stark contrast to the approach in Australia (in the Commonwealth jurisdiction, at least).

I state at the outset that this is not a "traditional" paper, in the sense that I have reproduced a significant amount of source material, rather than setting out exclusively to offer my views on the topics discussed in the paper. My intention is to put source material before the Conference attendees, with a view to opening up discussion during the actual presentation of the paper.

Pepper v Hart

The authoritative legal source, *Wikipedia*, summarises *Pepper v Hart* as follows:

Pepper (Inspector of Taxes) v Hart [1992] UKHL 3, is a landmark decision of the House of Lords on the use of legislative history in statutory interpretation. The court established the principle that when primary legislation is ambiguous then, under certain circumstances, the court may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation. Before this ruling, such an action would have been seen as a breach of parliamentary privilege.

Hart and nine others were teachers at Malvern College who benefited from a "concessionary fee" scheme that allowed their children to be educated at the College for one-fifth of the normal fees of a pupil. The Inland Revenue attempted to tax this benefit based on the Finance Act 1976. There was a dispute over exactly what the Act meant, which could be resolved with the use of *Hansard*, something not allowed at the time. The Special Commissioners charged with assessing the tax found in favour of Hart, however both the High Court of Justice and Court of Appeal of England and Wales found in favour

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1 [1992] UKHL 3.

of the Inland Revenue. The case then went to the House of Lords, which found in favour of Hart and allowed the use of *Hansard*. Lord Mackay, dissenting, argued that *Hansard* should not be considered admissible evidence due to the time and expense involved in a lawyer having to look up every debate and discussion on a particular statute when giving legal advice or preparing a case.

The decision met a mixed reception. While the judiciary were cautiously accepting, legal academics argued that it violated rules of evidence, damaged the separation of powers between the executive and Parliament and caused additional expense in cases. The decision was subjected to an assault by Lord Steyn in his Hart Lecture, delivered on 16 May 2000 and titled "*Pepper v Hart: A Re-examination*", in which he disputed exactly what the House of Lords had meant by their decision and also attacked the logic and legal theory behind it. Since Steyn's lecture, there have been several judicial decisions which limited the precedent set by the House of Lords, preventing the use of *Hansard* as a source of law, in criminal law cases or to overrule precedent set prior to *Pepper* except in exceptional circumstances. The result of these changes, according to Stefan Vogenauer, is that "the scope of *Pepper v Hart* has been reduced to such an extent that the ruling has almost become meaningless".²

Parliamentary privilege aspect of *Pepper v Hart*

The parliamentary privilege aspect of *Pepper v Hart* involved the possibility that the reference, in legal proceedings, to parliamentary material (without the leave of the House of Commons) might be a breach article 9 of the *Bill of Rights, 1689*.³ Article 9 provides:

That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

One of the issues in the case was whether the use of parliamentary materials in legal proceedings might amount to "an impeachment or questioning of the freedom of speech in debates in proceedings in Parliament", in breach of Article 9. The majority of the House of Lords decided that there was no breach of Article 9.

Lord Browne-Wilkinson stated:

My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.

2 http://en.wikipedia.org/wiki/Pepper_v_Hart.

3 The Bill of Rights is variously referred to as the Bill of Rights, **1688** and the Bill of Rights, **1689**. Both references are correct. The difference in reference is explicable by whether or not the date of the Bill of Rights is given in a way that recognises the change to the Julian calendar, when 1 January became the start of the year.

I accept Mr Lester's submissions, but my main reason for reaching this conclusion is based on principle. Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying Parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction. In many, I suspect most, cases references to Parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?⁴

That all sounds perfectly sensible to me.

The Commonwealth position re article 9 of the Bill of Rights

Part of the reason why the decision, in *Pepper v Hart*, that parliamentary material could be referred to in interpreting the meaning of legislation, sounds perfectly sensible to me is that this is, of course, very much the situation in the Commonwealth. For 2 reasons.

First, there is the existence, in the *Acts Interpretation Act 1901*, of section 15AB, which provides:

Use of extrinsic material in the interpretation of an Act

15AB (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

4 *Pepper v Hart* (note 1), at pages 22-3.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

- (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;
- (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;
- (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;
- (d) any treaty or other international agreement that is referred to in the Act;
- (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
- (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
- (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
- (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
- (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

The equivalent State and Territory provisions to section 15AB are listed in Pearce and Geddes' *Statutory Interpretation in Australia* (6th edition), at paragraph [3.13].

While I do not propose to go into the issue in any detail here, I simply note that the enactment of section 15AB was not without criticism.⁵

The second reason is section 16 of the *Parliamentary Privileges Act 1987*, which provides:

Parliamentary privilege in court proceedings

16 (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

⁵ See, eg, Pearce, DC and Geddes, RS, *Statutory Interpretation in Australia* (3rd edition), at page 49 and 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 page 512.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
- (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

- (a) a question arising under section 57 of the Constitution; or
- (b) the interpretation of an Act;**

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act. (emphasis added)⁶

Clearly, paragraph 16 (5) (b) addresses the issue of using *Hansard*, etc in legal proceedings.

The controversy about *Pepper v Hart*

The decision in *Pepper v Hart* was the subject of much criticism. Prominent among the critics was Lord Steyn, in his 2000 HLA Hart Memorial Lecture, entitled "*Pepper v Hart: A Re-examination*".⁷ The Full Wiki calls Lord Steyn's Hart Lecture an "assault" on *Pepper v Hart*.⁸ The President of the Supreme Court of the United Kingdom, Lord Phillips, recently called it "a closely reasoned attack".⁹

In this paper, in preference to the Hart Lecture, I am going to refer to a more recent "assault" of *Pepper v Hart* by Lord Steyn, his 2003 *Sydney Law Review* article, entitled "The Intractable Problem of the Interpretation of Legal Texts".¹⁰

Pepper v Hart broke new ground by holding that in cases of ambiguity it is permissible to refer in aid of construction of statutes to statements of a promoter of the bill. The rationale of this principle was memorably stated by Lord Denning, 'Why should judges grope about in the dark searching for the meaning of an Act, when they can so easily switch on the light?' I have, however, come to the conclusion that while the actual decision in *Pepper v Hart* was correct, the broadly based observations in that case are contrary to constitutional principle.

In the Westminster Parliament, exchanges sometimes take place late at night in nearly empty chambers whilst places of liquid refreshment are open. Sometimes there is a party political debate with whips on. The questions are often difficult but political warfare sometimes leaves little time for reflection. These are not ideal conditions for the making of authoritative statements about the meaning of a clause in a bill. Let me give you the flavour from an explanation by Lord Hayhoe, reported in *Hansard* of 27 March 1996. He said:

I remember only too well my first intervention as a new Minister at the Treasury on the Finance Bill in the very early hours of the morning on a subject about which I knew absolutely nothing but on which I had a marvellously thick book of briefing from the Inland Revenue. I appropriately read out the response to some detailed points that had been made by one of the Opposition spokesmen who stood up afterwards to say how well I had dealt with the point he had raised and welcomed my first intervention in Finance Bill Committees. However, I discovered from my private office afterwards that I had read out the wrong reply to the amendment. Clearly, it made not the slightest bit of difference.

6 Note that the Bill of Rights is variously referred to as the Bill of Rights, **1688** and the Bill of Rights, **1689**. Both are correct. The difference is attributable to whether or not the date has been adjusted, to take into account the introduction of the Julian calendar and the year starting on 1 January.

7 Steyn, Johan, "*Pepper v Hart; a re-examination*", (2001) *Oxford Journal of Legal Studies* 21 (1), pages 59–72.

8 http://www.thefullwiki.org/Pepper_v._Hart.

9 First Lord Alexander of Weedon Lecture (available at http://www.supremecourt.gov.uk/docs/speech_100419.pdf), at page 11.

10 Available at <http://www.austlii.edu.au/au/journals/SydLRev/2003/1.html>.

It is sometimes meaningful and appropriate for a judge to refer to the intention of parliament in recognition of its supreme law-making power. It is also perfectly sensible to say that legislation as duly promulgated reflects the will of parliament. But it is quite a different matter to ascribe to a composite and artificial body such as a legislature a state of mind deduced from exchanges in debates. The law can ascribe to legal persons, such as companies and state agencies, an intention to commit particular acts. Rules of attribution have been developed to suit the demands of particular contexts. But the argument that a legislature, operating through two chambers, may have an intention revealed by statements in debates is altogether more ambitious. Until *Pepper v Hart*, under the common law, there was in England no rule of attribution, or rule of recognition, which treated statements of ministers as acts of parliament.

Lord Steyn goes on to say:

The intention under consideration is one targeted on the meaning of language contained in a clause in a bill and employed in a ministerial statement. A bill is a unique document. It speaks in compressed language. Parliament legislates by the use of general words. It is difficult to ascribe to members of parliament an intention in respect of the meaning of a clause in a complex bill and how it interacts with a ministerial explanation. The ministerial explanation in *Pepper v Hart* was made in the House of Commons only. What is said in one House in debates is not formally or in reality known to the members of the other House. How can it then be said that the minister's statement represents the intention of parliament, ie, both Houses? The Appellate Committee took the view that opposing views expressed by a person other than the promoter can safely be disregarded whenever a statement by a promoter is admitted. This is also an assumption which seems inherently implausible in respect of the ebb and flow of parliamentary debates. In truth, a minister speaks for the government and not for parliament. The statements of a minister are no more than indications of what the government would like the law to be. In any event, it is not discoverable from the printed record whether individual members of the legislature, let alone a plurality in each chamber, understood and accepted a ministerial explanation of the suggested meaning of the words. For many the spectre of the ever-watchful whips will be enough. They may agree on only one thing, namely to vote yes. And they have no means of voting yes and registering at the same time disagreement with the explanation of the minister. Their silence is therefore equivocal. When one considers such realities of parliamentary life the idea of determining from *Hansard* the true intention of parliament on the meaning of a clause in a bill, and an associated ministerial statement, looks more and more farfetched. In *Black-Clawson*, Lord Reid, speaking with enormous parliamentary experience, said: 'We often say that we are looking for the intention of parliament but that is not quite accurate. We are seeking the meaning of the words which parliament uses.' It would have been a fiction for the House to say in *Pepper v Hart* that as a matter of historical fact the explanation of the Financial Secretary reflected the intention of parliament. Arguably the House may have had in mind in *Pepper v Hart* that an intention derivable from the Financial Secretary's statement ought to be *imputed* to parliament. If that were the case, the reasoning would rest on a complete fiction. The only relevant intention of parliament can be the intention of the composite and artificial body to enact the statute as printed.

Lord Steyn then makes an important point about how he thinks that *Pepper v Hart* might be explained:

There is a strong case for allowing a statute to be interpreted in favour of the citizen in accordance with a considered explanation given by a minister promoting the bill. It is the argument that the executive ought not to get away with saying in a parliamentary debate that the proposed legislation means one thing in order to ensure the passing of the legislation and then to argue in court that the legislation bears the opposite meaning. That is what happened in *Pepper v Hart*. Lord Bridge of Harwich said that the Financial Secretary 'assured' the House that it was not intended to impose the relevant tax. He must have taken the view, as did other members of the majority, that the Revenue in imposing the tax was going back on an assurance to the House of Commons. That would have been an unfair and unacceptable result. If such a consequence prevailed it would tend to undermine confidence in the legal system.

Whether one calls it an estoppel, a legitimate expectation, a principle of fairness, or whatever else, *Pepper v Hart* as decided on its facts can simply be viewed as a tempering of the traditional exclusionary rule in the interests of justice. On this basis the impact of the decision can be confined to the admission *against* the executive of categorical assurances given by ministers to parliament. This may be a principled justification of *Pepper v Hart*. And it does not involve a search for the phantom of a parliamentary intention.

Unfortunately, that is not how the reasoning of the House in *Pepper v Hart* was expressed. The House had before it a ministerial statement which it regarded as favouring the taxpayer. This framework dictated the shape of the arguments and the judgments. The converse case was not considered. What would the position have been if the statutory position had been truly ambiguous and the ministerial statement favoured the Revenue? *Ex hypothesi* the statement would have come from a minister promoting the bill and would have been clear on the very question in issue. It would therefore have been a trump card. A judge who declined to give effect to it would, on the reasoning in *Pepper v Hart*, be thwarting the intention of parliament. What then happens to the principle that if a taxation provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject? *Pepper v Hart* does not address this question.

Lord Steyn then talks of "the exclusionary rule":

The basis on which the exclusionary rule was relaxed ignores constitutional arguments of substance. Lord Bridge described the rule as 'a technical rule of construction'. And implicitly that is how the majority approached the matter. Surely, it was much more. It was a rule of constitutional importance which guaranteed that only parliament, and not the executive, ultimately legislates; and that the courts are obliged to interpret and apply what parliament has enacted, and nothing more or less. To give the executive, which promotes a bill, the right to put its own gloss on the bill is a substantial inroad on a constitutional principle, shifting legislative power from parliament to the executive. Given that the ministerial explanation is *ex hypothesi* clear on the very point of construction, *Pepper v Hart* treats qualifying ministerial policy statements as canonical. It treats them as a source of law. It is in constitutional terms a retrograde step: it enables the executive to make law. It is of fundamental importance to understand that the objection is not to the idea of a judge looking at *Hansard*. It is entirely acceptable for a judge to identify the mischief of a statute from *Hansard*. What is

constitutionally wrong in the English system is to treat the intentions of the government as revealed in debates as reflecting the will of parliament.

A matter not considered in *Pepper v Hart* is the likely impact of the relaxation of the exclusionary rule on executive practice. It was always predictable that the behaviour of ministers would alter in response to the change announced in *Pepper v Hart*. After all, why should ministers not take advantage of *Pepper v Hart* to explain the effect of the legislation in the way in which the government would like it to be understood? If this happens it must mark a constitutional shift of power from parliament to ministers. The parliamentary debates leading to the enactment of the *Human Rights Act 1998 [UK]* are revealing. When questioned about the effect of the omission to incorporate Article 13 of the European Convention on Human Rights the Lord Chancellor said: 'One always has in mind *Pepper v Hart* when one is asked questions of that kind. I shall reply as candidly as I may'. This makes my point: executive practice is bound to be influenced by *Pepper v Hart*. There is a real incentive for government to use this strategy to get *Pepper v Hart* statements on the record when it is reluctant to spell out its precise intentions on the face of the bill.

In *Pepper v Hart* the House of Lords failed to consider important constitutional questions. There are, however, those who believe that the relaxation of the exclusionary rule was the ultimate vindication of purposive construction. And purposive construction is like mother's milk and apple pie: who can argue against it? The reasoning in *Pepper v Hart* sought to build on the fact that official reports and white papers are admissible for the purpose of identifying the mischief to be corrected. Such reports are always admissible for what logical value they have. But the constitutional objections do not apply to such reports. They are part of the contextual scene against which parliament legislates. In any event, to present the *Pepper v Hart* issue as depending on whether one adopts a literal or purposive approach to construction is wide off the mark. By the time *Pepper v Hart* was decided, nobody supported literal methods of construction. The suggested antithesis misses the point of the fundamental and constitutional nature of the objections. The objections are not simply that a minister's view of a clause is irrelevant but that it is in principle wrong to treat it as a trump card or even relevant in the interpretative process.

What are the chances of *Pepper v Hart* being reversed? Being a decision that marks a shift of power from parliament to the executive, the prospect of any government initiating legislation to reverse it must be slight. It is, however, possible that *Pepper v Hart* may be confined by judicial decision to the use of *Hansard against* the executive when it goes back on an assurance given to parliament. This would not require the overruling of *Pepper v Hart*. It would simply confine its legal force to the material circumstances of that case. In England this question will not go away. In two recent decisions in the House of Lords there have been dicta raising these questions. The debate continues. (footnotes omitted).

Lord Phillips on *Pepper v Hart* and on Lord Steyn's analysis

On 19 April 2010, the President of the Supreme Court of the United Kingdom, Lord Phillips, delivered the first Lord Alexander of Weedon Lecture. In that lecture, Lord Phillips discussed Lord Steyn's Hart Lecture. Lord Phillips said this about the impact of Lord Steyn's Hart Lecture:

I cannot think of any extra-judicial statement that has had a greater influence on the development of an area of the law than Lord Steyn's lecture.¹¹

Lord Phillips then offered this analysis of Lord Steyn's Hart Lecture:

In the course of his lecture Lord Steyn floated an alternative justification for the result in *Pepper v Hart* which was not founded on the intention of Parliament. A Minister promoting a Bill should not be permitted to get the Bill through Parliament by saying that it meant one thing and then to argue in court that it bore the opposite meaning. A rule precluding this was akin to an estoppel and might provide a defensible and principled justification for *Pepper v Hart*. **On this basis *Pepper v Hart* could only be used against the Government.**

Lord Steyn's analysis of the relevant constitutional principles was compelling, but did it perhaps ignore the reality of the position that prevails where the Government has a decisive majority in Parliament?

In such circumstances it is likely to be the intention of the majority, albeit perhaps under the influence of the whip, that legislation shall have the effect that the Government wishes. If the promoting Minister has spelt out that intent, and the wording of the statute, albeit ambiguous, is capable of bearing the meaning that the Minister intends, there might be something to be said for an approach that gives effect to the joint intention of the Government and the majority in Parliament.¹² (emphasis added)

Justice Keith Mason on *Pepper v Hart* and on Lord Steyn's analysis

In 2006, (then) Justice Keith Mason, President of the NSW Court of Appeal, offered an interesting Australian analysis of *Pepper v Hart* and on Lord Steyn's analysis of the decision, in a paper entitled "Legislators' intent: How judges discern it and what they do if they find it".¹³ The paper (which was delivered in the United Kingdom) opens with a statement that should run a chill up drafters' spines:

In *Roe v Russell*, Scrutton LJ lamented that he could not order costs to be paid by the draughtsmen of the Rent Restrictions Acts, and the members of the Legislature who passed them, whom he considered responsible for the obscurity of the legislation.

In a long and thoughtful article, Justice Mason said:

Statutes must always fit one with the other, because the bedrock principle that the law is a coherent unity means that "the legislature cannot speak with a forked tongue".

11 Lord Phillips (note 9), at page 12.

12 Lord Phillips (note 9), at pages 11-2).

13 Available at

http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason021106. I have omitted the footnotes from the material extracted.

Chief Justice Willmott wrote in 1767 that "words are only pictures of ideas on paper". Sometimes the picture is unclear because the idea (or legislative policy) was also fuzzy. Sometimes the word-painter (or Parliamentary Counsel) had inadequate instructions or insufficient time to complete the portrait to fullest satisfaction. Judges need at least to remind themselves that legislative drafters often work to produce gold from dross within very short timeframes. From personal experience, they know that the discipline of writing a reserved judgment can itself expose problems requiring further attention. Alas for parliamentary counsel, there may not always be time for a further draft. And the attention span of those giving instructions may sometimes be limited. Sometimes too, distorting amendments are inserted in Committee, on the run, and by persons not completely au fait with the big picture.

In any event, it is vain to think that those involved in preparing legislation will foresee all problems, solve all foreseen problems, or never create fresh problems by their own tampering.

.....

The exigencies of the drafting task and the constancy of human imperfection guarantee that hard problems of statutory interpretation will always be with us. Parliamentary Counsel will never have to adopt the work practices of the rug weavers of Qum who deliberately insert a mistake into their handiwork because only Allah is perfect. Those who write judgments are similarly placed.

You may have observed that I have so far said nothing about the foresight, competency or motives of our legislators. I can assure you that my silence on this topic does not stem from Article 9 of the Bill of Rights

His Honour then turned to *Pepper v Hart*.

As acknowledged in *Pepper*, there were already decisions (some of them predating confirmatory legislation) in Australia and New Zealand that gave effect to principles similar to those that were to be adopted by the Law Lords. The exclusionary rule has also been abandoned in Canada, India and Singapore, some of the cases in those jurisdictions having preceded *Pepper*. American law is to similar effect, not without its critics, most notably Justice Antonin Scalia of whom more later. On my researches, only the Supreme Court of Ireland has rejected *Pepper*.

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... I should emphasise the reasons for caution about relying upon what is said and done in Parliament in aid of construction of statutes. The idea picks up the thinking in Bismarck's attributed aphorism that those who like law and sausages should never watch either being made. It is advanced most convincingly by those with direct experience in the cut and thrust of parliamentary law-making. Sir Nicholas Lyell QC, who was Attorney General at the time of *Pepper v Hart* and leading counsel for the Crown in the case itself, has pointed out that parliamentarians are not and cannot be equipped to consider nuances of language used by promoters of a Bill in the course of debate. It is therefore most unlikely that they will consult the text of earlier legislation or indeed any extraneous material before voting for a Bill as it emerges sausage-like from the churn of proceedings in Parliament. Professor Baker has reminded us that these considerations are multiplied when it is borne in mind that the members of one chamber of a bicameral legislature can hardly be expected to be on top of the speeches made in the other chamber.

Justice Mason then said some things about the proceedings of Parliament:

Now these matters should not be taken too far, lest judges apply different standards to Parliament than the members require of themselves. Modern legislatures have extremely tight schedules. Lots of material is taken as read, as it were. Attendance at Parliament is not compulsory. Party discipline is a reality. In these circumstances, it may be too precious and ultimately counter-democratic for judges to refuse in a proper case to infer that members did not assent to principles and policies advanced by the mover, incorporating them into their decision to vote for the Bill to pass.

Often it will be wrong to infer anything beyond courtesy from those listening silently or anything beyond preoccupation from those absent from the chamber during the critical debate. But surely not always. Can I seek to make the point negatively, by asserting that no-one today would defend the pre-*Pepper* law on the basis that the Queen's assent is necessary to pass a law and by arguing that Her Majesty was not privy to the proceedings in Parliament. Yet this was a reason given for the exclusionary rule when first promulgated in 1769.

A clear statement in a second-reading speech or explanatory memorandum that is replicated in each House may cast genuine light on the text to which it is addressed. The same cannot as easily be said for speeches made in Committee as to a perceived state of affairs, including remarks about the meaning of a clause or the current state of the common law. I confess to real difficulty in making a bridge between such statements and the meaning of the finished legislative product, especially where the statement is used to head off an amendment proposed in Committee in only one House of the Parliament. The readiness of Courts in [the United Kingdom] to use such material appears to be a real point of distinction between your jurisprudence and that with which I am more familiar.

Turning to Lord Steyn's analysis of *Pepper v Hart*, Justice Mason said:

Lord Steyn's proposed alternative ratio of *Pepper*, involving private law notions of estoppel and admissions by the Executive against interest, as well as what strikes me as the untenable corollary that an Act could have a different meaning depending on who invokes it, has been (in my respectful view) answered convincingly in the academic literature. It has not, to my knowledge, been endorsed by other than Lord Hope in *R v A (No 2)* and somewhat tentatively by Lord Hobhouse in *Wilson*.

Speaking more generally of the critics of *Pepper v Hart*, Justice Mason stated:

Some of *Pepper's* fiercest critics have, in my view, overstated their case and therefore not assisted in the search for those variants of *Pepper* that are worth retaining in the judicial kitchen. I include three matters in this context. The first are statements from Francis Bennion,¹⁴ Lord Steyn, Dr Aileen Kavanagh and others to the effect that ministers' statements may, under *Pepper*, operate to bind the courts or serve as a "trump card" in litigation, allowing the Executive to legislate through ministerial assertion. This is not a fair reading of the speeches in *Pepper*, as Professor Vogenauer and Lord Nicholls among others have pointed out. It is Parliament's legislated intention alone that counts.

14 I note that a critical analysis of *Pepper v Hart*, by Francis Bennion, appears in *The Loophole*, July 1995 (available at <http://www.opc.gov.au/calc/loophole.htm>), at pages 12-24. Bennion concludes by saying "Let us keep *Hansard* where it belongs".

Justice Mason then discussed the High Court's decision in *Re Bolton; Ex parte Beane*:

The law is very clear in Australia that a minister's understanding of the effect of a statute or the state of the common law cannot give the Bill he or she is promoting an effect inconsistent with its terms as construed by the court. In *Re Bolton; Ex parte Beane*, the High Court of Australia went further in refusing to give any weight to a minister's unambiguous second reading speech that contradicted the text. Mason CJ, Wilson and Dawson JJ stated:

"The words of a Minister must not be substituted for the text of the law.... It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

These three justices were former Solicitors-General.

The words of a minister can be definitive in the sense of resolving a particular dispute as to the meaning of an ambiguous text, but they are never "authoritative" in the sense sometimes advanced by the critics of *Pepper*.

Justice Mason then discussed criticisms of *Pepper v Hart* that were based on suggestions that it involved a breach of the separation of powers doctrine:

It would be an intolerable state of affairs if all agencies of government were not constantly involved in interpreting the laws by which they and citizens are governed. And there is nothing at all wrong with MPs forming their own views about the meaning of Bills and Acts as they go about their work. Courts alone can construe legislation authoritatively and the separation of powers doctrine requires their rulings to be followed by everyone unless and until Parliament speaks again. There is a world of difference between listening to someone's views and being bound to give them effect. A judge who takes account of evidence and listens to counsel does not abdicate the responsibility of judgment.

Pepper v Hart has nothing to do with the separation of powers, except in the entirely different sense that judges who are reluctant to give effect to ministerial statements (in general or in the particular) are emphasising the separation between the Executive and Parliament as regards law-making competence.

Justice Mason then discussed the effect of *Pepper v Hart* on Parliament itself:

Thirdly and most curious of all are the concerns expressed about the impact of *Pepper* upon the practices of Parliament itself. The voicing of these matters by judges and academics lies uneasily with the separation of powers arguments coming from the same sources. Now it is undoubtedly true that *Pepper* has led in this country to practices whereby members of Parliament ask the promoter of a Bill to give particular assurances, sometimes expressly referring to *Pepper v Hart* in case the minister has not got the message. Sometimes these questions may have been planted (we call them "Dorothy Dixers" in Australia). And it is undoubtedly the case that ministerial statements are occasionally used in preference to further drafting, or (worse still) to preclude a clarifying amendment in Committee. I have experienced the former situation myself when I was Solicitor General for New South Wales, where *Pepper* is nothing like the industry it is in [the United Kingdom].

But surely judges can be trusted not to be duped or overborne. They are capable of ensuring that the loud voice of an unambiguous text is not drowned out by the tiny voice of its promoter. This is an area where Article 9 of the Bill of Rights and separation of powers principles ought themselves to have some sway. Judges should leave Parliament to enforce its own best practice. They should also recognise that *Hansard* records statements made in a forum where meaningful debate and attempts at persuasion still sometimes occur. Parliament is the place to discipline the ministerial assurance that is untrue, sloppy or mispredictive. Courts do not need to wander down this path and *Pepper* does not require it.

Justice Mason goes on:

This leads me briefly to the philosophical debate about the intention of Parliament or the intention of the members whose votes are responsible for the passage of a Bill. At one level, the matter is a non-issue for, as Lord Reid pointed out, we are always looking for the meaning of the words which Parliament has used in its solemn enactment. The motives or beliefs of those who vote for a measure, even their beliefs as to its meaning, may cast little or no light on the meaning of the text and may, in any event, prove extremely difficult to establish in point of fact.

Some, like Lord Steyn and Scalia J attack the whole notion of the intent of the legislature as unprovable and spurious. Kirby J has described the concept as a “polite but unacceptable fiction”. Scalia J has observed that:

"We are governed by laws, not by the intentions of legislatures."

"Our task is not to enter the minds of the Members of Congress – who need have nothing in mind in order for their votes to be both lawful and effective – but rather to give fair and reasonable meaning to the text...."

Similar points about the minds of politicians were made by Lord Nicholls and Lord Hobhouse in *Wilson v First County Trust Ltd (No 2)*, but without I think denying the basal idea of Parliament’s intention. Lord Nicholls said delicately that “[i]t should not be supposed that members necessarily agreed with the minister’s reasoning or his conclusions”. Lord Hobhouse was blunter in stating (with the concurrence of Lord Rodger) that it was a “fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself”.

Sometimes legislative intention is explained as an objective concept, an idea that is in turn difficult to pin down from a philosophical point of view. It has been critically examined in the writings of Daniel Greenberg, Parliamentary Counsel and the author of the much improved latest edition of *Craies on Legislation*. I shall mask my ignorance by not venturing into these philosophical debates.

Returning to the issue of parliamentary intention, Justice Mason said:

To me, it is significant and sufficient that our highest Courts explicitly recognise that Parliament can have an intention that may be hidden behind the opacity of its statutory language, or even demonstrably misstated in that language. We have all seen examples of this, just as we have seen wills that make perfect and obvious sense if the word “not” is read into a clause or if a legacy to a non-existent “daughter” is read as going to the testator’s son. Every Interpretation Act sets out rules to be applied “unless the contrary intention appears”.

In *Pepper*, the Law Lords worked on the premise that there is such a thing as the "intention of the legislature". They spoke in these very terms and it is, I suppose, proper to have regard to their speeches to determine what they were intending to convey. Alas, there is little point in asking them personally because, as Lord Hoffmann remarked very recently in the *Deutsche Morgan* case:

"Once a judgment has been published, its interpretation belongs to posterity and its author and those who agreed with him at the time have no better claim to declare its meaning than anyone else."

Beyond the semantics, the philosophical debates and the empirical points about difficulty of proof lies the important constitutional message that judges are endeavouring to convey when they use this language of intention. Fairness, accessibility to law and the primary rules of statutory interpretation all direct us to the ordinary and grammatical sense of the enacted words read in context. We are also required nowadays to avoid absurdity and to construe enactments purposively. In your system this reference to purposive construction is found in the caselaw. For us in Australia it is a statutory rule of interpretation. In either case, "purpose" implies unexpressed intention in the sense of something anterior to and not discovered directly from the text itself.

Bennion is surely correct in describing the suggestion that there can be no true intention behind an Act of Parliament as "anti-democratic". When judges invoke the intention concept they are in the same breath acknowledging the supremacy of statute over common law and the reality that legislators and those assisting them (being human) do not always express their meaning clearly when signing off on the legislative text. "Legislative intention" is thus more than a polite fiction. As Gleeson CJ put it, the concept expresses the constitutional relationship between the legislature and the judiciary.

We fool ourselves if we think that, in every case, a single "true" meaning will emerge if we wrestle long enough with the text. It follows that we should welcome all the help we can get in resolving genuine ambiguities that emerge, so long as we remember that the task remains that of determining what Parliament meant by the words it used, not what it was intending to say. Judges must never assume a particular intention and then proceed to find it in *Hansard* or anywhere else.

Justice Mason concludes by saying:

Hansard may occasionally provide useful and legitimate clues. But not often, for myriads of reasons many of which I have already touched upon. There are others. Sometimes the people involved in statute-making were themselves uncertain about where they were aiming. Sometimes they deliberately chose to confer a broad discretion, or to use woolly or fuzzy language or language that was obviously always speaking. These latter methods of drafting are occasionally used with deliberate but undisclosed intent on the Executive's part. The Executive in Parliament may be content to let the courts work matters out by trial and error, even or especially if that leaves the judges taking the flack in particular classes of case. Lord Browne-Wilkinson was surely smiling when he wrote in *Pepper* that "Parliament never intends to enact an ambiguity".

We would fool ourselves if we thought that even sharper rules of statutory interpretation could iron out ambiguity or avoid hard choices in statutory construction. If our prescient legislators may be taken to recognise this truth of nature, then it is to me inconceivable that Parliament would not want judges to look at all available material that might cast genuine light upon what it was seeking to

convey. In several countries, including my own, Parliament has decided to spell out this mandate to the judges by enacting rules similar to those expounded in *Pepper*.

In 1946, Lord MacMillan, having detected the purpose of an Act, remarked that:

“The legislature has plainly missed fire.”

Lord Diplock’s extra-judicial riposte in 1978 was that:

“if ... the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed.”

This latter sentiment better captures the true role of judges when interpreting legislation in a parliamentary democracy.

The concept of the intention of Parliament expresses an important constitutional principle rooted in political reality and judicial prudence. Because of it, the principles in *Pepper v Hart*, properly understood and cautiously applied, should continue to guide our Courts.

Subsequent limitation of the effect of *Pepper v Hart*

Lord Phillips went on to discuss some of the limitations on the application of *Pepper v Hart* that had been made by subsequent court decisions. Lord Phillips referred to the decision of Lord Hope, in *R v A (No 2)*,¹⁵ where Lord Hope expressed the view that resort to *Hansard* was only permissible for the purpose of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in the Parliament, acknowledging that the source of this conclusion was Lord Steyn’s lecture.

Lord Phillips noted that Lord Hope repeated this view 2 years later, in *Wilson v First County Trust Ltd (No 2)*.¹⁶ Lord Phillips states:

In that case the House of Lords emasculated *Pepper v Hart*, without holding in terms that it was wrongly decided.

Lord Nicholls might appear to have been approving the decision when he said that it removed from the law an irrational exception, but he then went on to make it plain that, while regard could now be had to ministerial statements in Parliament, these could only be treated as part of the background against which the statutory words fell to be construed. Such statements could not dictate the *meaning* to be given to legislation. He said that Lord Steyn had rightly drawn attention to the “conceptual and constitutional difficulties” in treating the intentions of the Government revealed in debates as reflecting the will of Parliament. He said

“...the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight.”¹⁷

15 [2001] UKHL 25, [2002] 1 AC 45

16 [2003] UKHL 40, [2004] 1 AC 816.

17 Ibid, at paragraph 66.

What does all that mean??

I confess that I'm not really sure!! As I stated at the outset, until recently, I had no idea that *Pepper v Hart* was such a contentious decision. One of the reasons that I set out the material above was that I wondered whether others might be similarly surprised.

One thing that I will say is that, on the one hand, the discussion above made me think how much easier it is for us in Australia to make use of parliamentary material in interpreting ambiguous or obscure provisions. On the other hand, however, I have not previously had cause to be quite so dubious about the real value of parliamentary material as extrinsic aids to interpretation.

And that's without any consideration of the *quality* of a lot of the explanatory material that is produced in Australian jurisdictions.

Lord Steyn's and Lord Phillips comments are echoed in a recent editorial in *Statute Law Review*, entitled "Parliamentary Intention and the Democratic Process".¹⁸ That editorial discusses the decision of the English Court of Appeal in *GG v Secretary of State for the Home Department*.¹⁹ The case was about the reach of general statutory words and, in particular, whether general words were, by themselves, sufficient to displace or restrict fundamental rights. The particular focus of the case was whether provisions of the *Prevention of Terrorism Act 2005* were sufficient to allow the Secretary of State to make a control order requiring a person to submit to a personal search while in their residence.

Subsection 1 (3) of the Prevention of Terrorism Act provides:

- (3)** The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.

Subsection 1 (4) provides:

- (4)** Those obligations may include, in particular—
- (a) a prohibition or restriction on his possession or use of specified articles or substances;
 - (b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
 - (c) a restriction in respect of his work or other occupation, or in respect of his business;
 - (d) a restriction on his association or communications with specified persons or with other persons generally;
 - (e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;
 - (f) a prohibition on his being at specified places or within a specified area at specified times or on specified days;
 - (g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;

18 *Statute Law Review* (2010) 31 (2): iii-iv.

19 [2009] EWCA Civ 786; [2010] 1 All ER 721.

- (h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;
- (i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;
- (j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;
- (k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
- (l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;
- (m) a requirement on him to allow himself to be photographed;
- (n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;
- (o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;
- (p) a requirement on him to report to a specified person at specified times and places.

The *Statute Law Review* editorial states that some, but not all, of the 16 obligations specified by subsection (4) would be unlawful if not authorised under the Act. The editorial notes that the specified obligations do not include a requirement to submit to a personal search. The editorial goes on to state:

The Court unanimously held that the two provisions did not entitle the Secretary of State to impose an obligation in the control order that the recipient submit to personal search while in his residence.

In reaching this decision, one consideration was obviously the relationship between section 1 (3) and subsections following it, most notably section 1 (4); a relationship described by Sedley LJ as ‘not altogether obvious’.²⁰ The drafter could have made it more obvious by the using standard drafting techniques; for instance, by introducing section 1 (4) with a phrase such as ‘Subject to subsection 3 ...’ or ‘Without prejudice to the generality of section 1 (3) ...’.

20 *Ibid*, at para [17].

The editorial goes on to state:

However, founding on the principle that fundamental rights of the individual cannot be restricted or displaced except by express statutory words, unless general statutory words are supported by contextual legislative regulation, the Court held that, in the absence of such contextual regulation, the terms of section 1 (3), when read with section 1 (4), did not empower the inclusion of an obligation in the control order to submit to personal search.

To a large extent, the analysis of the two subsections proceeded by reference, implicit and explicit, to ‘the intention of Parliament’.²¹ The phrase is a convenient shorthand for the best conclusion which can be reached on the interpretation of statutory words using accepted rules and techniques of, and aids to, interpretation; for it is difficult to envisage how the intention of an institution consisting of many members sitting, in this case, in two chambers could otherwise be reasonably determined.

Alongside parliamentary intention, there is also reference to a parallel but distinct concept to support a refusal to accept that general statutory words may alone curtail fundamental rights. This is that where there are merely general statutory words, in the words of Lord Hoffman in *ex p Simms*,²² ‘there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process’. This concept that the interpretative implications of a legislative provision might be unnoticed by Parliament in its enactment is deployed in the analysis of other cases that were considered.²³

An emphasis on parliamentary process rather than on parliamentary intention has an attraction. It would be more realistic. It is capable of extension from the interpretation of general legislative words to statutory interpretation more broadly. It could also be explored by reference to parliamentary materials admitted under *Pepper (Inspector of Taxes) v Hart*.²⁴ Although the application of that case for this purpose might re-open the question of whether this would be a breach of Article 9 of the Bill of Rights 1689 ‘that the ... debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament’.²⁵ (emphasis added)

I shudder at the prospect of trying to make some sort of *qualitative* analysis of any parliamentary material relating to legislation that is subject to review by a court or a tribunal, for the purpose of working out what (if anything) it says about the Parliament’s intention.

21 See, for instance, paras [10], [28], [36], [39], [40], [41], [43], and [44].

22 *R v. Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, HL(E); [1999] 3 All ER 400; the case was considered in *GG v. Secretary of State for the Home Department* and the words of Lord Hoffman were quoted in the judgment of Dyson LJ at para. [29].

23 At paras [36] and [40].

24 [1993] AC 593.

25 *Statute Law Review* (note 14), at pages iii to iv.

What is required to displace or restrict “fundamental rights”??

On the issue of what is required, by Australian courts, if “fundamental rights” are to be displaced or restricted, I note that, in *Evans v State of New South Wales*,²⁶ the Full Federal Court (French, Branson and Stone JJ) considered a challenge to regulations made by the NSW Government in the context of the recent World Youth Day. The challenge was based on arguments that (among other things) the regulations in question interfered with fundamental rights and freedoms.

The Full Federal Court stated (at [68]):

It is an important principle that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms. That principle dates back to the statement in *Potter v Minahan* (1908) 7 CLR 277 in which O’Connor J, quoting from the fourth edition of Maxwell PB, *On the Interpretation of Statutes* (Sweet & Maxwell, London, 1905) (at 304):

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

See also *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18 and *Coco v R* (1994) 179 CLR 427. In the latter case the High Court said (at 437):

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

Having set out this background to the approach of the courts to laws that interfere with “fundamental principles”, the Full Federal Court stated (at [70]):

... we observe that the legislature, **through the expert parliamentary counsel who prepare draft legislation**, may be taken to be aware of the principle of construction in *Potter* 7 CLR 277 and later authorities such as *Bropho* 171 CLR 1 and *Coco* 179 CLR 427, and the need for clear words to be used before long established (if not “fundamental”) rights and freedoms are taken away. (emphasis added)

This indicates to me not only what the Federal Court requires for “fundamental rights” to be displaced but that drafters are considered to have a role in the protection of “fundamental rights”.

A similar point was made by in the High Court, in 2010, by Chief Justice French, in *South Australia v Totani* where the Chief Justice stated:

The effect of the [*Serious and Organised Crime (Control) Act 2008* (SA)] on personal freedoms was a matter for consideration by the South Australian Parliament which enacted it. Its merit as a legislative measure is not a matter for this Court to judge. Applying the “principle of legality”, courts will, of course, construe statutes, where constructional choices are open, so as to minimise their

26 [2008] FCAFC 130 (15 July 2008).

impact upon common law rights and freedoms. **That principle, well known to the drafters of legislation, seeks to give effect to the presumed intention of the enacting Parliament not to interfere with such rights and freedoms except by clear and unequivocal language for which the Parliament may be accountable to the electorate.**²⁷ (emphasis added)

Again, this is, clearly, powerful authority and, also clearly, indicative that drafters have an important role in the protection of “fundamental rights”.

Quality of explanatory material

I have often spoken about the quality of explanatory material, based on my experiences advising the ACT Standing Committee on Justice and Community Safety (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee), in relation to subordinate legislation.²⁸ The ACT Committee has a role, under principle (b) of its terms of reference, in ensuring that explanatory statements meet “the technical or stylistic standards expected by the Committee”.²⁹

I note that this role is relatively uncommon. I think that I am correct in saying that, apart from the ACT, only in Queensland do parliamentary committees have a role in relation to explanatory statements. Under recent reforms to the parliamentary committee system of the Queensland Parliament, the legislative scrutiny role that was previously undertaken by the Scrutiny of Legislation Committee is now undertaken by “portfolio committees”. Standing Order 132 of the *Standing Rules and Orders of the Legislative Assembly* provides:

132 Portfolio committee consideration of Bills

(1) Each portfolio committee to which a Bill is referred shall examine the Bill and—

(a) determine whether to recommend that the Bill be passed;

(b) may recommend amendments to the Bill; and

(c) consider the application of fundamental legislative principles contained in Part 2 of the *Legislative Standards Act 1992* to the Bill and compliance with Part 4 of the *Legislative Standards Act 1992* regarding explanatory notes.

(2) A report by a portfolio committee on a Bill is to indicate the committee’s determinations on the matters set out in this Standing Order.

In my work with the ACT Committee, I have taken a keen interest in the content of explanatory statements, largely because I consider that not enough use is made of them, by the makers of subordinate legislation. The end result is that they are often of little or no use. Which makes them a waste of everyone’s time.

In *SI bhnf CC v. KS bhnf IS*, Chief Justice Higgins of the ACT Supreme Court stated that a particular explanatory memorandum, “consistently with the apparent purpose of such documents of explaining as little as possible”, merely stated the effect of the provision that he was considering and did “little justice to the ambiguities and apparent draconic effect” of the relevant provision.³⁰

27 [2010] HCA 39 (11 November 2010).

28 See, eg, Argument, S, Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher, *The Loophole*, October 2007, at pages 70-1.

29 Available at <http://www.legassembly.act.gov.au/committees/index1.asp?committee=119>.

30 [2005] ACTSC 125 (2 December 2005).

The Chief Justice's views on the helpfulness of explanatory material are not unusual. Nor are they inaccurate. As someone who reads more than his fair share of explanatory statements, I think I can speak with a certain amount of authority on this issue.

An explanatory statement drafted, perhaps, not as well as it might be

While it involves particularly unsavoury subject matter, I offer the following example of an ACT Explanatory Statement that would have benefited from a closer proof-reading before being published. It relates to the *Crimes Legislation Amendment Bill 2010*:

It is noted that the preamble to the [Human Rights] Act, at 6, states that few rights are absolute. Whilst the re-introduction of the bestiality offence may raise some concerns over the interference with the section 12 right to privacy, the limitation on the right to privacy is proportionate to achieving the policy objective of preventing animals from being subjected to abuse in the form of non-consensual sexual acts. The criminalising of bestiality is consistent with the criminalising of non-consensual act generally. The reintroduction of the offence is the least restrictive and appropriate interference with this right, as required by section 28 of the [Human Rights] Act.³¹

Part of what I am trying to do in my advice to the ACT Committee is improve the quality of explanatory material (for subordinate legislation, at least) and to avoid clangers like this one.

The UK situation

I want to conclude by extracting some material from the United Kingdom relating to explanatory material. The United Kingdom Parliamentary Counsel has published, on its website, a document entitled *Working with Parliamentary Counsel* (January 2011)³². It states:

Explanatory Notes

- 281 Extensive guidance about Explanatory Notes is contained in Chapter 11 of the Cabinet Office's *Guide to Making Legislation*.
- 282 Explanatory Notes are required for every Bill introduced into Parliament, for every Bill sent to the second House and for the first list of amendments sent back from the second House to the first House. A set of Notes for the Act is also required as soon as possible after Royal Assent.
- 283 An up to date set of Explanatory Notes approved by the OPC team is required to be circulated with the papers for the PBL Committee meeting that will consider the Bill's readiness for introduction.
- 284 Explanatory Notes on a Bill or on second House amendments are prepared by the departmental team but they are printed and published by Parliament, not the Government. So the House authorities have ultimate control over their content and form.
- 285 The role of the OPC team in relation to Explanatory Notes is as follows-
 - to clear in advance with the department the set of Explanatory Notes that is sent to the Cabinet Office Legislation team for circulation in advance of the PBL Committee meeting about the Bill;

31 Available at http://www.legislation.act.gov.au/es/db_40345/default.asp.

32 Available at <http://www.cabinetoffice.gov.uk/resource-library/working-parliamentary-counsel>.

- to remind the department in advance of introduction, transfer to the second House or third reading in the second House that a set of Notes will be needed, or have to be revised for the next stage;
 - to clear in advance the set that is sent to the House on each occasion;
 - to send an electronic and hard copy of the Notes on a Bill or on second House Amendments to the PBO in time for each stage at which they are needed and to communicate with the PBOs about them;
 - to liaise with the department about the PBO's comments on the Notes; . to clear the Explanatory Notes on the Act before they are sent to the Office of Public Sector Information (OPSI) by the department.
- 286 When clearing Notes for PBL Committee, for publication by the House or after Royal Assent, Counsel will concentrate on securing-
- the technical accuracy of the notes; and
 - that the Notes to be printed by Parliament conform to the requirements of the House authorities.
- Counsel may also be able to advise the departmental team about the application of the guidance in the *Guide to Making Legislation*.
- 287 The principal requirement of the House authorities is that the notes, when they describe a clause, should be explanatory and factual, rather than seek to argue the case for the policy.
- 288 The House authorities do not find it helpful to be asked to read Explanatory Notes at the last minute. It assists if work can be done on the Notes as far as possible in advance, so that Counsel can show a relatively final version of the Notes to the House authorities a week or so in advance of their likely publication date. This is more difficult between Houses than it is, or at least should be, before initial introduction.
- 289 Counsel reading Explanatory Notes will also be checking for whether they reveal a possible misunderstanding between the drafter and the department about what a particular provision of a Bill, or an amendment, was intended to do.
- 290 Counsel commenting on Explanatory Notes may also, if there is time, draw attention to respects in which they can be made more helpful or more compatible with the guidance.
- 291 OPC's functions in relation to the Explanatory Notes can be time-consuming and often needs to be undertaken at a time when the Bill itself is making heavy demands on Counsel's time. The same is true for the departmental team. At the beginning of a Session, the House authorities are also likely to be very busy. For this reason it is wise not to postpone the work until the last minute and to plan as much of the work as possible for a less busy time.
- 292 The following are tips to consider when preparing Explanatory Notes-
- Think about them early and start work on them as provisions begin to settle down.
 - Think about the Notes that will be needed on second House amendments as they are made.
 - Ensure the Notes are drafted by a member of the Bill team who is familiar with the work on the Bill and with what it is trying to do.

- A paraphrase of the Bill will not be helpful to the reader and is actually more likely to be inaccurate than a more discursive explanation.
- Try to use the instructions, rather than Counsel's drafting, as the basis for explaining what the provisions do - but remember that the policy may have moved on.
- Remember that the real value of the Notes is that they can include things that should not be in the text of the Bill (eg background and context, examples and full explanations of the effect of a cross reference or of the existing law).
- Make sure that everyone who is given permission to amend the Notes is familiar with how to use the Word template in which they must be prepared and has it properly installed.
- Appoint one person to be the principal editor of the Notes.

293 Where Explanatory Notes need to be amended to take account of points made by Counsel or the House authorities, Counsel will normally return the electronic version for amendment by the department. This is the safest way to avoid template problems and problems arising from the use of different versions of Word.

294 Please consult the OPC team if there is a suggestion that the Explanatory Notes should be published on interleaved pages facing the Bill text. Arrangements can be made for this in the case of draft Bills; but various things need to be prepared for and considered first.³³

In addition to the quite detailed instructions set out above, the Cabinet Office's *Guide to Making Legislation*³⁴ contains a 92-paragraph chapter on explanatory notes, including examples and references to useful precedents. While the chapter is generally informative, I particularly note the following paragraphs:

Legal status of the Notes

11.10 The Notes are not legislation. They do not form part of the Bill and are not amendable by Parliament nor endorsed by it. They are not designed to resolve ambiguities in the text of the Bill – if ambiguities are identified as the Bill progresses, they should be removed by amendment. The Notes should make clear that they do not purport to be authoritative rulings on the interpretation of the proposed legislation, as only the courts can give these.

11.11 After Royal Assent, the final version of the Notes will be published alongside the Act. If the Notes are successful in the purpose of helping the reader, they are likely to be read by judges as well as by others. Occasionally it may be that the Notes are referred to in litigation, on a basis analogous to that which allows *Hansard* to be taken into account under the conditions contained in the rule in *Pepper v Hart* [para 6.37 refers]. So it is important that the Notes do not mislead; and that they do not include material which seems to take the law further than the Bill or Act does.

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33 Available at <http://www.cabinetoffice.gov.uk/resource-library/working-parliamentary-counsel>.

34 Available at <http://www.cabinetoffice.gov.uk/resource-library/guide-making-legislation>.

11.19 When the Bill is ready to be introduced, the final version of the Notes should be sent to Parliamentary Counsel. Parliamentary Counsel will make a final check of the Notes, then send them on to the House authorities together with the Bill. The House authorities will also check the text (and may require changes), before arranging printing and publication.

Concluding comments

Given the limited use that courts in the United Kingdom make of parliamentary materials – especially when compared with the express, statutory role of parliamentary material in Australia – it seems almost perverse that there are such clear and explicit instructions, in the UK, on how to prepare explanatory notes, when there is little such guidance in Australia.

While I do not seek to create more work for legislative drafters, it seems doubly perverse that, in the UK, drafters have an express, hands-on role in relation to the content of explanatory material when, in Australia, drafters generally have no role whatsoever in relation to explanatory material. Given the express, statutory basis for such material being used by courts to interpret ambiguous or obscure provisions, this seems odd. Or perhaps it is just the Poms who are odd.