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SOUTH AUSTRALIA

NINTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

LAW RELATING TO CONSTRUCTION OF STATUTES

1970

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The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
S. J. JACOBS, Q.C.
K. P. LYNCH.
D. ST.L. KELLY (during the preparation of the report).
J. F. KEELER (during the consideration of the report).

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court Department, Adelaide, South Australia.

NINTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

We have the honour to report to you on the use of *travaux préparatoires* and other aids in ascertaining the intention of Parliament for the purposes of the construction of a Statute.

In making this report we had originally intended to refer simply to *travaux préparatoires* but these today have a specialized meaning in continental law, namely texts which are brought into existence for the purpose of telling the Courts and any reader of the Statute what Parliament's intention was. Continental material is divided into three kinds: descriptive texts, motivating texts and expounding texts. Only the second and third of these would be *travaux préparatoires* in the strict sense. The first are aids to construction of a kind which we have in general been denied from using in Australia although this, as may be seen later, is not an invariable rule and include various materials either brought into being prior to the enactment of a Statute or more frequently in the course of enactment together with the legislative debates and deliberations. Because this analysis has been pushed further in continental Europe, particularly in Scandinavia, we have annexed to this paper an excerpt from Scandinavian Studies in Law 1966 which makes this clear. In addition, we have dealt with three matters which we feel call for attention in relation to this branch of the law, which do not fall within any branch of the Scandinavian analysis.

We have not dealt with such matters as punctuation, side-notes, the division of a Statute into parts or the headings of various parts of a Statute, as these whilst necessary parts of statutory interpretation are rarely guides to the intention of Parliament as distinct from the grammatical construction of the Statute and accordingly we have not dealt with the English recommendation 1 (1) (*a*).

The Australian position in relation to the matters discussed in this paper is nearer to the English than the American position. The English position is more rigid than ours, and there are some differences which are well set out in a paper which Sir Garfield Barwick gave to the 1961 Legal Convention called "*Divining the Legislative Intent*" which is found in 35 *A.L.J. at pages* 197-204. We certainly do not advocate the unrestricted use of legislative materials as is done in America. For those who want to see the advantages and disadvantages of the American position, we refer to two articles, one "Legislative Material as an Aid to Statutory Interpretation—a Caveat" by Stephen L. Wasby in 12 Journal of Public Law commencing at page 262 and the other: "Statutory Construction—Legislative Intent—Use of Extrinsic Aids in Wisconsin" in 1964 Wisconsin Law Review commencing at page 660.

The English law on the subject is in such a state of flux at present that whereas, for example, in the 9th Edition of *Maxwell on the Interpretation of Statutes* there is a substantial amount written on the use of

Parliamentary history in construing Statutes at pages 27-30; in the current edition, the 12th, written by a different editor, the whole area is dealt with quite differently at pages 50-54.

The Law Commission and the Scottish Law Commission in Law Commission Paper No. 21, Scottish Law Commission Paper No. 11 (which is the identical paper differently numbered) on the Interpretation of Statutes printed 9th June, 1969, has dealt with this matter in detail in England. Their appendix A which is set out in an annexure to this paper sets out the English recommendations. In order to compare these with the current position in England it may be convenient to set the latter out as it is summarized in paragraph 622 of Volume 36 of the 3rd Edition of Halsbury s.v. "Statutes" as follows:—

> "*Proceedings in Parliament: Reports of Commissions, Etc.*
> Even when words in a statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the bill by which it was introduced, or to the fate of amendments dealt with in either House of Parliament, or to what has been said in Parliament.
>
> Reference may not be made for the purpose of ascertaining the meaning of a statute to the recommendations contained in the report of a Royal Commission or of a departmental committee or in a White Paper which shortly preceded the statute under consideration because it does not follow that such recommendations were accepted by the legislature. On the other hand, reports of commissions preceding the enactment of a statute may be considered as showing the facts which must be assumed to have been within the contemplation of the legislature when the statute was passed.
>
> Explanatory notes provided by a government department for the assistance of officials concerned in the administration of a statute are wholly inadmissible for the purpose of construing the statute".

In older Statutes the intent of the Statute and the mischief against which it was directed was set out in a preamble. Sir Garfield Barwick in his speech to the 12th Australian Legal Convention argued in favour of the provision of a memorandum explanatory of the Bill to take the place of the old preamble, "not as a binding command to the Court but as an assistance in time of ambiguity or doubt or where policy may govern the meaning to be assigned to some operative words". As Sir Garfield points out at page 199 such a memorandum is envisaged in section 19 of the Interpretation Act, 1960, of the Republic of Ghana.

We think this solution is preferable to using the Parliamentary history of the Statute to the extent which American cases allow, because, as has been pointed out by American writers, it is a temptation to legislators to insert into the American equivalent of "Hansard" matter which can afterwards be used in making ambiguities where none otherwise exist. Parliamentary history has been allowed to be used in providing the historical background to the mischief rule to the extent set out in *Maxwell 9th Edn. at page* 27-30 and in the last two pages of Sir Garfield's address. The unrestricted use of Parliamentary history to the extent allowed in America seems to us to be undesirable and an explanatory memorandum to be a far superior way of providing the Court with background material where there is a true ambiguity and we recommend that such a memorandum be prepared and supplied at the

same time as any Bill (other than Finance and similar Bills) is introduced. The only difficulty with explanatory memoranda is that they will need to be revised from time to time. Provision may have to be made for this because the intent at the time of a Statute many years old may not govern the exposition of the Statute today. A typical example that a member and a former member of this Committee have had to argue up to the Full Court of this State was a Statute imposing, as it turned out, absolute liability in relation to straying animals which was originally intended over forty years ago to govern amongst other things straying animals on the Anzac Highway, one of Adelaide's main arterial roads, an extremely improbable construction today. Accordingly it may well be necessary for some provision to be made that either on each reprint of the Statutes or after given periods of time that explanatory memoranda be revised and brought up to date and submitted to Parliament for approval as a schedule to a Statute Law Revision Bill.

We agree with the English Law Commission that it should be possible to refer to Command Papers, reports of Royal Commissions and other similar material upon which the Statute is based. It is interesting to note that a report of the Law Commission itself has been so used in a very recent bill at present before Parliament in England. In the "Times" of Thursday, January 29, 1970, the Solicitor-General moved the second reading of the Matrimonial Proceedings and Property bill in the House of Commons. It has already been through the House of Lords. There is a provision in the bill that the Courts may have regard to the Law Commission's reports in construing the bill and the bill was read a second time in the Commons with that provision in the bill. Whether the reports of this Law Reform Committee ought to be accorded similar respect is a matter we leave open!

However, we feel that the findings of Royal Commissions and other similar bodies from which a Statute is ultimately constructed should be before the Courts in case of doubt and accordingly we agree with recommendation 1 (1) (*b*) of the English and Scottish Commissions.

As far as 1 (1) (*c*): "relevant treaty or other international agreement" is concerned, it would appear that this is already admissible in Australia if it is referred to in the Act (see the decision of the High Court of Australia in *Burns Philp & Company Limited v. Nelson and Robertson* 1958 *A.L.R.* 334). We see no reason why if the international agreement has been entered into by Australia but has been implemented by Statute without the agreement being scheduled it should not be equally available for use. We do not agree that if Australia is not bound by it at that time that it should be material for the consideration of the Courts and to that extent our views are more conservative than those set out in 1 (1) (*c*) of the Law Commission's recommendation.

Their points 1 (1) (*d*) and 1 (1) (*e*) deal with Command Papers and any other document (which would include an explanatory document of the kind we have referred to before). Our equivalent of a Command Paper is a White Paper. They are rarer in this country but in the case of major legislation would be a valuable aid to construction.

Accordingly with the restriction referred to in the discussion of the English clause 1 (1) (*c*) we recommend that our Acts Interpretation Act, 1915-1960 be amended to include a section in similar terms. We also recommend the enactment of sections in the like terms to sections 2 and 3 of the English Commission's report.

Turning now to matters beyond the Law Commission's recommendations we should like to refer to three other matters which are not in their study but which we think should be considered.

The first is that where an undertaking is given in Parliament by a Minister that a Statute will be administered in a certain way in order to have that Statute passed, it should be possible to prove that undertaking in the Courts on any prosecution for an infringement of that Statute. One of the members of the Committee was in the unenviable position many years ago of defending a man who did what a Commonwealth Minister said it was perfectly legitimate to do, only to find himself charged with a black marketing offence, and the joint persuasion of a very annoyed Counsel for the Crown and an equally annoyed Counsel for the accused, failed to move the Court on the matter. If the Minister wants to change his mind after giving such an undertaking the only honest thing to do is to amend the Act and bring the point before Parliament for consideration.

Equally it should be possible to prove any official direction to the citizenry of the country as to how they may comport themselves so as to avoid criminal liability. There is an excellent example of this in *"Second Class Citizen"* by Robyn Lewis, an English solicitor, in relation to the use of Welsh in proceedings where the Home Office at Whitehall had previously directed in a circular to Clerks of Courts that Welsh could be used in the Courts in Wales as an absolute right and Parker L.C.J. in the case of *The Queen v. Port Talbot Justices; Ex parte Dyfrig Thomas* 12*th January*, 1968, punished a man for doing that which the Home Office said he could do. It is fair to add that the circular was not brought by Counsel to the attention of the Lord Chief Justice. Both of these instances seem to be repugnant to any proper system of justice in relation to the administration of Statutes in the criminal Courts in ascertaining the intent which the legislature intended the Statute to carry out. Both of these matters would require amendments to the Evidence Act, 1929-1968.

The second point which we wish to raise is as to the effect of consolidating Acts. English and Australian law is in complete conflict on the point. In England the rule is that if a section of a Statute has received a certain judicial construction then on its consolidation or re-amendment it must receive the same construction. Chief Justice Sir Owen Dixon strongly dissented from this view in *The Queen v. Reynhoudt* 107 *C.L.R.* 381 *at* 388. We agree with Sir Owen Dixon's view and recommend that the point be put beyond doubt by Statute. It has already been done by section 38 (4) of the Canadian Interpretation Act, 1967, 16 Eliz. II c. 7 and we recommend that that section be adopted here.

The third matter which we feel ought to be explicitly dealt with in Statutes is one which is at present in the realm of divination in which the Roman augurs could not have done a better job in divining by signs on the livers of animals, namely whether a particular criminal offence is or is not one of absolute liability and whether when a matter is punishable criminally it imports a civil remedy. We think that Parliament should be required to state in the case of absolute offences that they are absolute offences and if not whether either they import mens rea or that an honest and reasonable belief is a defence as the case may be and in the second case that a civil remedy is or is not to be presumed (it matters not which solution is prescribed so long as there is a definite statutory direc-

tion) from the creation of a criminal offence unless the particular Statute expressly deals with the question. These would both require amendments of the Acts Interpretation Act and we point out that the Committee were not unanimous on this point and accordingly the first solution proposed (if adopted) would not follow the English proposed section 4. Each solution has its merits and the final decision must be a matter of government policy.

We are conscious that this is not a full treatment of the subject. To do so would be to write a thesis. What we have done is to make these recommendations in the hope that some better method of divining the legislative intent can be obtained by the amendments we recommend. Any amendment would be better than the present position as to which it has been truly said that authority can be provided for any and every possible way of interpreting the words of any section of any Statute. We are confident that it is time that the defects enumerated by Professor Laski and quoted at page 201 of Sir Garfield Barwick's address be eliminated.

We have the honour to be

HOWARD ZELLING.
S. J. JACOBS.
K. P. LYNCH.
JOHN KEELER.

Law Reform Committee of South Australia.

APPENDIX A

DRAFT CLAUSES

Aids to interpretation.

1. (1) In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for the purpose apart from this section, include the following, that is to say—

(*a*) all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act;

(*b*) any relevant report of a Royal Commission, Committee or other body which has been presented or made to or laid before Parliament or either House before the time when the Act was passed;

(*c*) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time;

(*d*) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time;

(*e*) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section.

(2) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances.

(3) Nothing in this section shall be construed as authorizing the consideration of reports of proceedings in Parliament for any purpose for which they could not be considered apart from this section.

Principles of interpretation.

2. The following shall be included among the principles to be applied in the interpretation of Acts, namely—

(*a*) that a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not; and

(*b*) that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not.

Application to subordinate legislation.

3. Sections 1 and 2 above shall apply with the necessary modifications in relation to Orders in Council (whether made by virtue of any Act or by virtue of Her Majesty's prerogative) and to orders, rules, regulations and other legislative instruments made by virtue of any Act (whether passed before or after this Act), as they apply in relation to Acts.

Presumption as to enforcement of statutory duty.

4. Where any Act passed after this Act imposes or authorises the imposition of a duty, whether positive or negative and whether with or without a special remedy for its enforcement, it shall be presumed, unless express provision to the contrary is made, that a breach of the duty is intended to be actionable (subject to the defences and other incidents applying to actions for breach of statutory duty) at the suit of any person who sustains damage in consequence of the breach.

APPENDIX B

SCANDINAVIAN STUDIES IN LAW 1966

Legislative Material and Construction of Statutes

"5. Before we proceed to describe the modern legislative process and the documents originating from its successive stages, it seems justifiable to analyse, in general terms and without direct reference to any particular legal system, the various kinds of documents which may be considered as *travaux préparatoires* in relation to a given text.

Without pretending to cover all possible variations or to establish a complete "typdogy", it is submitted that documents belonging to the category of legislative material may be grouped under three main heads: descriptive, motivating, and expounding texts. It is further submitted that "subjective" methods of interpretation are likely to be particularly successful and widespread where the two latter types of preliminary works are used and that, by way of reflex, a fairly uniform adoption of subjective methods is likely to encourage the elaboration of expounding documents in the course of preliminary works.

By "descriptive texts" I mean documents which record the process of legislation—deliberations and debates. Generally speaking this method is the oldest one, for from time immemorial statutes of any importance have normally been the result of collective effort. Thus the preliminary works of the Swedish Code of Laws, 1734, consist of the minutes of a commission appointed in 1686 which submitted its results in 1734. To this material should be added the records of the debates in the Four Estates of the Realm. Similar collections of documents have been published in respect of the great Continental codes.

Descriptive *travaux préparatoires* tend to be uneven sources of information. Quite apart from the obvious danger of mistakes in the process of recording, the part played by chance is considerable: whether a proposed enactment is discussed at all, whether it is correctly understood by those whose opinions are recorded and whether misinterpretations are corrected are matters which depend upon a great number of political, personal, and other often trivial circumstances. Where memoranda or other pieces of writing of the same kind are attached to the records, these risks are reduced to some extent.

"Motivating texts" are such as explain *why* an enactment is proposed and what considerations have led its authors and/or drafters to choose the solution embodied in the proposed enactment. The typical 18th-century preamble is a characteristic document of this kind. For the purposes of interpretation, motivating texts are obviously of some interest because they tend to express, in a concentrated form, the evaluations underlying the proposed enactment and the result which its authors hope to achieve. On the other hand, documents of this kind are likely to keep to a comparatively high level of abstraction: details will seldom, if ever, be discussed.

"Expounding texts" are such as comment upon the proposed statute, section by section, in much the same way as commentaries or textbooks. The present use of expounding texts gives rise to the problems of subjective and objective interpretation in their most acute form: here the "legislator" purports to give guidance to the solution of a great number of questions but, at the same time, for obvious practical reasons, runs

the inevitable risk of simplifying and standardizing conflicts which, when they come before the courts, may be attended by special circumstances not foreseen by the drafters and tending to make their solutions difficult to accept.

Expounding texts are faily recent; hardly known in France, they developed in the course of the 19th century in Germany, and Scandinavia, where probably Sweden has pushed the method further than any other country. It is difficult to venture any conjecture as to the origin of the system, but it reflects the method adopted in the great German commentaries on the "gemeines Recht", the modified Roman law that was applied as a principal or subsidiary source of law in most parts of the Reich until the period 1790-1810, was applicable in some German territories until the coming into force of the Bürgerliches Gesetzbuch in 1900, and is still of some interest as "local law" in branches of the legal system left outside the Bürgerliches Gesetzbuch. Since the better-known systematic commentaries of this kind served as unofficial sources of law, and since codification tended to be made according to the systematic pattern of legal science, at least in the field of private law, it would seem quite natural for German lawyers to draft statute books as a series of theoretical propositions duly commented upon and exemplified. Another trend of legal thinking seems likely to have favoured the rise of elaborate preparatory works of this kind (although it must be admitted that this is only a conjecture, and would be hard to prove). German "positivism", as it developed towards the middle of the 19th century, identified "law" with "statutory law" to an extent and with a consistency unparalleled even in those periods when absolute monarchs claimed the role of exclusive fountains of justice. The logical outcome of this attitude would seem to be legislation which covers all imaginable problems; since the actual text of the statutes cannot possibly be drafted so as to achieve such a result without having recourse to highly abstract language, the need for detailed commentaries must be particularly great.

Within the category of "expounding" texts, various different patterns and methods can be observed, but three types seem entitled to particular attention. The first method is that of laying down, more explicitly than the statutory text and the short exposé des motifs by which it may be accompanied, the general purposes and principles of proposed enactments. In what follows this method will be referred to as the "abstract" technique. The second type—which obviously corresponds to the method known in the history of legal doctrine as "conceptualistic jurisprudence" (Begriffs jurisprudenz)—tends to expound the text by means of deductive reasoning; it makes the terms of enactments the essential starting point of analysis and goes on to lay down series of definitions intended to- make clear the field of application of each particular enactment. This method may be called "conceptualistic". Generally speaking, an abstract and scientific legislative technique of the kind which is found particularly in the German Bürgerliches Gesetzbuch would seem to encourage this method of expounding. Finally, use may be made of a pragmatic and casuistic method whereby each enactment in a proposed legislation is elucidated by series of practical examples. This method—for which there would seem to be particular justification where the statute is drafted in a casuistic manner—may be called the "pragmatic" method.

A. B. JAMES, GOVERNMENT PRINTER, ADELAIDE