what does it mean?

'I often look at the Hansard records of Parliamentary Debates and I must confess that I not infrequently find my own contributions, when a member of the Australian Senate, particularly valuable.'

Mr Justice L.K. Murphy, February 1983

beyond the letter. The high level symposium on interpretation of legislation foreshadowed in these pages (see [1983] *Reform* 8) duly assembled in Canberra 4-5 February 1983. The symposium was opened by the then Federal Attorney-General, Senator P.D. Durack, Q.C. and chaired by the leading force behind the moves for reform and the procedure of a public discussion, Mr Pat Brazil, now Secretary of the Federal Attorney-General's Department. See below p. 90.

Senator Durack urged consideration of the proposal for reform included in a discussion paper *Extrinsic Aids to Statutory Interpretation*, 1982. The paper proposed the preparation of explanatory memoranda, including possibly by the ALRC, to accompany legislation and to elaborate on the economical language of the statute:

> 'Judges should become bolder in applying both the principles of the common law and guidelines laid down by Parliament. Hopefully, Parliament might be persuaded to give a greater role to judges if it knew that they would accept the change. With a purposive approach and better aids to interpretation, Parliament might be encouraged to reduce the size and complexity of legislation'.

Lord Wilberforce, a long-time advocate of reform in England, presented his paper on 'A Judicial Viewpoint'. Specifically he urged that courts should be allowed 'for guidance' to consult reports of such bodies as permanent law reform commissions 'since their reports, being politically uncontroversial, tend to be accepted in full'. These comments raised a few wry smiles in the audience because of the Australian experience both to give controversial matters as references to LRC's and then to consider most closely, as if afresh, all of their recommendations. Lord Wilberforce urged that explanatory memoranda should reflect mutual confidence between Parliament and the judiciary. But he called for room to be left for 'judicial discretion and, dare I say it, occasional discreet legislation'.

ministers' speeches. In a paper read by Mr Chris Maxwell on behalf of Senator Gareth Evans, then in Opposition, it was said that a Minister's Second Reading Speech was often the best guide to what legislation was intended to do. Senator Evans proposed that such speeches should be available as an extrinsic aid in the interpretation of the legislative intent and identifying the 'mischief' being addressed by law. Sir Maurice Byers, Q.C., Solicitor-General made a confession:

> 'It will shock no one if I confess that I go to the Debates [on the Constitution] when a substantial problem arises...Surely it is a quaint notion that one may look at the changes in the text as a guide to the construction but not to the reasons that may have prompted them'.

Mr Justice Murphy of the High Court of Australia, reflecting the practice which is well documented in his High Court judgements, saw no difficulty at all in proceeding to the Parliamentary Debates and *Hansard.* As disclosed in the last issue of *Reform* an increasing number of judges are doing this despite *dicta* of the courts for more than 100 years that it should not be done. In the Federal Court of Australia, a Full Court, encouraged by observations of Mr Justice Mason in the High Court, examined the *Hansard* reports of Ministerial Second Reading Speeches to discern the 'mischief' designed to be remedied by disputed legislation before the Court. See *TCN Channel 9 Pty. Ltd. v AMP Society* (1982) 42 ALR 496.

Commenting on a paper giving a parliamentary viewpoint offered by Mr Graham Harris, M.P., the ALRC Chairman

drew attention to the initiatives already taken by the ALRC in this area:

- In ALRC 4 it was proposed that resort might be had to the Commission's report in interpreting Breathalyzer legislation. This provision was deleted from the Bill when it was enacted.
- In ALRC 20 a similar provision was included in relation to the draft Bill on insurance contracts law.
- Also in ALRC 20 the Commission annexed not only a draft Bill but also a detailed explanatory memorandum with comments on draft clauses offering explanations, illustrations and examples of the proposed operation of the law.
- In the recent reference on Admiralty jurisdiction, the ALRC has been asked to prepare a explanatory memorandum in support of any draft Bill.

Views differed at the symposium on the way ahead:

- Mr Justice Murphy, confident of the growing tendency of the judges to have regard to extrinsic material, thought Parliament should do nothing, leaving developments to the common law and the judiciary.
- Mr Justice Kirby urged that if anything were done by Parliament, it should not inhibit legitimate judicial innovation which had already overtaken, in some quarters at least, notions of explanatory memoranda and defined, limited aids.
- Mr Justice McGarvie (Supreme Court of Victoria) urged caution lest lawyers might be held liable for professional neglect by having failed to go beyond the statute into various extraneous sources, such as Parliamentary Debates, background reports, etc.
- Mr Justice Mason, in his summing up, suggested that the views of Mr Justice Murphy were 'too conservative'! He said that the methods by which courts interpret statutes was very much a matter for parliamentary concern, subject to possible constitutional limitations on the Federal Parliament's power to give directions to the judges. There was now a doubt and uncertainty as to the old rule that the courts could not look at extrinsic materials such as *Hansard.* He said that this doubt and uncertainty should be 'set at rest' by Parliament or by the High Court but preferably by Parliament. Parliamentary action was to be preferred because, unlike the courts, Parliament was 'not afflicted by the accumulated overburden of past judiciary decisions'.

Mr Justice Mason correctly estimated that there was a significant body of support in the symposium for the judiciary resorting to relevant extrinsic material 'though it is felt that cautious use should be made of them'. Certainly, he said, reports on which legislation was based, particularly LRC reports should be 'legitimate aids'. But he warned of the lack of accessibility to lawyers of *Hansard* and other materials and the fact that having to look at this could increase the work load of the High Court of Australia which was already 'altogether too great'.

judges' laws. Editorial comments on the seminar, which received wide publicity in the Australian press varied. The *Sydney Morning Herald* (10 March 1983) expressed the view:

> '[I]t is a risky procedure to change drastically the way laws are written because of the ideology of specific judges. As things stand now a reasonably effective balance has been established. Legislation passed last year, requires judges to look at Parliament's intentions when interpreting legislation. In tax cases this has meant the end of the strictly literal interpretation of the law...While

> the useful distinction is retained of politicians making the laws and judges saying what these laws mean, the efforts of aspiring politicians to get themselves elected to Parliament and there become influence brokers will not be in vain'.

The Melbourne *Herald* (7 February 1982, 3) cautioned, in a passage that may strike some lawyers as inconsistent:

> 'Certainly our Parliaments do produce far too much law. We are drowning in a sea of legalistic confusion...But the fact remains that as a principle, judges as both lawmakers and interpreters would be a bad thing. Judges are not elected and are properly free from political interference...It is Parliament, not the courts, that should make those laws regarded as indispensable. Another idea raised at the legal seminar was the suggestion of greater access for the courts to the parliamentary thinking behind legislation and that could only be to the good'.

and overseas. The symposium was attended by a number of overseas lawyers in addition to Lord Wilberforce. Professor Ken Keith of the Victoria University of Wellington, NZ drew attention to the decision of the Privy Council in *Lesa v Attorney-General of New Zealand* [1982] 3 WLR 898. That decision, dealing with the right of Samoans to citizenship reflects the willingness of the highest courts in our tradition to look beyond the language of legislation. The Privy Council gave the seal of approval to the NZ Court of Appeal's action in looking to the records of the resolutions of the Council of the League of Nations in 1923, upon which the New Zealand citizenship legislation of that year had been based.

Readers specially interested in developments in the interpretation of statutes in New Zealand will find most interesting an article by Mr D.A.S. Wall, NZ Parliamentary Counsel 'A Criticism of the Interpretation of Statutes of the New Zealand Courts' [1963] NZLJ 293. Though 20 years old, the article is still a seminal work. Apart from anything else, it explains the effect of s 5(j) of the Acts Interpretation Act 1924 (NZ) which urges as a canon of its construction that legislation should be interpreted to achieve 'a fair large and liberal interpretation'. Whether the new section 15AA of the Australian Acts Interpretation Act 1901 will be any more effective, remains to be seen. The item in the NZLJ is worth a glance if for nothing else than the poem 'Poetic Justice' by J.P.C. Sample?

> 'I am the Parliamentary Draftsman,
> I compose the country's laws.
> And of half the litigation, I'm undoubtedly the cause'

Someone who should know, Mr John Q. Ewens, formerly First Parliamentary Counsel of Australia and a past ALRC Commissioner, expressed his views on legislative draftsmen in an invited paper for the meeting of Commonwealth Law Ministers held in Sir Lanka in February 1983. To sum it up, Mr Ewens urged that an effective legislative drafting service required a number of conditions to be satisfied:

- obtaining the right sort of people;
- giving them the right sort of training;
- furnishing them with the right sort of instructions; and
- providing them with the right tools of trade.

As to the people, Mr Ewens expressed no doubt. They are 'born and not made'. As to the training, Mr Ewens is all for the 'apprenticeship method'. The Legislative Drafting Institute of Australia, an initiative of Attorney-General Murphy, recently abandoned, was based on an assumption that drafting could be taught in a class – an assumption Mr Ewens questions. As for instructions, 'nothing is more frustrating to the draftsman than to have to sit for hours on one side of the table whilst the "clients" on the other side, thrash out amongst themselves what they really want'. Amongst the 'tools of trade', Mr Ewens mentions the *Commonwealth Law Bulletin* and a word processor – a magic machine he first saw

(with reactions like Keats' first looking into Chapman's Homer) when he took up his appointment as an ALRC Commissioner.

An important paper. And made more so by the companion piece by Mr G. Nazareth, Q.C., Law Draftsman of Hong Kong on the training and retention of legislative draftsmen. One suspects Messrs. Nazareth and Ewens would only agree with the comments by First Parliamentary Counsel Mr Geoffrey Kolts, QC, at the Canberra symposium that governments in Australia set impossible timetables for legislation. The results were that legislation often contained a mere outline and this 'allowed the courts to go off on a frolic, often deciding cases in a way contrary to the parliamentary legislation with the result that more, corrective legislation was needed'.

The key to simpler legislation is a new approach to legislative drafting and judicial interpretation. This is recognised by comments at the top level of politics and the judiciary. It is reflected in legal and popular texts. The point is made, for example, in the fourth edition of *An Introduction to Law* by D.P. Derham, F.K. Maher and P.L. Waller (Law Book, 1983), 128. The change of Federal Attorney-General in Australia will not, apparently, diminish the search for reform here. It is clear that Senator Evans intends to continue Senator Durack's important initiatives. As a hint of things to come, another quote from the law and justice policy of the ALP is in order:

> 'The complexity of Federal legislation means that most members of the public are unable to understand their rights and obligations even if they can obtain copies of the legislation itself. Labor will explore means of simplifying drafting techniques, and making summaries of the law and of legal rights under Federal law readily available to the public...The question of what materials should be available to the courts and the public in interpreting statutes is the subject of continuing debate. Committee reports, explanatory memoranda and second reading speeches can all be of assistance in appropriate cases in ascertaining the purpose of statutory provisions. Labor will seek to formally widen the range of aids that may be employed in interpretation of Commonwealth statutes, at the same time ensuring that they are equally available to all who need them'.

reform in the west

'Now I know what a statesman is; he is a dead politician. We need more statesmen'.
Bob Edwards c 1951

the other change. February 1983 saw the election of a new State Government in Western Australia under Premier Brian Burke. The Labor Party claimed a swing of well over 8% and in some areas up to 17% giving it a clear majority in the biggest landslide in the State's electoral history. A number of State Ministers lost their seats and as it transpired, the election on 19 February 1983 predicted the national change that was to follow exactly a fortnight later.

The incoming government was elected on a platform including numerous promises of law reform. Among the items included in the new State Government's program are:

- abolition of capital punishment and flogging;
- review of sentences of imprisonment in WA;
- prohibition of entrapment by officials;
- reduction of penalties for marijhuana for personal use;
- review of laws on credit reporting agencies and listening devices;
- decriminalisation of laws on adult consenting homosexual conduct;
- community law reform
- provision of a new procedure for processing reports of the WALRC. The Government promises to provide within 12 months of their tabling in Parliament, a statement as to its intentions in respect of WALRC reports.