Legislative Assembly for the Australian Capital Territory

Standing Committee on Legal affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

scrutiny report no. 9

7 May 2002

Terms of reference

(1) The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):

(i) is in accord with the general objects of the Act under which it is made;

(ii) unduly trespasses on rights previously established by law;

(iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee

(c) consider whether the clauses of bills introduced into the Assembly:

(i) unduly trespass on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Members of the Committee

Mr Bill Stefaniak, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Ms Kerrie Tucker, MLA

Legal Adviser: Mr Peter Bayne
Secretary: Mr Tom Duncan
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Celeste Italiano
(Scrutiny of Bills and Subordinate Legislation Committee)

Role of the Committee

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

There is no matter for comment in this report.

SUBORDINATE LEGISLATION

There is no matter for comment in this report.

GOVERNMENT RESPONSE

The Committee has examined the Attorney-General's response to Scrutiny Report No 4 on the Legislation Amendment Bill 2002.

In Report No 4 of 2002, the Committee pointed to two kinds of rights concerns that arose out of clause 19 of the Legislation Amendment Bill 2002 in the respect that it proposes that a new section 142 be inserted in the *Legislation Act 2001*. Section 142 would deal with the power of a court to have regard to material that does not form part of an Act in working out the meaning of a provision of the Act. Proposed new section 142 says simply: "In working out the meaning of an Act, any relevant material not forming part of the Act may be considered".

The Committee pointed, in the first place, to an " access to law perspective", in that "the wider the range of materials that may be used to give meaning to the words of a law, the less the reader of a law is able to work out what those words mean simply by reading the text of the law". Secondly, the Committee pointed to "a separation of powers perspective, in that the greater the scope for the courts to mould the words of a law to achieve the 'purpose' of the law, the more the courts are made part of the legislative process".

The Committee thanks the Attorney-General for his reply to Report No 4. It considers that the Assembly might be further assisted by a reply from the Committee. The insertion into the *Legislation Act 2001* of proposed new section 142 raises the distinct prospect that the courts will interpret all the legislation of the Territory in a distinctly different fashion to their current mode of approach. In turn, counsel who appear before the ACT courts, and those who prepare opinions on the meaning of ACT laws, will need to adjust their mode of approach. Change is not of course necessarily a bad thing, and judicial and legislative reform of the law in this area has occurred over the past 20 or so years. The issue is whether the reform proposed by section 142 is desirable. In the end, this is a matter of policy. In this further comment, the Committee seeks to assist debate by some elaboration of the comments it made in Report No 4 that are by way of comment on the letter of the Attorney-General of 8 April 2002.

1. The Attorney-General notes that "the use of extrinsic materials is now a long-established reality in Australia", and argues that proposed new section 142 "reflects the current position both under the *Interpretation Act 1967*, section 11B and the common law". The Committee will respond to this point first.

The heading to section 142 refers to section 11B of the *Interpretation Act 1967*, and, like section 11B, it deals with the topic of the use the courts may make of extrinsic materials. Section 142 would, however, make a change in the way the topic is addressed.

Subsection 11B(1) provides:

> 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 …

Subsection 11B(2) then goes on to list in 8 paragraphs certain kinds of document that could fall within subsection 11B(1). These documents - such as an Explanatory Memorandum, a presentation speech, a report of a committee of the Assembly that was made to that Assembly before the time when the provision was enacted - are all of a kind that would provide guidance as to what those who drafted the statutory provision in question were seeking to achieve by that provision. The 9th paragraph in subsection 11B(2) refers to: "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". This of course gives the Legislative Assembly control of the kinds of documents that will fall within subsection 11B(2).

If regard were paid only to the 9 paragraphs of subsection 11B(2), it would be clear that under the *Interpretation Act 1967*, the extrinsic material to which section 11 refers is that which would provide guidance as to what those who drafted the statutory provision in question were seeking to achieve by that provision. It is suggested that this is how the concept of ' extrinsic material' has generally been understood from the 1980s, the time from which, as the letter of the Chief Minister correctly notes, nearly all Australian jurisdictions have enacted laws similar to section 11B.

But the opening words of subsection 11B(1) state expressly that the listing of the 9 categories is *not* to be taken to limit the generality of subsection (1), and the latter refers to "any material not forming part of the Act [that] is capable of assisting in the ascertainment of the meaning of the provision [whose meaning must be ascertained]". But it is not clear whether subsection 11B(1) permits reference to treaties such as the human rights instruments such as the *Universal Declaration of Rights*. Given that paragraph 11B(2)(b) specifies " any treaty or other international agreement that is referred to in the Act" as an extrinsic source, it is arguable that this specific reference to some kinds of treaties indicates that when the Assembly enacted section 11B, it did not have in mind other kinds of treaties.

Even if this not be the case - and that subsection 11B(1) permits reference to treaties such as the human rights instruments such as the *Universal Declaration of Rights* - section 142 approaches the topic in a very different way. Section 142 is simply open-ended in what it allows an interpreter to make reference. The only guidance given by the words of the Act is in the phrase "any relevant material not forming part of the Act …". By comparison with section 11B, (which provision is noted in the heading to section 142 as a predecessor), it is apparent from the text of section 142 that it is no longer concerned with whether the extrinsic material is of the kind that will provide guidance as to what those who drafted the statutory provision in question were

seeking to achieve by that provision. Such a concern is of course reflected in 7 of the 8 examples which are appended to the text of section 142. But example 7, which illustrates how the *Universal Declaration* might be used, makes it plain that this concern does not limit the scope of section 142.

In Example 7 it is said that the language of a (hypothetical) Act might be understood by reference to a provision of the United Nations *Universal Declaration of Rights*. The problem posed in this Example is one where it is not clear from the hypothetical Act whether a person might make application for relief from a forfeiture of property, (occasioned by the person having committed a serious offence), under only one of two, or under both provisions of the Act that permits such an application. It is suggested in the Example 7 that were reference made to the "property rights recognised by the [*Universal Declaration*]", the problem could be solved in favour of the person being able to make successive applications.

It can be argued, as Justice Kirby does, that it should be "presumed that … legislation is written against the background of an acceptance of such fundamental principles [as are found in the *Universal Declaration*]". Then, having made this presumption about what an Australian legislature would have intended, Justice Kirby then argues that a statute, "in so far as it manifests ambiguity or obscurity", should be read in a way that protects the fundamental principles found in documents such as the *Universal Declaration* and the ICCPR; (*DPP v Logan Park Investments Pty Ltd* (1995) 132 ALR 449 at 456).

(It should be noted that his Honour spoke more broadly about the fundamental principles of the law of civilised countries, including principles upheld by the common law of Australia": *DPP v Logan Park Investments Pty Ltd* (1995) 132 ALR 449 at 456. In a case decided a few months later, Kirby P relied on some provisions of the *International Covenant on Civil and Political Rights* (ICCPR) to interpret another Commonwealth law: *DPP v Serratore* (1995) 132 ALR 461 at 466.)

In this way it can be argued that documents as the *Universal Declaration* and the ICCPR are no different to the classic kinds of extrinsic materials referred to in subsection 11B(2) of the *Interpretation Act 1967*. There is, however, a significant point of difference. Where an Act is drafted against the background of a document such as a law reform report, it is reasonable to say that the legislature might be presumed to have had regard to the report. That cannot said, without more, about a document such as the *Universal Declaration*. It is as a practical matter very unlikely that more than a few members of the legislature, at the most, would have had in mind that its principles would inform the interpretation of the Act being enacted. It would of course be different if those documents had been referred to in the legislative history of the statute the meaning of which is in question

In the end, one can see how section 11B of the *Interpretation Act 1967* is a predecessor to proposed new section 142 of the *Legislation Act 2001*. The Committee does consider, however, that section 142 represents a distinct change in emphasis, in particular in view of the inclusion of Example 7.

The Committee must stress that modification of proposed new section 142 to align it more closely with existing section 11B of the *Interpretation Act 1967* would not preclude the courts adopting the kind of reasoning employed by Justice Kirby. Clearly, some judges do take his approach, although it is also clear that many do not. The 'common law' on use of international rights documents is in a state of development, and it is arguable that it is best left for the present to judicial development.

2. The Committee is concerned that use of extrinsic materials, in particular of kinds such as the *Universal Declaration*, will add to the cost of litigation. This will be so in terms not only of the work of lawyers, but of the time of the courts that will be taken up in working out just how statements of rights can guide the meaning of a particular provision of the Act. Moreover, as pointed out in Report No 4, it is not simply a question of making reference to the words of a document such as the *Universal Declaration.* The question of what these words mean is, in turn, a question to be resolved by reference to the extrinsic materials that surround the *Universal Declaration*, and such guidance as there is from bodies that have interpreted the document. In relation to documents such as the *European Convention of Human Rights*, that decisions of the courts of Europe and the United Kingdom run now to very many volumes.

This concern was in the minds of those who drafted section 11B of the *Interpretation Act 1967*, for in subsection 11B(3) it is provided:

> (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 Committee notes that there is no corresponding provision in the amendments proposed to the *Legislation Act 2001*. This again represents a change of emphasis, and might indeed lead the courts to conclude that the matters referred to in subsection 11B(3) are no longer relevant.

3. The Committee also stated 'separation of powers' concerns about proposed new section 142 of the *Legislation Act 2001*. It noted that "the greater the scope for the courts to mould the words of a law to achieve the ‘purpose’ of the law, the more the courts are made part of the legislative process", and that it would "confer on the courts, and others who interpret the words of a law, a great deal more room for choosing the interpretation that they think desirable". This is borne out by an examination of the reasoning of Kirby ACJ in *DPP v Logan Park Investments Pty Ltd* (1995) 132 ALR 449. The letter of the Chief Minister indicates that it was this

judgment that inspired the terms of Example 7 appended to the text of proposed new section 142.

One M was convicted of a serious drug offence. Prior to conviction, the Commonwealth had obtained a restraining order in respect of certain property of Logan Park Investments Pty Ltd, a company that the Crown said M controlled. If the order was in force six months after conviction, the property was forfeited to the Commonwealth. But provision was made in s 48 of the Act for another person to seek relief from such forfeiture prior to its taking effect. Another person did so, but the court dismissed the application, and the forfeiture took effect. Later, the person seeking relief made application under another provision (s 31) of the Act that conferred on the courts a power to grant relief from forfeiture. The issue was whether this second application was possible.

In the Court of Appeal, Handley JA held that the terms of the Act provided a clear answer: "Given that the grounds for relief available to third parties under s31 after forfeiture, are wider than those available before forfeiture the intention of Parliament must have been that the remedies should be cumulative": 132 ALR 449 at 460. Kirby ACJ, (with whom Powell JA concurred on the point of reasoning dealt with below), took a much longer and more complicated route to the same conclusion.

Both Kirby ACJ (at 455) and Powell JA (at 460) acknowledged that it was "the intention of the legislature, when enacting s31(4)(5) of the *Proceeds of Crime Act 1987* … to limit the cases in which leave might be granted to those in which the relevant applicant had not earlier sought to have the subject property excluded from the restraining order, and that its failure to do so did not involve negligence on its part". Kirby ACJ made explicit reference to the Explanatory Memorandum, which made it plain that if the issue of interpretation was resolved in accordance with what was said there, the Act should be interpreted to the effect that a second application for forfeiture was not possible.

Moreover, both Kirby ACJ (at 455) and Powell JA (at 460) acknowledged there was an ambiguity or obscurity in the Act. Kirby ACJ explicitly allowed that the position take by the DPP on the appeal was arguable; that is, if so minded, Kirby ACJ could have reached the opposite result in the case.

But both judges chose to resolve the ambiguity, not by reference to the clear indications of the Explanatory Memorandum, but by reference to the general standpoint that a construction opposite to that expressed in the Explanatory Memorandum would better protect interests in private property. Kirby ACJ said:

> The Act establishes a scheme for depriving persons of property rights which they otherwise enjoy by law. This is as much true of a company as it is of an individual. The right to own and to control property is an important civic right in a society such as ours. Indeed, it is an attribute of economic liberty. The ownership of property is recognised in the *Universal Declaration of Human Rights*. Article 17 provides:

> "17.1 Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property."
>
> Although these provisions are not, as such, part of Australian municipal law, they reflect fundamental principles of the law of civilized countries, including principles upheld by the common law in Australia. To the extent that they state applicable principles of international law, they are available to assist in the construction of ambiguous Federal legislation. It will be presumed that such legislation is written against the background of an acceptance of such fundamental principles … . Therefore, it can be accepted that the Act, insofar as it manifests ambiguity or obscurity, would have been intended to respect basic property rights … . To deprive property owners (and I would say property owners contingently divested of their rights) of such rights, clear legislation is required. Although in the present case, it is true that the respondents' property had been forfeited to, and vested in, the Commonwealth, a proper view of the scheme of the Act, including s31, is that the forfeiture is not complete until all rights of the property owner (including any rights enjoyed under s31) are exhausted.

Kirby ACJ deal with the Explanatory Memorandum in this way:

> Whilst it is legitimate to have regard to the Explanatory Memorandum and the purpose of the drafter, and whilst I would accept that the legislation here is ambiguous, permitting that course, the ultimate duty of a court is one of fidelity to the language which Parliament has actually used: … . Ministerial speeches and Explanatory Memoranda cannot substitute for the language of Parliament which is expressed in its statutes. The experience of the courts shows how, on many occasions, legislation misfires. Whilst courts should strive to avoid that result (and use Explanatory Memorandum in aid of that laudable objective) they may not use such Memoranda to put words into an Act of Parliament which the legislators have not themselves added … .

In this case, Kirby ACJ thought the argument of the DPP did amount to having the court insert additional words in section 31 of the Act. This is an odd conclusion given that Kirby ACJ accepted that the DPP's argument was 'arguable'.

The point that emerges from this analysis is that on Kirby ACJ's approach, *DPP v Logan Park* was a case where, if so minded, he could have resolved the point of interpretation in the way suggested by the DPP. He chose not to, by having regard to the vague language of Article 17 of the *Universal Declaration*. Moreover, there was no examination of how international human rights courts (such as the European Court of Justice) had approached the issue of the weight to be attached to property rights in the context of forfeiture provisions of the kind in issue in *DPP v Logan Park*. Nor was there any consideration of countervailing rights. In countless sentencing decisions, Australian courts have stressed the grave danger presented to the Australian community by the importation of heroin. It is arguable that Kirby ACJ should have weighed this consideration against the point that he was able to draw from Article 17.

The analysis just made suggests a number of points.

First, it shows how a rights approach by reference to documents such as the *Universal Declaration* can prevail over an approach that would have regard to documents, such as an Explanatory Memorandum, that are more explicit guides to what the legislature meant when it enacted a provision of an Act.

Secondly, it shows how a particular rights analysis is often an incomplete approach even in terms of what such an approach would suggest. No doubt the judges and counsel limit their analysis simply by reason of lack of time and resources to take it further. This does not, however, make up for the deficiency in analysis. There will also no doubt be cases where counsel or the court chooses to limit the analysis in order to produce the result desired.

Thirdly, it suggests that the wording of Example 7 presents an incomplete analysis of how just how rights arguments might have applied in the example. This is a point that is not addressed in the amendment proposed by the Chief Minister to the wording of Example 7.

Conclusion

The Committee draws attention to these aspects of proposed new section 142, and in particular to what is suggested by Example 7, because it perceives that this provision may bring about a distinct change in the way the courts of the ACT will interpret legislation. (That this might be so is apparent from the face of section 142, and gains greater likelihood if section 142 is compared to existing section 11B of the *Interpretation Act 1967*.)

The change in prospect is that the courts will, as a matter of course, make reference to documents such as the *Universal Declaration* and the ICCPR when they work out the meaning of an Act. In this respect, it should be noted that under the proposals of the Bill, the concept of "working out the meaning of an Act" is very broad, and is not confined to situations where the language of the law is ambiguous or obscure. Thus, proposed new section 139 would provide:

> ***working out the meaning of an Act*** means—
>
> (a) resolving an ambiguous or obscure provision of the Act; or
> (b) confirming or displacing the apparent meaning of the Act; or
> (c) finding the meaning of the Act when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
> (d) finding the meaning of the Act in any other case.

And of course the courts will expect barristers to make reference to this material. Others who at earlier stages of dispute address an issue of statutory interpretation will need make the same explorations. In all this, there are issues of access to the law, and the proper role of the courts.

Copy of the response is attached.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

Bill Stefaniak MLA
Chair

7 May 2002

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR HEALTH MINISTER FOR COMMUNITY AFFAIRS MINISTER FOR WOMEN
MEMBER FOR GINNINDERRA

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Chair
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Dear Mr Stefaniak

I refer to the Committee's comments on the Legislation Amendment Bill 2002 in Scrutiny Report No 4 of 2002.

Proposed section 47 (7) (clause 10)

Clause 10 remakes *Legislation Act 2001*, section 47. The main reason for remaking the section is to incorporate the changes necessary to accommodate the introduction of the concept of determinative provisions.

The Committee will recall that existing section 47 was significantly influenced by the Committee's comments on the Legislation (Access and Operation) Bill 2000, clause 39. (This clause became section 47 of the present Act.)

In referring to clause 39, the Committee, in Report No 15 of 2000, said:

> It raises the question whether clause 39 should be accompanied by a scheme that would ensure that a reader of the relevant statutory instrument was provided with a means of access to the other law, or to the other instrument. . . . One possible means would be to require that the text of the other law, or of the other instrument, . . . be available on the ACT legislation register.

The then Attorney-General accepted this option and in his reply to the Committee (see Scrutiny Report No 2 of 2001) said:

> Although the approach is novel, I am attracted to the first option suggested by the Committee. Accordingly, I propose moving an amendment to the Bill to require the text of applied laws and instruments to be notified on the ACT legislation register. Applied laws and instruments that are not notified will not be enforceable.

> Clearly exceptions will need to be provided. . . .
>
> At this stage, it is not possible to comprehensively identify all the exceptions that need to be provided. They will need to be developed and refined over time. Accordingly, the amendment that I propose moving will except ACT laws and allow laws and instruments to establish other exceptions on a case-by-case basis. The Committee will be able to scrutinise these exceptions as they are proposed and ensure that they are justified.

As section 47 had only recently been subject to debate in the Legislative Assembly, the explanatory memorandum did not recanvass these issues.

Proposed section 47(7) is part of the scheme for the notification of adopted instruments on the legislation register devised in response to the Committee's earlier comments. The scheme clearly contemplated that some instruments would need to be exempted from notification by delegated legislation. It represents a careful balance between, on the one hand, the need to provide access to the text of an adopted law or instrument and, on the other, the need to administer a legislative scheme in a workable way.

The proposed section does not diminish the Legislative Assembly's existing control over delegated legislation nor the Assembly's existing ability to ensure access to the law. Indeed, in one respect the proposed section enhances the Assembly's ability to ensure access to the law. Under the existing section, the provisions that require adopted laws or instruments to be notified on the legislation register may be displaced or changed by an instrument not subject to Assembly scrutiny. Under the proposed section this can only be done by an instrument that is subject to disallowance and amendment by the Assembly.

Proposed section 47 (8) (clause 10)

Any mechanism to apply laws or instruments made in one context to another must necessarily include the power to make changes or modifications to the law or instrument (compare, for example, the *Acts Interpretation Act 1901* (Cwlth), s 49A). Proposed section 47 (8) does not represent a departure from existing section 47. Existing section 47 (2) and (3) each expressly recognise that a law or instrument may be applied '(with or without change)'. These have been generalised in section 47 (8) so that the power to apply a law or instrument carries with it the power to make changes. By expressing the power in this way, the text of proposed section 47 (5) and (6) has been simplified. Like section 47 (7), section 47 (8) is part of the necessary machinery to enable laws and instruments to be applied in a way that provides the maximum access and workability.

Use of extrinsic materials

The committee raised concerns about the use of extrinsic materials in interpreting the legislation. However, the use of extrinsic materials is now a long-established reality in Australia. Since the 1980s, legislation in all jurisdictions except South Australia have permitted recourse to extrinsic

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materials. As well as this, the common law itself now recognises the use of extrinsic materials. In permitting the use of extrinsic materials, proposed section 142 reflects the current position both under the *Interpretation Act 1967*, section 11B and the common law. The examples in proposed section 142 have mostly been drawn from actual cases and illustrate the wide range of extrinsic materials that have been considered by the courts. There do not appear to be any difficulties with the operation of the existing law that would justify attempting to restrict the use of extrinsic materials by the courts.

Example 7 to proposed section 142

Example 7 sets out a hypothetical case where a court resorts to an international treaty to assist in resolving an ambiguity in a statute. The example mirrors the facts in *DPP v Logan Park Investments Pty Ltd and Anor* (1995) 132 ALR 449 and reflects (in relevant respects) the legal reasoning of Kirby ACJ (as he then was).

The common law already permits recourse to human rights treaties in certain cases. It should be stressed, first, that proposed section 142 does not *require*, but merely permits, 'relevant' material to be considered in working out the meaning of a statute. It remains for the courts to decide when extrinsic material may be considered. Second, it is now well-established that human rights treaties may be used, in appropriate cases, in interpreting statutes. D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) par 3.8 summarise the present position as follows:

> Increasingly, the courts are also taking international agreements into consideration in the process of interpreting legislation with which those agreements have no explicit connection. It is clear that international agreements such as the International Covenant on Civil and Political Rights, which was signed by Australia in 1972 but is not part of Australian domestic law, may be taken into account to resolve ambiguities in domestic legislation. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97 at 123, citing English authority, Brennan, Deane and Dawson JJ said:
>
> > We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.
>
> They added that the provisions in questions were not ambiguous. However, the concept of ambiguity is not to be applied in any narrow sense. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 362 Mason CJ and Deane J endorsed the comment of Brennan, Deane and Dawson JJ quoted above and added:
>
> > If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.

It should also be mentioned that the cases cited by Pearce and Geddes in the passage above predated the High Court's decisions in *CIC Insurance and Newcastle City Council* and the exhortation to interpreters in *CIC* to consider context 'in its widest sense' (see the explanatory memorandum, par 88).

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Although the common law already permits recourse to human rights treaties, the Government believes that the example provides a valuable signpost, indicating that the Legislative Assembly recognises that human rights instruments are among the materials that the courts may use to interpret ACT legislation. The Government's view, is in this respect at least, consistent with the conclusion reached by the NSW Legislative Council Standing Committee on Law and Justice, in its report *A NSW Bill of Rights* (Report No 17 (2001), ch 9, esp par 9.17 and recommendation 2). That Committee recommended that the *Interpretation Act 1987* (NSW) be amended to confirm the common law position that judges are able to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute.

Having said that, the Government accepts that some minor clarification of example 7 may be helpful. In that example the language of the hypothetical Act gave some support to the conclusion reached by the court. However, the last sentence of the example could suggest that it is *only* the human rights treaty that was crucial. For this reason the Government would be prepared to move an amendment to replace the last sentence of the example with the following:

> Because of the drastic consequences of the application of the Act and its impact on property rights, it may be appropriate for the court hearing the section 50 application to have regard to the property rights recognised by the declaration. This, together with other factors such as the language of the Act, may assist the court to conclude that the Act allows successive rights of relief against forfeiture.

Need to increase awareness about the Legislation Act

The Parliamentary Counsel's Office is keenly aware of the need to increase awareness of the Legislation Act and has been publicising its provisions in a number of ways, including education programs. In the last year or so a number of Acts have extensively amended most of the laws in force in the ACT to facilitate the operation of the Legislation Act. Where new provisions have been inserted, or old provisions replaced, a note has usually been inserted as part of the amendment drawing attention to relevant provisions of the Legislation Act. This process will continue in future Statute Law Amendment Bills and, where appropriate, other Bills. The question of increasing awareness of the Legislation Act is one that the Parliamentary Counsel's Office is keeping under review. The Office would be very interested to hear any ideas that the Committee might like to suggest.

Proposed section 191 (1) (clause 22)

Proposed section 191 replaces a long-standing provision in the *Interpretation Act 1967*, section 33F. Section 33F has its equivalent in all other Australian jurisdictions and the United Kingdom (see eg *Crimes Act 1914* (Cwlth) s 4C, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 20, *Interpretation of Legislation Act 1984* (Vic), s 51, *Acts Interpretation Act 1954* (Qld), s 45 *and Interpretation Act 1978* (UK), s 18). The provision can be traced back at least as far as the *Interpretation Act 1889* (UK), section 33. Despite a range of views in the courts about the purpose of the provision and its relation to the common law rules of *autrefois convict*, (see Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) par 6.44), it does not seem that the construction put forward by the Committee has ever previously been suggested. For example, the earlier UK

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equivalent was considered in a case where a person convicted of feloniously wounding his wife with intent to murder was later convicted of murder following her death (*R v Thomas* [1950] 1 KB 26).

The Government will nevertheless review the wording of the provision in the context of its consideration of the Model Criminal Code, chapter 2.

Proposed section 192 (3) (clause 22)

Proposed section 192 (3) replaces *Interpretation Act 1967*, section 33G (3). Section 33G was inserted into the Interpretation Act only recently by the *Crimes Legislation Amendment Act 2001*. Section 33G in turn replaced the *Magistrates Court Act 1930*, section 31 (1A). That subsection was inserted into the Magistrates Court Act by the *Magistrates Court Amendment Act (No 2) 1999*. The three subsections are identical in all relevant respects.

The Committee will recall that *Magistrates Court Act 1930*, section 31 (1A) was subject to comments by the Committee in Scrutiny Report No 9 of 1999. The then Government rejected the need to amend the subsection (see Scrutiny Report No 12 of 1999).

In the context of the subsection, it is difficult to see how section 192 (3) could be given the construction apparently suggested by the Committee. It would almost always be the case that an inquest or inquiry mentioned in the subsection would be an inquiry into a matter that discloses an offence rather than an inquiry into the circumstances of an already established offence. It should also be pointed out that the subsection refers to an inquest or inquiry being held *into a matter* that relates to an offence (emphasis added) and not an inquest or inquiry being held into an offence. However, to put the matter beyond doubt the Government is prepared to move an amendment to replace the words it proposed to omit 'relates to' with the words 'discloses or is otherwise found to relate to'.

I trust that these comments are of assistance to the Committee.

Yours sincerely

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