



**DISCUSSION PAPER 112
STATUTORY REVISION:
REVIEW OF THE INTERPRETATION ACT
33 OF 1957
(Project 25)**

SEPTEMBER 2006

**CLOSING DATE FOR COMMENTS:
31 December 2006**

ISBN: 0-621-36904-7

(ii)

Introduction

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

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The Commission wishes to express its appreciation to the following persons and agencies for their involvement in this investigation –

- Professor Cora Hoexter of the School of Law of the University of the Witwatersrand who served as the project leader of this investigation until December 2004;
- the Deutsche Technische Zusammenarbeit (German Agency for Technical Co-operation ("GTZ")) for its technical and financial assistance in this investigation, and particularly its representatives Claudia Lange and Dr Lothar Jahn;
- Mr Gerrit Grove, a legal consultant of Pretoria who was commissioned by the GTZ for the drafting of the Bill; and
- Prof Christo Botha, Head of the Department of Public Law at the University of Pretoria, who was commissioned by the GTZ to assist in the investigation.

Preface

This Paper has been prepared to elicit responses and to serve as basis for the Commission's further deliberations. It contains the Commission's **preliminary** recommendations. The views, conclusions and recommendations which follow should not be regarded as the Commission's final views.

The Paper (which includes draft legislation) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the Commission. **A summary of preliminary recommendations and questions for comment appear on pages (vii) – (xvi). The proposed draft legislation is contained in Annexure A on pages 467 – 498 of this Paper.**

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comment and representations to the Commission by 31 December 2006 at the address appearing on the previous page. Comment can be sent by post or fax, but comments sent by e-mail in electronic format are preferable.

This Discussion Paper is available on the Internet at www.doj.gov.za/salrc/index.htm.

Any enquires should be addressed to the Secretary of the Commission or the researcher allocated to the project, Mr Pierre van Wyk. Contact particulars appear on the previous page.

PRELIMINARY RECOMMENDATIONS AND QUESTIONS FOR COMMENT

1. The Commission has been mandated with the task of revising the South African statute book for constitutionality, redundancy and obsolescence. One of the Acts to be revised is the Interpretation Act 33 of 1957. The Interpretation Act which was drafted during an era of parliamentary sovereignty, is in line neither with the current constitutional dispensation nor with the principles and practices of drafting and interpretation which the legislature and the courts have adopted since 1994 (par 1.1 and 1.2).

2. In other jurisdictions a review of the relevant interpretation statute has been combined with the drawing of a drafting manual to set down uniform standards for drafting of new legislation. The drawing of a drafting manual to set down uniform standards for drafting of new legislation is beyond the ambit of our brief and would be a very time-consuming exercise. Furthermore, there is a South African drafting manual, compiled by the office of the Chief State Law Advisor. It is considered that the problem is not so much the lack of a uniform drafting manual, but rather the availability of the manual to drafters at all levels of government (par 1. 21 and 1.28).

3. It is proposed that the new interpretation Act be named the "Interpretation of Legislation Act". The term "legislation" is preferred over "statutes" to avoid confusion. The Act will govern principles relating to all types and categories of legislation. It is also proposed that a general long title be included in line with present drafting practice (par 2.3 and 2.4).

4. It is proposed that a preamble be included in the Bill (par 2.8).

5. Two lists of definitions are included in the Bill, namely one which defines in Chapter 1 of the Bill terms or words used in the Bill and the second in Chapter 4 of the Bill which defines words or expressions which occurs in any legislation (par 2.14).

6. Section 2 of the Interpretation Act provides that "[t]he following words and expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby assigned to them respectively . . .". It is proposed that the introductory wording to the definition provision should be as follows, namely "in this Act, unless inconsistent with the context or clearly inappropriate . . . means . . ." (par 2.15 and 2.17)

7. The following definitions are included in the Bill: assigned legislation, duty, extrinsic information, function, intrinsic information, legislation, national legislation,

old order legislation, organ of state, original legislation, power, previous Constitution, provincial legislation, provision, subordinate legislation (par 2.17.1 – 2.17.17).

8. The purpose provision of the Bill makes it clear that its purpose is to align the interpretation of legislation with constitutional supremacy as envisioned by the Constitution, to facilitate the interpretation and understanding of legislation, and to promote uniformity in the use of language in legislation (par 2.25).

9. The proposed Interpretation of Legislation Bill should apply to the interpretation of all legislation, ie to existing legislation as well as legislation to be enacted in future. If a provision of the proposed Bill is inconsistent with any specific legislation, that provision must, to the extent of the inconsistency, be disregarded in the interpretation of that legislation. If a provision of the Bill is excluded from applying to any specific legislation, that provision must, to the extent of its exclusion, be disregarded in the interpretation of that legislation. There are also a substantial number of statutes that refer to the present Interpretation Act. Consequential amendments need to be effected to existing statutes that refer to the Interpretation Act. These amendments are reflected in the Schedule to the Bill (on page 493 in Annexure A of this paper). Existing legislation needs to be scrutinized to ensure a proper application of the proposed Interpretation of Legislation Bill. In some instances it will be obvious that the proposed provisions of the Bill need to apply to existing provisions, such as those provisions which refer to the tabling, approval and the effect of disapproval of regulations as provided for by the present Interpretation Act. The corresponding new provisions of the Interpretation of Legislation Bill on the transfer of legislation, powers and functions by the President to other Cabinet members clearly also need to apply to existing legislation and consequential amendments need to be effected to those statutes. In other instances the question will arise whether the new provisions should apply with qualifications since there is existing legislation which provides that *person* has the meaning assigned to it by the Interpretation Act (par 2.34 – 2.35 and also 3.262 – 3.263).

10. How does the Bill deal with the supremacy of the Constitution? When interpreting legislation the supremacy of the Constitution is paramount, the spirit, purport and objects of the Bill of Rights in Chapter 2 of the Constitution must be promoted, and any reasonable interpretation that is consistent with the Constitution must be preferred over any alternative interpretation that is inconsistent with the Constitution (par 2.49).

11. When interpreting legislation the meaning of a provision in that legislation

must be determined by its language and its context in the legislation read as a whole. Any reasonable interpretation of a provision that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation of that provision that is inconsistent with the purpose and scope of that legislation. The constituent parts of a provision to be taken into account in determining the meaning of legislation are – the short or long title of the legislation, the enacting statement, the preamble, the table of contents, any of the segments into which the text of the legislation is divided, a segment heading, a schedule or annexure to the legislation, or any distinct part of or phrase contained in any of the constituent parts, but not any marginal note, foot note, end note, information statement, memorandum or any explanatory or other information published in or together with the text of legislation. A provision in assigned or subordinate legislation must be interpreted also in the context of its enabling legislation (par 2.69).

12. How should legislation be interpreted in the light of changing circumstances? The Bill provides that enactments apply to circumstances as they arise in accordance with the contemporary meaning of its language as this will enable the courts to take account of changing circumstances in interpreting the law. However, this should only apply as far as the purpose and scope of the legislation permits (par 2.81).

13. In the event of any inconsistency in the same legislation between a long title, enacting statement, preamble, table of contents, segment heading, schedule or annexure in any legislation and any other provision of that legislation, that other provision prevails (par 2.88).

14. Extrinsic information is defined in the Bill as meaning any reports, submissions, comments or any other information which sheds light on the background to, or the purpose or scope of, legislation. Extrinsic information may be taken into account when interpreting legislation but only as an opinion on the information it conveys and for the purpose of establishing the background to, or the purpose or scope of, the legislation or any of its provisions, if such background, purpose or scope cannot be established from the text of the legislation or provision, to resolve any ambiguity or obscurity in the legislation or provision, if the ambiguity or obscurity cannot be resolved from the text of the legislation or provision, or to confirm the meaning of the legislation or provision (par 2.198).

15. Existing common-law presumptions and maxims should not be codified, because a codification could lead to more unnecessary rigidity in statutory interpretation. The courts and other interpreters may still rely on these common-law

maxims and presumptions, insofar as they are not in conflict with the values of the Constitution (par 2.207).

16. A general provision explaining the commencement or coming into force of legislation is needed. The Bill defines the meaning of *commencement provision*. The Bill also sets out the position where commencement of legislation is subject to commencement provisions, where commencement of legislation is not subject to commencement provisions and where different commencement dates are set for different provisions (par 3.17).

17. How does legislation apply before its commencement? A power or duty contained in any legislation that has been published may be exercised or carried out before the commencement of that legislation but only insofar as the exercise of the power or the carrying out of the duty is necessary to bring that legislation into effect. In addition, nothing done should take effect before the commencement of the legislation in terms of which it was done (par 3.26).

18. The Bill deals with publication of legislation as a precondition for its enforcement, publication of legislation in the Gazette, and alternative manner of publication (par 3.35).

19. Parliamentary scrutiny of subordinate legislation is a collateral issue to this investigation. In July 2006 the Department of Justice and Constitutional Development requested that this issue in particular be considered as part of this investigation. Parliamentary scrutiny of subordinate legislation is not presently regulated by the rules of Parliament. Interim measures will probably be implemented in the foreseeable future by Parliament to regulate this. A provision has therefore been drafted to make provisions for the submission of subordinate legislation to Parliament and provincial legislatures based on the present position. The Commission invites comment on parliamentary scrutiny of subordinate legislation and submission of subordinate legislation to Parliament (par 3.117).

20. The Commission also invites comment in particular on whether respondents have views on the way in which different versions of Bills as they pass through the parliamentary stages are numbered in South Africa (par 3.143).

21. *Amendment* and *repeal* are defined in the Bill. The Bill also sets out the circumstances when legislation is regarded as having been repealed, the effect of repeal and replacement of legislation, the effect of repeal of enabling legislation on assigned or subordinate legislation, the effect of repeal or amendment of legislation

on references in other legislation and that amendment becomes part of the legislation that is amended (par 3.163).

22. The Department for Justice and Constitutional Development requested the Commission to consider the issue of sunseting of subordinate legislation as part of this investigation. The question arises how sunseting of subordinate legislation should be regulated and whether a separate statute should be adopted for this purpose, as was done in the Australian States and also by the Commonwealth Parliament. The latter adopted the Legislative Instruments Act in 2003. The Commission invites respondents to comment on the issue of sunseting of subordinate legislation in particular (par 3.186).

23. Comment is invited in particular on the question whether there is a need to include a provision in the Bill dealing with the issue of prospective or retrospective application of legislation (par 3.191).

24. A distinction should be made between old order legislation and legislation enacted after 28 April 1994. Old order legislation should not bind the state except to the extent that the legislation expressly or by implication indicates that the state is bound. Legislation enacted after 28 April 1994 should bind the state except to the extent that it cannot be applied to the state or its application to the state is clearly inappropriate, its application to the state may impede the state in the exercise of its statutory functions, or the legislation expressly or by implication indicates that the state is not bound. Assigned or subordinate legislation should not bind the state unless the enabling legislation in terms of which that assigned or subordinate legislation was enacted binds the state or indicates that that assigned or subordinate legislation binds the state. State is defined to include organs of state and persons in the service of organs of state acting in their official capacity (par 3.260 and 3.264). The Australian Law Reform Commission considered that much of the confusion in their existing law stems from the principle that the executive may be bound by an Act by implication in the absence of express words to that effect. They considered that any exceptions to their proposed new rule that the executive be bound by statute should be provided for expressly and not by implication. The Commission invites comment in particular on its proposed provision in view of the comments made in Australia on this issue (par 3.261).

25. Section 10(1) of the Interpretation Act provides that when a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Section 10(1) is vague and should be clarified. Undoubtedly the bodies and functionaries in whom these powers and duties are vested should know when and in what circumstances these powers may be exercised and these duties must be performed. The provisions governing the exercise of statutory powers and duties should be included in the Interpretation Act. This would be pragmatically the sensible option although the preferable option would be to deal with this issue in the Promotion of Administrative Justice Act and the Interpretation Act. It is considered that gaps might be created if the current Interpretation Act were to be repealed in the expectation that the PAJA will be amended (par 4.82 – 4.83).

26. A provision is included in the Bill which would change the common law position in regard to repeal (revocation) or amendment of a decision. (This provision has, however, been questioned.) In terms of the proposed provision, where legislation confers a power or imposes a duty, that legislation must be read as implying that any decision taken in the exercise of the power or the performance of the duty may be reconsidered and either be confirmed, altered or repealed by the person on whom the power is conferred or the duty is imposed or either by that person or the person who took the decision, if the decision was taken by another person in terms of a power or duty delegated to that other person. It is proposed further that a decision may be altered or repealed with effect from a date determined by the person altering or repealing the decision, which may be a date before, on or after the decision to alter or repeal was taken. If the person to whom a decision relates has been notified, the decision may not be altered or repealed if the alteration or repeal will detract from any rights that have accrued or any legitimate expectations that have arisen as a result of the decision, but this should not apply if the affected person agrees in writing to the alteration or repeal of the decision, the decision was procured by fraudulent, dishonest or any other illegal means or the decision is for other reason invalid. Finally, the following decisions may not be altered or repealed, namely a decision which is the subject of internal or administrative appeal proceedings, alternative dispute resolution proceedings, or judicial proceedings, or a decision taken to decide an internal or administrative appeal (par 4.97 and 4.98). Comment received on this provision suggests that it would be very problematic to enact a provision which would confer a general power (albeit subject to the limitations set out in the draft provision) on administrative bodies or functionaries to revoke or amend their decisions. Such a provision would arguably be contrary to the principles of finality and certainty, which are important elements of the rule of law doctrine and the principle of legality. A general power to revoke or amend administrative decisions

would not only give rise to uncertainty about the reliability and longevity of such decisions but might even be unconstitutional on account of inconsistency with the rule of law doctrine and the principle of legality. Consequently, according to this view, the point of departure and general principle should be that, subject to the specific exceptions listed, administrative decisions are irrevocable and cannot be varied unless the relevant enabling legislation permits revocation or variation (par 4.100).

27. Notification of anything done or to be done in terms of legislation may be given in the Gazette (par 5.7).

28. There is a need for a provision dealing with the interpretation of words as peremptory or directory. If legislation states that a person may do, or is entitled to do, or has or shall have the power, authority or right to do a particular thing, that legislation must be read as implying that that person has the freedom of choice whether or when or how to do that thing. If legislation states that a person must or shall do, or has or shall have the duty, obligation or responsibility to do a particular thing, that legislation must be read as implying that that person has no freedom of choice whether to do that thing and that that thing must be done (par 5.23).

29. A power conferred in terms of legislation to perform an act must be read as implying to confer all powers that are necessary for the performance of that act or incidental to the performance that act (par 5.27).

30. The Bill deals with amendment or repeal of subordinate legislation. Legislation which provides for subordinate legislation to be issued must be read as including a power to amend or repeal that subordinate legislation. If the issuing of subordinate legislation is subject to compliance with specific conditions, that subordinate legislation may only be amended or repealed subject to the same conditions. Subordinate legislation may be amended or repealed with effect from a date before, on which or after the decision to amend or repeal the legislation was taken (par 5.29).

31. The Bill deals with exercise of powers and functions by the person on whom the power is conferred or the duty is imposed, or if the power is conferred or the duty is imposed on the holder of a specific office by the holder of that office or by a person acting in the capacity of the holder of that office or by the person to whom the power or duty is delegated (par 5.37).

32. Legislation which confers the power to appoint a person to an office must be read as including the power to determine the duration and the terms and conditions

of the appointment to suspend or remove a person from office in the event of misconduct, incapacity or incompetence to re-appoint a person previously appointed and to appoint a person in an acting capacity if there is a vacancy or the holder of the office is absent or not available for the performance of the duties of office. These powers may be exercised also in relation to a person appointed in an acting capacity (par 2.52).

33. Legislation which confers a power to issue subordinate legislation must be read as including the power to limit the application of such subordinate legislation to a particular category of persons, a particular matter or category of matters, or a particular area or category of areas, or to differentiate between different categories of persons, different matters or categories of matters or different areas or different categories of areas. This provision does not permit unfair discrimination (par 5.55).

34. Section 10(6) of the Interpretation Act deals with the delegation of functions, power or duties imposed or entrusted to any Minister of State or other authority. This provision serves a useful purpose and needs to be retained in the Bill. This provision may not, in fact, have a better home under the Promotion of Administrative Justice Act as was suggested. More detailed provisions should be included in the Bill setting out what delegation entails (par 5.75).

35. Section 10(5) of the Interpretation Act relates to the assignment of powers. The Commission would rather err on the side of caution and retain a section similar to section 10(5) of the Interpretation Act dealing with the transfer of legislation, powers and functions by President to other Cabinet members (par 5.84).

36. The following general definitions for words and expressions often used in legislation are included in the Bill: Act of Parliament, affidavit, affirmation, aircraft, Auditor General, Cabinet, calendar month, calendar year, Constitution, commence, constitutional institution, consult, continental shelf, delegation, Deputy President, district, document, enact, exclusive economic zone, Executive Council, Gazette, individual, juristic person, MEC, Minister, month, municipal by-law, municipality, name, oath, ordinary post, Parliament, person, Premier, premises, President, Prince Edward Islands, province, provincial Act, public holiday, record, state, territorial waters, the Republic, vehicle, vessel, working day, week, word, and writing (par 6.15).

37. The Bill makes it clear that when one of the words and expressions (mentioned in the previous paragraph) occurs in legislation, that word or expression has the meaning as defined except in legislation where – (a) that word or expression

is defined differently; (b) the context in which that word or expression occurs indicates another meaning; or (c) the definition is clearly inappropriate (par 6.14).

38. There is no need for the inclusion in the Bill of a section containing the old-order definitions which apply to legislation passed before the commencement of the new Act. This aspect is sufficiently dealt with in the Constitution in Schedule 6, Item 3 (par 6.16.3).

39. The inclusion of a provision dealing with derivatives and other grammatical forms of defined words and expressions would mean that it would no longer be necessary to state in a definition of a word that a word or expression which is a derivative or other grammatical form of a word or expression defined in legislation, has a corresponding meaning (par 6.24).

40. A provision is included in the Bill setting out that a reference to a person includes a reference to an organ of state (par 6.25).

41. In any legislation a word denoting the masculine, feminine or neuter gender includes the other genders (par 6.40).

42. In any legislation a word denoting the singular includes the plural and a word denoting the plural includes the singular (par 6.44).

43. There is a need to deal with the meaning of a word or expression used in assigned or subordinate legislation which is defined in the legislation enabling such assigned or subordinate legislation (par 6.45).

44. Provisions dealing with reckoning of time are included in the Bill. Excluded days and period are defined in the Bill. The Bill deals with when the period starts and ends for the reckoning of time, periods expressed in calendar months or years, and the meaning of what a reasonable time is when something may or must be done (par 7.43).

45. The Interpretation Act deals presently with the measurement of distance. The Bill provides for the measurement of distances, in addition to the method of in a straight line on a horizontal plane, by means of beacons on a map, diagram or plan or any other acceptable method of measuring distances in a straight line on a horizontal plane (par 7.52).

46. There is a need to deal in the Bill with the use of official forms (par 8.13).

47. The Interpretation Act deals with the service of documents by post. Provisions dealing with methods of serving, delivering, sending or submitting documents,

methods of posting documents and serving of documents by post are included in the Bill (par 8.32.).

48. In the interim Constitution the terms “after consultation with” and “in consultation with” were critical for implementing the system of government of national unity. Sections 233 (3) and (4) were accordingly inserted in the interim Constitution to ensure a correct interpretation of these terms. Similar provisions are included in the Bill to apply in relation to legislation generally (par 8.35).

49. There is a need for a clause dealing with the exercise of powers, duties or functions by persons other than natural persons (par 8.37).

50. Many statutes refer to decisions of bodies consisting of members. There are instances where it is not specified in a statute what number of members constitute a quorum or majority for purposes of a meeting or for taking decisions. Provisions are included in the Bill dealing with decisions of bodies consisting of members, quorums for meetings, and distant participation by members. Comment is requested in particular on the proposed wording requiring that decisions must be taken at a meeting of the body (par 8.67).

51. It is not necessary to include in the Bill provisions on the basic powers, capacities and restrictions affecting corporations (par 8.70).

52. The Criminal Procedure Act 51 of 1977 deals comprehensively with issues such as charges to be met by accused persons and sentencing. It would therefore seem unnecessary to include provisions dealing with offences and penalties in the revised Interpretation Act (par 8.73).

53. There are many other standard provisions which are contained in Acts in the South African statute book. Proposals as to other standard provisions which might be suitable for insertion in the Bill are welcomed (par 8.74).

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BIBLIOGRAPHY

Arden Mary Dame "Improving the Statute Book: A Law Reformer's Viewpoint" 1997 *Statute Law Review* 169 – 176

Australian Attorney-General's Department and the Office of Parliamentary Counsel *Discussion Paper on the Review of the Commonwealth Acts Interpretation Act 1901* 1998 (available at <http://www.ema.gov.au/aqd/Department/Publications/welcome.htm> accessed on 7 September 2006)

Australian Law Reform Commission *Report 92: The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* 2001 available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/92> (accessed on 8 September 2006)

Baxter Lawrence *Administrative Law* Juta: Cape Town 1984

Bennion FAR "Threading the Legislative Maze – 5" available at <http://www.francisbennion.com/pdfs/fb/1998/1998-011-threading-5.pdf> (accessed on 5 September 2006)

Bennion FAR *Statutory Interpretation* 4th edition Butterworths: London 2002

Boros Elizabeth *Virtual Shareholder Meetings* 2004 *Duke Law and Technology Review* 8 available at <http://www.law.duke.edu/journals/dltr/articles/2004dltr0008.html> (accessed on 12 September 2006).

Boros Elizabeth "[Virtual Shareholder Meetings: Who Decides How Companies Make Decisions?](#)" 2004 *Melbourne University Law Review* 9 available at <http://www.austlii.edu.au/au/journals/MULR/2004/9.html> (accessed on 12 September 2006).

Corder Hugh *Final Report on Methods for Scrutiny of Legislation by Parliament* 1999 available at <http://www.pmg.org.za/docs/1999/minutes/991027scrutiny.htm> (accessed on 4 September 2006)

Crabbe VCRAC *Legislative Drafting* Cavendish: London 1993

Currie I & J De Waal *The Bill of Rights Handbook* 5th edition Juta: Cape Town 2004

Devenish GE *Interpretation of Statutes* Juta: Cape Town 1992

Devenish GE "*African Christian Democratic Party V Electoral Commission: The New Methodology and Theory of Statutory Interpretation in South Africa*" 2006 *South African Law Journal* Vol 123 Issue 3 399 – 408

De Ville JR *Constitutional and Statutory Interpretation* Interdoc Consultants 2000

De Ville JR *Judicial Review of Administrative Action in South Africa* LexisNexis Butterworths: Durban 2003

Downes Garry AM Justice "Finality of Administrative Decisions: The Ramifications of *Minister for Immigration and Multicultural Affairs and Bhardwaj*" (2002) 209 CLR 597

Du Plessis LM "Interpretation of Statutes and the Constitution" Bill of Rights Compendium in *Constitutional Law Direct*

Du Plessis LM "Statute law and Interpretation" in *The Law of South Africa* first reissue vol 25 Butterworths: Durban 1998

Du Plessis LM *Re-Interpretation of Statutes* Butterworths: Durban 2002

English Law Commission *Post-legislative Scrutiny Consultation Paper* January 2006 available at <http://www.lawcom.gov.uk/docs/cp178.pdf> (accessed on 10 August 2006)

English and Scottish Law Commission "The Interpretation of Statutes", (Law Com No 21) (Scot Law Com No 11) 1969 Reports English Law Commission Report No 21; Scottish Law Commission Report No 11 available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/other/EWLC/1969/21.html&query=irish+law+commission+report+plain+language&method=all> (accessed on 8 September 2006)

Enright C "Introduction to Administrative Law" available at <http://www.gtcentre.unsw.edu.au/introduction-to-administrative-law.asp> (accessed on 24 June 2004)

Foulkes David *Administrative Law* 8th ed Butterworths: London 1995

Hahlo & Kahn *The South African legal system and its background* Juta: Cape Town 1973

Hoexter Cora with Rosemary Lyster *The New Constitutional and Administrative Law* Vol II Administrative Law Juta: Kenwyn 2002

Hong Kong Law Reform Commission *Report on Extrinsic Material as an Aid to Statutory Interpretation* 1997 available at <http://www.hkreform.gov.hk/en/docs/rstatutory-e.doc> (accessed on 7 September 2006)

Interim Report of the Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation published for information in pursuance of a decision of the Joint Rules Committee of the Parliament of South Africa on 29 October 2002 available at <http://www.pmg.org.za/viewminute.php?id=5874> (accessed on 3

September 2006)

Irish Law Reform Commission *Consultation Paper on Statutory Drafting and Interpretation* Dublin 1999

Irish Law Reform Commission *Statutory Drafting and Interpretation, Report on Plain Language and the Law* (LRC 61-2000) 2000 available at http://www.lawreform.ie/publications/data/lrc110/lrc_110.html (accessed on 7 September 2006)

Kaye Philip *When Do Ontario Acts and Regulations Come Into Force?* Research Paper B31 available at <http://www.ontla.on.ca/library/billsresources/b31.htm> (accessed on 9 January 2006)

Keeshan M David & Steeves Valerie *The 1996 Annotated Federal and Ontario Interpretation Acts* Carswell: Scarborough Ontario 1996

Kellaway EA *Principles of Legal Interpretation* Butterworths: Durban 1995

Michigan Law Revision Commission "A report on the use of technology to conduct government meetings and recommendation to the Legislature" in *Michigan Law Revision Commission 38th Annual Report 2003* 9 – 19 available at http://council.legislature.mi.gov/files/mlrc/2003/2003_MLRC_Annual_Report.pdf (accessed on 12 September 2006).

Murphy Gavin "Extended Parliamentary Power over Regulations in Canada" 2005 *Statute Law Review* Vol 26 161 – 170

New Zealand Law Reform Commission Report 17 *A New Interpretation Act: To avoid Prolixity and Tautology* (NZLC R17) 1990.

New Zealand Law Commission Study Paper 6: *To Bind Their Kings in Chains – An Advisory Report to the Ministry of Justice* December 2000 (the *Kings Report*) available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_109_278_SP6.pdf (accessed on 10 October 2005)

New Zealand Legislative Advisory Committee *Guidelines on Process & Content of Legislation 2001 edition* available at http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html (accessed on 23 January 2006).

New Zealand Ministry of Justice Report June 2001 in response to the requirement under section 28(1) of the Interpretation Act (Ministry of Justice Report) available at <http://www.justice.govt.nz/pubs/reports/2001/interpretation/report.pdf> (accessed on 10 October 2005)

New Zealand Parliamentary Counsel Office *Public Access to Legislation (PAL) Project* available at <http://www.pco.parliament.govt.nz/pal/> (accessed on 15 September 2006)

Odgers' Australian Senate Practice Eleventh Edition Chapter 15 - Delegated legislation and disallowance: executive law-making available at <http://www.aph.gov.au/senate/pubs/odgers/chap1502.htm> (accessed on 11 August 2006)

O'Regan Catherine "Rules for Rulemaking: Administrative Law and Subordinate Legislation" *Acta Juridica* 1993 157

Orr Robert and Robyn Briese "Don't Think Twice – Can Administrative Decision Makers Change Their Mind?" available at <http://law.anu.edu.au/aial/Publications/webdocuments/Forums/Forum35.pdf> (accessed on 18 May 2004)

Pearce Dennis "Rules, Regulations and Red Tape: Parliamentary scrutiny of delegated legislation" Senate Occasional Lecture Series Parliament House 25 June 2004 available at <http://www.aph.gov.au/senate/pubs/pops/pop42/pearce.pdf> (accessed on 10 August 2006) see also http://www.aph.gov.au/senate/pubs/oc-ca_lect/transcripts/250604.pdf (accessed on 10 August 2006)

Pretorius DM *The Functus Officio Doctrine in Anglo-South African Administrative Law, with reference to analogous principles in the administrative law of other Commonwealth jurisdictions* (PhD Thesis, University of the Witwatersrand) December 2005

Rautenbach IM & Malherbe EFJ *Constitutional Law* 3rd edition Butterworths: Durban 1999

Rose Roger "Should We Expect More Assistance From Interpretation Legislation?" available at http://www.jerseylegalinfo.je/Publications/jerseylawreview/Oct00/Interpretation_Legislation.aspx (accessed on 10 October 2005)

Ross Susan "Breakdown or breakthrough in participatory government?: How state open meetings laws apply to virtual meetings" *Newspaper Research Journal Summer 1998* available at http://www.findarticles.com/p/articles/mi_qa3677/is_199807/ai_n8802854 (accessed on 12 September 2006).

Scotland Subordinate Legislation Committee *Inquiry into the regulatory framework in Scotland 31st Report 2005 (Session 2)* available at <http://www.scottish.parliament.uk/business/committees/subleg/reports-05/sur05-31-01.htm> (accessed on 11 August 2006)

Steyn Johan Lord "The Intractable Problem of The Interpretation of Legal Texts" John Lehane Memorial Lecture 2002 25 September 2002 University of Sydney available at <http://www.austlii.edu.au/au/journals/SydLRev/2003/1.html> (accessed on 7 September 2006)

Steyn LC *Uitleg van Wette* fifth edition Juta: Cape Town 1981

Tanner George "Law Reform and Accessibility" Australasian Law Reform Agencies Conference Wellington 13 - 16 April 2004 Access To Justice: Rhetoric or Reality

Thornton GC *Legislative Drafting* 4th edition Butterworths: London 1996

Zander Michael *The Law Making Process* 6th edition Cambridge University Press: Cambridge 2004

Winckel Anne "The Contextual Role of a Preamble in Statutory Interpretation" available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MULR/1999/7.html> (accessed on 7 September 2006)

CASE LAW

Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A)

Administrator, Cape v Raats Röntgen & Vermeulen (Pty) Ltd 1992 1 SA 245 (A) 261

2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool) [1996] 3 SCR 919

Anhym Bpk v Oudtshoorn Munisipaliteit 1990 (3) SA 252 (C)

Baloro v University of Bophuthatswana 1995 (4) SA 197 (B) at 241B

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)

Bellairs v Hodnett and Another 1978 (1) SA 1109 (A)

Berman Brothers (Pty) Ltd v Sodastream Ltd And Another 1986 (3) SA 209 (A)

Bloem v State President of the Republic of South Africa 1986 (4) SA 1064 (O)

BOE Bank Ltd v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA)

Bropho v Western Australia (1990) 171 CLR 1

Case v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996 (1) SACR 587 (CC)

Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service 2001 (3) SA 210 (W)

Cats Entertainment CC v Minister of Justice Van der Merwe v Minister of Justice Lucksters CC v Minister of Justice 1995 (1) SA 869 (T)

Chairman, Board on Tariffs and Trade v Teltron (Pty) Ltd 1997 (2) SA 25 (A)

Chandler v Alberta Association of Architects [1989] 2 SCR 848

Chieu v. Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 84

Christian Lawyers Association of SA and Others v Minister of Health and Others 1998 (4) SA 1113 (T)

Coetzee v Government of the RSA 1995 (10) BCLR 1382 & 1995 (4) SA 631 (CC)

Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans) [1997] 1 SCR 12

Commercial Union Assurance Company of South Africa Ltd v Clarke 1972 (3) SA 508 (A)

Daniels v Campbell 2003 (9) BCLR 969 (C)

Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home 2000 (8) BCLR 837 (CC)

De Freitas v Somerset West Municipality 1997 (3) SA 1080 (C).

Delisle v Canada (Deputy Attorney General) [1999] 2 SCR 989

De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 389 (W)

Durban Corporation v Estate Whittaker 1919 AD 201

End Conscription Campaign v Minister of Defence 1993 1 SA 589 (T)

Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (10) BCLR 1289 (CC)

Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another 2002 (7) BCLR 663 (CC)

Ex Parte Robinson v Parole Board [1999] EWHC Admin 764

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)

Fourie and Another v Minister of Home Affairs and Others 2005 (3) SA 429 (SCA)

Francis & Another, R (on the application of) v Secretary of State for the Home Department & Another [2004] EWHC 2143 (Admin)

Friends of the Oldman River Society v Canada (Minister of Transport) [1992] 1 S.C.R. 3

Garydale Estate and Investment Co (Pty) Ltd v Johannesburg Western Rent Board 1957 (2) SA 466 (T)

Gcilitshana v General Accident Insurance Co SA Ltd 1985 (2) SA 367 (C)

Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd. 1998 (2) SA 19 (SCA)

Holomisa v Argus Newspapers Ltd 1996 (6) BCLR 836 (W)

Huisamen v Port Elizabeth Municipality 1998 (1) SA 477 (E) 481

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit 2001 (1) SA 545 (CC)
Inter Aviation Services (Pty) Ltd T/A Interair V Chairman, International Air Services Council, and Others 2002 (6) SA 51 (T)

James Maurice Goulding v Chief Executive Ministry of Fisheries [2003] NZCA 244

Kalla v The Master 1995 (1) SA 261 (T)

Lindsay Keller & Partners v AA Mutual Insurance Association Ltd 1988 (2) SA 519 (W) at 523

Mathope and Others v Soweto Council 1983 (4) SA 287 (W).

McDonnell (FC) (Appellant) v. Congregation of Christian Brothers Trustees available at www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmtjd031204/don_nel-1.htm

Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11 (14 March 2002).

Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co 1961 (4) SA 415 (T).

Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith 2004 (1) SA 308 (SCA)

Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (1) BCLR 1 (CC); also reported in 2006 (2) SA 311 (CC)

- Minister of Home Affairs v Watchenuka* 2004 (2) BCLR 120 (SCA)
- Minister of Home Affairs and Another v Fourie and Others* Case 2006 (1) SA 524 (CC)
- Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC)
- Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A)
- Minister of Water Affairs and Forestry and others v Swissborough Diamond Mines (Pty) Ltd and Others* 1999 (2) SA 345 (T)
- Mgijima v Eastern Cape Appropriate Technology Unit and Another* 2000 (2) SA 291 (TkH)
- Moleah v University of Transkei* 1998 (2) SA 522 (TkH)
- National Coalition for Gay and Lesbian Equality and Others v Minister Home Affairs* 1999 (3) BCLR 280 (CC)
- National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (C)
- National Iranian Tanker Co v MV Pericles* GC 1995 (1) SA 475 (A)
- Ngcobo and Another v Van Rensburg and Others* 1999 (2) SA 525 (LCC)
- Nkosi v Khanyile* 2003 (2) SA 63 (N)
- Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA)
- Nouranidoust v Canada (Minister of Citizenship and Immigration) (TD)* [2000] 1 FC 123
- Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA)
- Pepcor Retirement Fund and Another v Financial Services Board* 2003 (6) SA 38 (SCA)
- Pepper (Inspector of Taxes) v Hart and Related Appeals* [1993] All ER 42 (HL).
- Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)
- President of the Republic of South Africa v Eisenberg and the Minister of Home Affairs* 2005 (1) SA 247 (C)
- President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
- President of the Republic Of South Africa v South African Rugby Football Union And Others* 2000 (1) SA 1 (CC) 71
- President of the Republic Of South Africa and Others v United Democratic Movement*

(African Christian Democratic Party And Others Intervening; Institute For Democracy in South Africa and Another as Amici Curiae) 2003 (1) SA 472 (CC)

Public Carriers Association v Toll Road Concessionaries (Pty) Ltd 1990 (1) SA 925 (A)

R v Brener 1932 OPD 45

R. v. Hasselwander [1993] 2 SCR 398

Rates Action Group v City Of Cape Town 2004 (5) SA 545 (C)

Ridgway v Janse van Rensburg 2002 (4) SA 186 (C)

Regina v. Secretary of State for Health ex parte Quintavalle (on behalf of Pro-Life Alliance) [2003] UKHL 13

Rizzo & Rizzo Shoes Ltd. (Re) [1998] 1 SCR 27

Sachs v Dönges NO 1950 (2) SA 265 (A)

SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission and Another 1987 (4) SA 155 (W)

S v De Bruin 1975 (3) SA 56 (T)

S v Liberty Shipping and Forwarding (Pty) Ltd 1982 (4) SA 281 (D)

S v Makwanyane 1995 (3) SA 391 (CC)

S v Manamela (Director-General of Justice Intervening) 2000 (5) BCLR 491 (CC)

S v Mafunisa 1986 (3) SA 495 (V)

S v Nel 1987(4) SA 276 (O)

Smeaton v Secretary of State for Health [2002] EWHC 610 (Admin) (18th April, 2002)

Swanepoel v Johannesburg City Council 1994 (3) SA 789 (A)

Thomas v Liverpool & London & Globe Insurance Co of SA Ltd 1968 (4) SA 141 (C)

Thompson, Trading as Maharaj & Sons v Chief Constable, Durban 1965 (4) SA 662 (D)

Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA)

Tutu v Minister of Internal Affairs 1982 (4) SA 571 (T)

Union Government v Tonkin 1918 AD 533

Union of Teachers' Associations v Minister of Education 1993 (2) SA 828 (C) 841

Van Rooy v Law Society (OFS) 1953 (3) SA 580 (O)at 585A

Watson v Lee [1979] HCA 53; (1979) 144 CLR 374 (23 October 1979)

Weenen Transitional Local Council v Van Dyk 2000 (3) SA 435 (N)

Westminster City Council v National Asylum Support Service [2002] UKHL 38

Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC)

CHAPTER 1

A. ORIGIN OF THE INVESTIGATION

1.1 The South African Law Reform Commission has been mandated with the task of revising the South African statute book for constitutionality, redundancy and obsolescence. One of the Acts to be revised is the Interpretation Act 33 of 1957.

1.2 The Interpretation Act 33 of 1957 (the Act), which was drafted during an era of parliamentary sovereignty, is in line neither with the current constitutional dispensation nor with the principles and practices of drafting and interpretation which the legislature and the courts have adopted since 1994.

B. HISTORY OF THE INTERPRETATION ACT

1.3 The South African Interpretation Act of 1910 was taken over from the British Interpretation Act of 1889. The Interpretation Act 33 of 1957 repealed and replaced the Interpretation Act of 1910. There were no fundamental alterations and the Act is therefore substantially a re-enactment of the 1910 Act. The essential reason for the Act was to replace the former Dutch text with an Afrikaans text.

C. SCOPE AND NATURE OF THE PROBLEM

1.4 The present Interpretation Act is outdated and does not fulfil the functions of an Interpretation Act. Our brief is to draw up a new, updated Interpretation Act which will reflect the changes brought about by the new Constitution.

In many significant ways the South African Interpretation Act is obsolete and requires revision. The 'obesity' of South African Law increases each year, making the law increasingly inaccessible to the public. A revised Interpretation Act could make a useful contribution to rendering future statute law shorter and more comprehensible.¹

1.5 Over the years there have been many studies of the problems of legislation.² The English and Scottish Law Commissions conducted an investigation into the rules of statutory interpretation in 1969.³ They drew a clear distinction between their investigation, which was an examination of the rules for the interpretation of statutes, and an investigation which would revise the Interpretation Act. The report states⁴ that an Interpretation Act is largely concerned with the conventions or shorthand of particular legislative expressions rather than general principles of interpretation. In the summary of conclusions and recommendations to

¹ Devenish *Interpretation of Statutes* 260.

² Arden DBE "Improving the Statute Book: A Law Reformer's Viewpoint" 1997 *Statute Law Review* 169 – 176.

³ English Law Commission Report No 21; Scottish Law Commission Report No 11.

⁴ English and Scottish Law Commission Reports (*op cit*) para 82.

the report, the Law Commissions state that “it is the function of an independent jury to interpret the law and no proposals which we may make can and should undermine the freedom which this function requires”.⁵ The report refers to an English judgment in which was said:

The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from which issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.⁶

1.6 The Law Commissions of England and Scotland concluded as follows:⁷

We do not propose any comprehensive statutory enumeration of the factors to be taken into account by the courts in the interpretation of legislation. Even in countries with the most highly codified systems the principles of interpretation largely rest on a body of flexible doctrine developed by legal writers and by the practice of the courts.⁸

1.7 They also noted the danger that a comprehensive codification of the law of interpretation would introduce excessive rigidity into the law. However, they did recommend a limited degree of legislative intervention for four purposes:

- (a) to clarify, and in some aspects to relax the strictness of the rules which exclude certain material from consideration in determining the proper context of a provision;
- (b) to emphasise the importance in the interpretation of a provision of
 - (i) the general legislative purpose underlying it
 - (ii) the the fulfilment of any relevant international obligation of her Majesty’s Government in the United Kingdom
- (c) to provide assistance in the courts in ascertaining whether a provision is or is not intended to give a remedy in damages to a person who suffers loss as a result of a breach of an obligation created by that provision.

⁵ English and Scottish Law Commission Reports (*op cit*) para 79.

⁶ Per Donaldson J in *Corocraft Ltd v Pan American Airways Inc.* [1968] 3 W.L.R 714 at 732.

⁷ English and Scottish Law Commission Reports (*op cit*) para 81.

⁸ English and Scottish Law Commission Reports (*op cit*) para 81.

- (d) to encourage the preparation in selected cases of explanatory material for use by the courts, which may elucidate the contextual assumptions on which legislation has been passed.

1.8 The Law Reform Commission of Hong Kong in its 1997 Report on Extrinsic Material as an Aid to Statutory Interpretation concluded in favour of a legislative approach, finding that it “would be desirable to codify and modify the existing common law principles and in the process extend and clarify the position by way of legislation.”

1.9 In its consultation paper on statutory drafting and interpretation⁹ the Irish Law Reform Commission recommended that the basic rules of statutory interpretation should be set out in legislative form. It did not, however, recommend a comprehensive codification of all of the many rules of statutory interpretation. It recommended minimal intervention, to set out the general principle that the purpose of legislation should be borne in mind and that it should be permissible (though not required) for the courts to look at extrinsic aids in the interpretation of legislation in certain circumstances.

1.10 In the discussion paper on the Commonwealth Acts Interpretation Act 1901 prepared by officers of the Attorney-General’s Department and the Office of Parliamentary Counsel, the codification of the rules of statutory interpretation was considered.¹⁰ The view was expressed that to the extent that codification could be achieved, it would help to ensure that both drafters and users of legislation applied the same rules in dealing with legislation, and would make those rules more accessible to users as they would not have to be extracted from the case law by each individual user. On the other hand, however, it was felt that codification of any set of legal principles is a difficult task, and mistakes are easily made. It was also argued that attempts to codify the common law would impose undesirable restrictions on the ability of the courts to develop the common law to cope with new issues.

1.11 A limited degree of statutory intervention would seem to be indicated. Some of the rules and principles of statutory interpretation which merit consideration for inclusion in an Interpretation Act are the following:

- (a) Rules determining which materials can be used to aid interpretation of legislation, to assist the courts in ascertaining the purpose of the legislation.
- (b) Provisions to emphasise the importance of the Constitution and the general legislative purpose when interpreting legislation.

⁹ Irish Law Reform Commission *Consultation Paper on Statutory Drafting and Interpretation* 1999 Dublin para 4.03.

¹⁰ Para 2.14.

D. PARTICULAR USES OF AN INTERPRETATION ACT

1.12 In a discussion paper on the review of the Commonwealth Acts Interpretation Act 1901 prepared by the officers of the Australian Attorney-General's department and the Office of Parliamentary Counsel in 1998, the particular uses of an interpretation Act were discussed.¹¹ The various kinds of provisions that might be used to achieve the objectives of an interpretation Act were also considered. These are provisions that:

- (a) define words and phrases commonly used in legislation;
- (b) contain rules about gender and number and the use of other parts of speech;
- (c) enable the use of shorthand methods of
 - (i) creating offences or imposing penalties; or
 - (ii) providing for the delegation of powers; or
 - (iii) the service of documents;
- (d) relate to the calculation of time or the measurement of distance;¹²
- (e) provide a technical framework to support all legislation, eg commencement and repeal of Acts; provisions legally necessary to ensure that Acts operate properly;¹³
- (f) codify or change the rules of statutory interpretation;¹⁴
- (g) maintain consistency in law and administration, eg standard provisions for the handling of periodic reports about the activities of a range of people and bodies;
- (h) provide for legislation to be updated or corrected without recourse to Parliament.¹⁵

¹¹ Roger Rose explains that the first difficulty concerning an interpretation act is its name: (See "Should We Expect More Assistance From Interpretation Legislation?" available at http://www.jerseylegalinfo.je/Publications/jerseylawreview/Oct00/Interpretation_Legislation.aspx accessed on 10 October 2005.)

"The Interpretation (Jersey) Law 1954 (referred to in this article as the "Jersey Interpretation Law"), comprising as it does nineteen substantive articles, is fairly typical of such legislation in many Commonwealth jurisdictions. A quick glance at it shows that a number of its provisions are not strictly speaking concerned with interpretation at all, but with laying down rules for such matters as the commencement of an enactment, the effects of repeal of an enactment, the consequences of the granting of a power in an enactment, and a rule for the measurement of distance.

Different Commonwealth jurisdictions have dealt with this name problem by adopting a more precise short title: the equivalent statutes in India and Pakistan (both from a common origin) are called General Clauses Acts, even though they contain large numbers of defined words and rules of interpretation. In something of a compromise, the equivalent legislation in Kenya and Zambia is called the Interpretation and General Provisions Act, and in Malawi it is the General Interpretation Act. For the sake of simplicity however, when referring in general terms to such legislation, reference in this article is made to an 'interpretation act'." (Footnotes omitted.)

¹² Australian Review of the Interpretation Act 1.

¹³ Australian Review of the Interpretation Act 13.

¹⁴ Australian Review of the Interpretation Act 16.

E. WORKING METHODOLOGY

1.13 Many other countries have conducted investigations into or drawn up new Interpretation Acts. The New Zealand Interpretation Act 1999 has been in force since 1 November 1999. It is largely based on the recommendations made by the Law Commission in its 1990 report¹⁶. A new Interpretation Act was enacted in Canada in 1985. The Australian Capital Territory Interpretation Act 1967 was replaced by the Legislation Act in 2001. These Acts vary in their scope and in their function. We have conducted a comparative survey of the Interpretation Acts of other countries in order to ascertain what is included in the statutes of other jurisdictions; to ascertain what we need in our Act; and to draw up a new Interpretation Act for South Africa.

1.14 The Interpretation Act is so outdated that it has not been taken into account in the drafting of recent Acts. Devenish¹⁷ suggests that the question of the interpretation of the Constitution and other legislation is a cognate and important issue which should have been dealt with together with the new Constitution. Significantly, many provisions contained in the Interpretation Acts of other countries have been included in other South African statutes.

1.15 In the Australian Government review of the Commonwealth Acts Interpretation Act 1901, the following questions are considered: what an Interpretation Act should include and whether it should be a self-contained Act that includes all the provisions necessary for its operation, including constitutional provisions and codifications of all relevant common law.¹⁸ The report states that this might be theoretically achievable, but is not practically feasible. According to the report,¹⁹ it is more realistic to set out in the Interpretation Act all the relevant statutory provisions that are currently found in other statutes of general application.

1.16 The advantage of repeating definitions and provisions of general application in an Interpretation Act is that in the drafting of new legislation, it will not be necessary to repeat these provisions. A cross-reference to the Interpretation Act could be included in new legislation, thereby reducing the volume of the statute book. We would also have to consider whether definitions and provisions of general application contained in existing statutes should be deleted with a reference to the Interpretation Act.

1.17 Subject-specific legislation is intended to deal with particular subject-matter and needs tailor-made provisions. But there could be certain areas in each Act in which the use

¹⁵ Australian Review of the Interpretation Act 20.

¹⁶ *A New Interpretation Act: To avoid Prolixity and Tautology* (NZLC R17).

¹⁷ Interpretation of Statutes 262.

¹⁸ At para 1.14.

¹⁹ At para 1.15.

of standard provisions might be considered. Where certain issues come up again and again in legislation, it is necessary to

- (a) identify these issues;
- (b) decide whether these particular matters should be dealt with according to a policy approach that is developed consistently across the statute book;
- (c) decide whether, if there are standard policies, they should be expressed in provisions that are as far as possible identical (standard provisions).²⁰

1.18 The example given in the Australian review of the Interpretation Act is that of an Act imposing a new tax in which provisions for assessment and collection of tax could reflect existing provisions, and existing administrative structures for the assessment and collection of other similar taxes.

1.19 Other standard provisions found in other interpretation legislation are the following:

- (a) Provisions relating to corporations and setting out corporate rights and powers²¹ and conflict of interests.²²
- (b) Provisions relating to majority or quorum.²³
- (c) Provisions relating to public officers, their appointment, appointment to certain boards, commissions and appointed bodies; implied powers of public officers.

1.20 In order to obtain the views of experts in the field, the Commission distributed a draft discussion paper to a selected group of experts. Expert meetings were held in Pretoria, Durban and Cape Town in August 2004 to discuss the draft. The experts' submissions have been taken into account in compiling this discussion paper. The Commission sincerely thanks the persons who attended the meetings and made submissions. The names of the experts who contributed to the development of this discussion paper are listed in Annexure B hereto. At its 100th meeting on 9 September 2006, the Commission considered a draft discussion paper and approved its publication for general information and comment subject to a number of amendments to the paper and Bill.

F. INTERPRETATION AND DRAFTING

1.21 In other jurisdictions a review of the relevant interpretation statute has been combined with the drawing of a drafting manual to set down uniform standards for drafting of new legislation.

1.22 In September 1993, the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs (the House of Representatives Committee) recommended

²⁰ Para 1.33.

²¹ Section 16 of the Saskatchewan Interpretation Act, 1995.

²² Section 17 of the Saskatchewan Interpretation Act, 1995.

²³ Section 18 of the Saskatchewan Interpretation Act, 1995.

that the Attorney-General's Department and the Office of Parliamentary Counsel publicly review and rewrite the Acts Interpretation Act 1901 (AIA). The House of Representatives Committee's report found considerable evidence to support the view that interpretation legislation plays a fundamental role in "promoting desirable features in drafting, such as brevity and consistency between different pieces of legislation.

1.23 The Committee accepted that interpretation legislation is generally of great importance to legislative drafting, and that it helps promote legislation that is easy to read. Several of the people appearing before the Committee thought that the AIA was of great assistance in facilitating desirable features of drafting. The Committee concluded that Interpretation legislation can positively encourage improved drafting and make legislation easier to understand and to use.

1.24 The Irish Law Reform Commission's Consultation Paper on statutory drafting and interpretation²⁴ found that there was a need for greater uniformity of style in statutory drafting. The Commission recommended that "general guidelines concerning the language and style of drafting, based on objectives of clarity and effective communication, should be contained in a drafting manual"²⁵.

1.25 A number of commentators to the English and Scottish Law Commissions Joint Working Paper stated that "any problems which may arise in the Interpretation of statutes are attributable in great measure to defects in their drafting rather than to any inherent defects in our rules of interpretation". In their report, the Commissions stated that while they fully appreciated the relevance of statutory drafting to the Interpretation of statutes, they were of the view that it "would be an over-simplification to look solely to improvements in this field without regard to the rules of interpretation which have been developed by the courts". They felt that it would be more accurate to say that there is an interaction between the words used in drafting the legislation and the rules by which it is to be interpreted. They were of the view that there are practical limits to the improvements which can be effected in drafting.

1.26 In the United States, many of the States have adopted Legislative Drafting Manuals which set out rules of clear, plain language drafting. The Office of the Revisor of Statutes in the State of Maine has published the Legislative Drafting Manual of the State of Maine²⁶. All proposed legislation must be submitted to the office of the Revisor prior to its introduction. Part II of the manual deals with the form and format of legislative instruments. Part III sets

²⁴ LRC CP14 – 1999 IELRC 1 par 2.31.

²⁶ Available at <http://janus.state.me.us/legis/ros/manual/contents.htm> (accessed on 7 September 2006).

out the “conventions of style and grammar applied by the Office of the Revisor of Statutes to help ensure consistency throughout statutes and other Maine laws.”

1.27 Professor Hofman²⁷ expressed the view that drafting legislation and interpreting legislation are two sides of the same coin. He is of the view that the more consistent the style of drafting, the easier it becomes to anticipate how a court will interpret it. He proposed that there should be some mechanism put in place to require those who draft legislation to meet certain formal standards before it is tabled in a legislative body as this would bring consistency and uniformity in drafting.

1.28 The drawing of a drafting manual to set down uniform standards for drafting of new legislation is beyond the ambit of our brief and would be a very time-consuming exercise. Furthermore, there is a South African drafting manual, compiled by the office of the Chief State Law Advisor. It is considered that the problem is not so much the lack of a uniform drafting manual, but rather the availability of the manual to drafters at all levels of government.

²⁷ Hofman Julien *Comments on revision of Interpretation Act 2003*.

CHAPTER 2

A. NAME OF ACT AND LONG TITLE

2.1 The long title of the present Interpretation Act reads as follows: “To consolidate the laws relating to the interpretation and the shortening of the language of statutes”. The long title of the Australian Commonwealth Acts Interpretation Act reads as follows: “An Act for the Interpretation of Acts of Parliament and for shortening their Language”. The long title of the Australian Capital Territory Legislation Act provides as follows: “An Act about legislation”.

2.2 The South Australian Acts Interpretation Act contains the following long title: “an Act for consolidating certain Acts relating to the interpretation of Acts of Parliament, and for further shortening and interpreting the language used in Acts of Parliament”. The long title of the Canadian Federal Interpretation Act states as follows: “An Act respecting the interpretation of statutes and regulations”. The long title of the New Zealand Interpretation Act is: “An Act relating to the interpretation, application, and effect of legislation”.

2.3 It is proposed that the new interpretation Act be named the “Interpretation of Legislation Act”. The term “legislation” is preferred over “statutes” to avoid confusion. The Act will govern principles relating to all types and categories of legislation (“legislation” to be defined in the definition section in this Chapter).

2.4 It is proposed further that a general long title be included in line with present drafting practice. The following wording is proposed:

To give effect to the principle of constitutional supremacy in the interpretation of legislation; to provide certain rules and practices for the interpretation of legislation; to promote uniformity in the language of legislation; and to provide for incidental matters.

B. PREAMBLE

2.5 A preamble is an amendable, descriptive component of a statute, and is generally placed after the long title and before the enacting words and the substantive sections.¹ Since the advent of the new constitutional order, preambles are back in fashion. (See the discussion on principles of interpretation below for a further discussion on interpretation of preambles.)

¹ Anne Winckel “The Contextual Role of a Preamble in Statutory Interpretation” available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MULR/1999/7.html> (accessed on 7 September 2006).

2.6 The preamble of the Promotion of Administrative Justice Act 3 of 2000 is a good example of a modern preamble. It not only emphasizes the core concerns and values of the Act, but also expressly refers to the Constitution:

Preamble

WHEREAS section 33 (1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;

AND WHEREAS section 33 (3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to-

- * provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- * impose a duty on the state to give effect to those rights; and
- * promote an efficient administration;

AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33 (3) must be enacted within three years of the date on which the Constitution took effect;

AND IN ORDER TO-

- * promote an efficient administration and good governance; and
- * create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,

2.7 The Local Government: Municipal Systems Act 32 of 2000 is another good example of a modern Preamble:

Preamble

Whereas the system of local government under apartheid failed dismally to meet the basic needs of the majority of South Africans;

Whereas the Constitution of our non-racial democracy enjoins local government not just to seek to provide services to all our people but to be fundamentally developmental in orientation;

Whereas there is a need to set out the core principles, mechanisms and processes that give meaning to developmental local government and to empower municipalities to move progressively towards the social and economic upliftment of communities and the provision of basic services to all our people, and specifically the poor and the disadvantaged;

Whereas a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, service delivery and performance management;

Whereas the new system of local government requires an efficient, effective and transparent local public administration that conforms to constitutional principles;

Whereas there is a need to ensure financially and economically viable municipalities;

Whereas there is a need to create a more harmonious relationship between municipal councils, municipal administrations and the local communities through the acknowledgement of reciprocal rights and duties;

Whereas there is a need to develop a strong system of local government capable of exercising the functions and powers assigned to it; and

Whereas this Act is an integral part of a suite of legislation that gives effect to the new system of local government;

2.8 It is proposed that the following preamble be included in the Bill:

WHEREAS the Constitution requires legislation to be accessible;²

AND WHEREAS rules and practices for the interpretation of legislation are an important aid to facilitate access to legislation not only by courts, but also by the administrators of legislation and by ordinary citizens;

AND WHEREAS the Constitution requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation;³

AND WHEREAS current legislation providing general rules for the interpretation of legislation does not serve the new order of constitutional supremacy,⁴

² The Constitution refers specifically to the accessibility of subordinate legislation. Section 101(3) provides that proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.

³ Section 39(2) of the Constituion requires that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

⁴ At its meeting on 9 September 2006 when the draft discussion paper was considered the Commission was of the view that there is no need for the following two preambular paragraphs (which preceded the last preambular paragraph):

AND WHEREAS the Constitutional Court is in terms of the Constitution the highest court in all constitutional matters, including the interpretation of the Constitution;

AND WHEREAS there is a need for rules and practices of interpretation to be enacted for ordinary legislation to reflect the new order of constitutional supremacy in the Republic;

(This first preambular paragraph is based on section 167(3) of the Constitution which provides that the Constitutional Court – (a) is the highest court in all constitutional matters; (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. Note also that section 167(7) provides that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. The second paragraph explains that there is a need for rules of interpretation for ordinary legislation ie other than the Constitution.)

C. THE CONCEPT “LEGISLATION”

2.9 Before we deal with the definition clause it is necessary to take note of the concept *legislation*. As will be seen below, the Bill differentiates between –

- original and assigned legislation;
- primary legislation (parliamentary and provincial Acts and municipal by-laws) and legislation issued by the executive (subordinate or secondary legislation);
- legislation from different spheres (national legislation, provincial legislation and municipal by-laws);
- new legislation and old order legislation;
- legislation enacted before and enacted after the new Bill will take effect.

2.10 In order to facilitate a proper evaluation of the different kinds of legislation for purposes of the Bill, diagrams are included below setting out the different kinds of legislation under the 1996-Constitution and the 1993-Constitution as well as the different kinds of old order legislation.

2.11 Please note the following with respect to the diagram showing the different kinds of legislation under the 1996-Constitution:

2.11.1 The Constitution does not state specifically that primary legislation such as Acts of Parliament, provincial Acts and municipal by-laws are "subordinate" to the Constitution, but states in stead, in section 2, that the Constitution is the "supreme law" of the Republic and that any law or conduct inconsistent with it is invalid. This clears the way for using the term "subordinate legislation" to describe proclamations, regulations and other secondary legislative instruments issued by the executive in terms of national or provincial Acts.

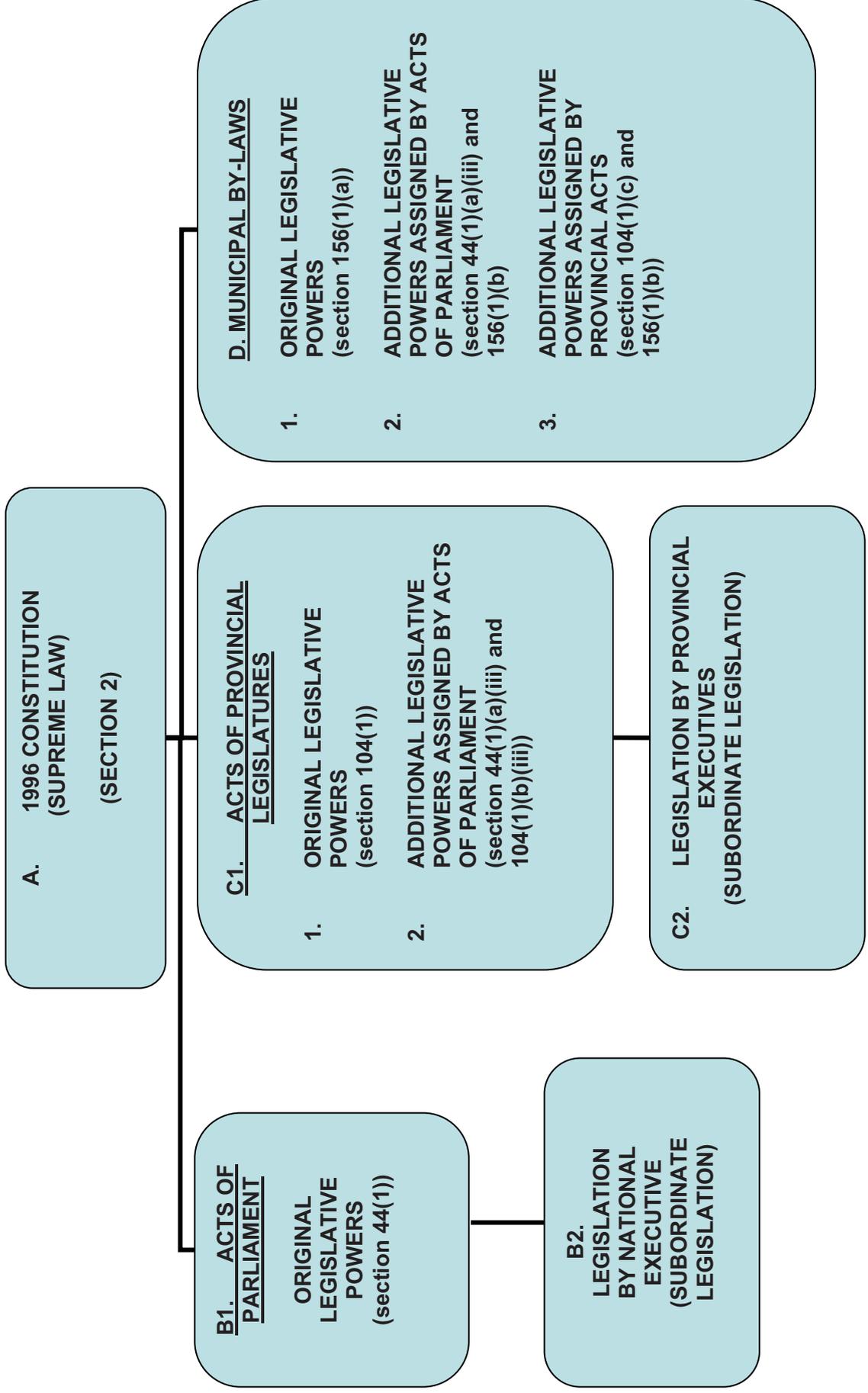
2.11.2 (Block B1) The Constitution confers original legislative powers on Parliament to pass legislation on any matter, subject to the Constitution.

2.11.3 (Block B2) The suggestion that the term "subordinate legislation" should not be used in the Interpretation Bill to describe proclamations,

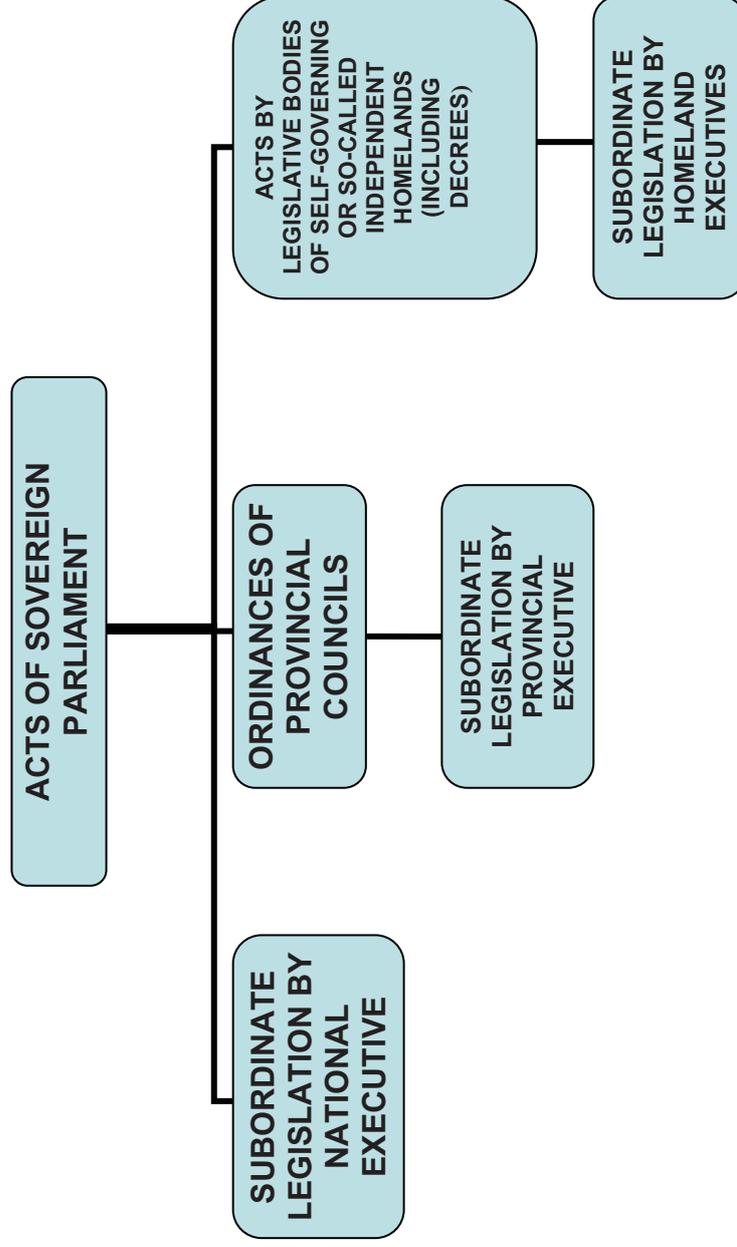
regulations and other legislative instruments issued by the executive in terms of national or provincial Acts is problematic because the Constitution itself refers to this kind of legislation as "subordinate legislation". See for instance sections section 101, 140 and 239. The term "delegated legislation" is bound to be misleading, firstly, because the Constitution not only provides for the delegation of legislative powers to the executive but also to legislative bodies such as provincial legislatures and municipal councils. Legislation made in terms of assigned powers cannot be typified as "delegated legislation". See notes below. The second problem with the term "delegated legislation" is that a delegatee normally acts in the name of the delegator which is not the case here.

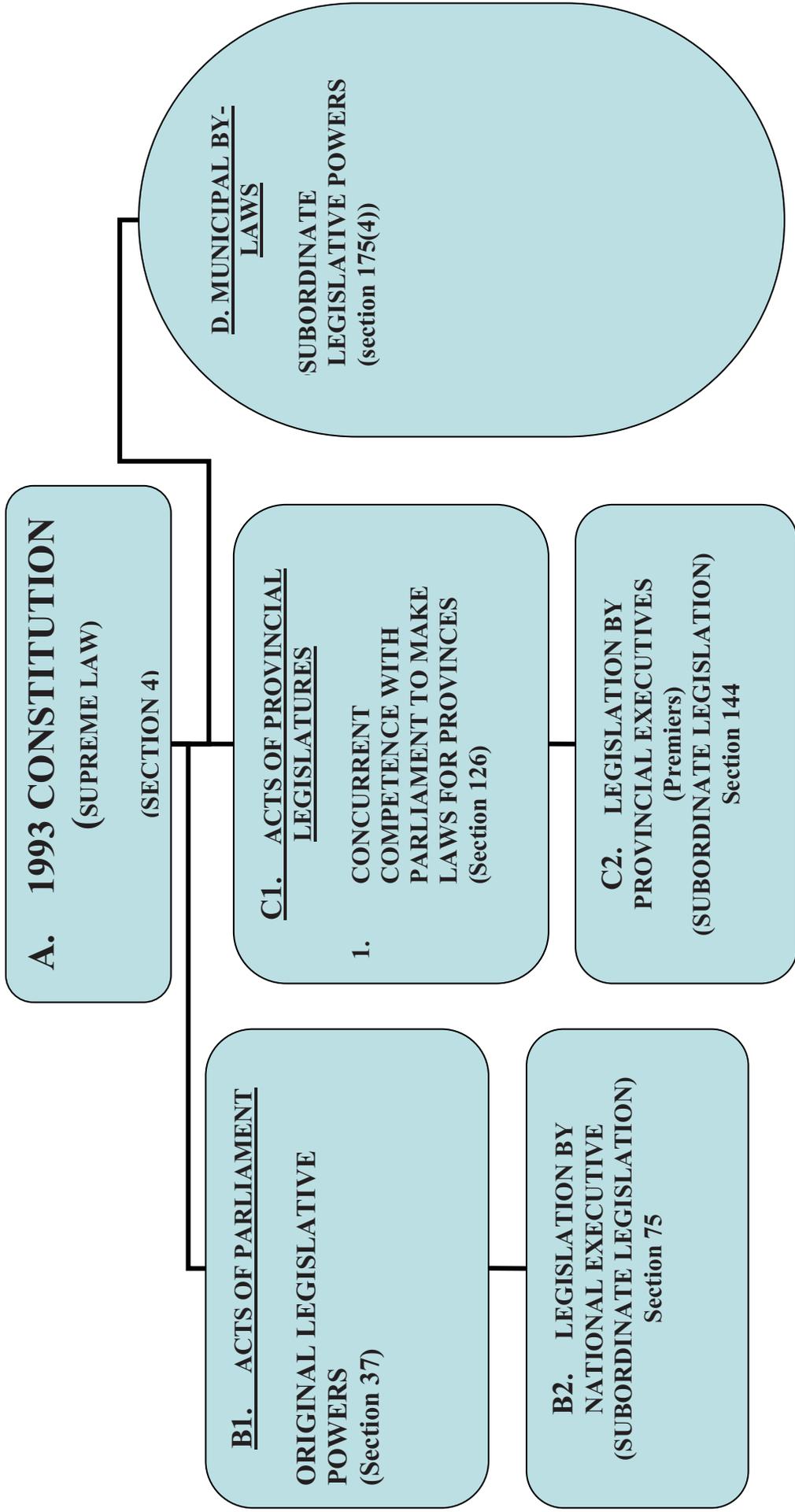
- 2.11.4 (Block C1) The Constitution confers original legislative powers on provincial legislatures to pass legislation for their provinces on matters referred to in Schedules 4 and 5 to the Constitution and, in addition, provides for additional legislative powers to be **assigned** to them by Acts of Parliament on matters outside the Schedules. The term "assigned" as used in the Constitution with reference to additional legislative powers implies that the legislation is to be passed in the name of the assignee (provincial legislature).
- 2.11.5 (Block C2) Provincial Acts may empower the provincial executive to issue subordinate legislation.
- 2.11.6 (Block D) Under the pre-1996 dispensation local government was treated as a functional area for which both Parliament and the provincial legislatures/councils could legislate. Municipal by-laws were seen as mere subordinate legislation. With the concept of three spheres of government under the 1996-Constitution, the status of local government and its legislation has fundamentally changed. As is the case with the legislatures in the national and provincial spheres of government, municipal councils now have original legislative powers, and may pass by-laws for their areas on matters referred to in Schedules 4B and 5B without enabling parliamentary or provincial Acts. Additional legislative powers may also be assigned to them by either national or provincial legislation. Municipalities do not issue subordinate legislation and only legislate by way of by-laws.

Accordingly there is no “subordinate legislation” category for the local sphere.



OLD ORDER LEGISLATION





D. DEFINITION CLAUSE

2.12 The definition clause in an Act usually contains definitions applicable to that particular legislation. However, an Interpretation Act deals with the interpretation of all legislation. The definition section in the current Interpretation Act 33 of 1957 contains a list of definitions applicable to all legislation. Du Plessis⁵ explains this as follows:

The definitions in the Interpretation Act do not apply to legislative instruments which expressly exclude them and also not in instances where the language and/or context of an enactment suggests their exclusion or where a “contrary intention appears”.

2.13 In the Canadian Federal Interpretation Act a different method is employed: section 2 (entitled “Interpretation”) contains the definitions for the Interpretation Act only, and section 35 (entitled “General Definitions”) contains the definitions that are applicable to all legislation. Section 2 of the Canadian Federal Interpretation Act defines words such as *Act*, *enact*, *enactment*, *public officer*, *regulation* and *repeal*. The Canadian methodology differs from the South African drafting practice where the definitions are consolidated in a single provision at the beginning of the legislation. The 1999 New Zealand Interpretation Act follows an arrangement similar to that in the South African Interpretation Act, although the definition section (section 29) appears at the end of the Act.

2.14 The view has been expressed that all definitions in an Interpretation Act should apply to all legislation (including the Interpretation Act itself), unless excluded expressly, and that a system where two different definition clauses are used in different parts of the Act will cause unnecessary confusion. The Commission takes note of this comment but considers provisionally that there is merit in the introduction of two lists of definitions into the Bill. It is therefore proposed that two lists of definitions should be included in the Bill, namely one which defines in Chapter 1 of the Bill terms or words used in the Bill and the second in Chapter 4 of the Bill which defines words or expressions which occur in any legislation. The defined terms or words used in the Bill are discussed in what follows directly below. Words and expressions often used in legislation are discussed in Chapter 6 and standard provisions in Chapter 8.

2.15 Section 2 of the Interpretation Act provides that “[t]he following words and expressions shall, unless the context otherwise requires or unless in the case of any

⁵ Du Plessis *Re-Interpretation of Statutes* (2002) 205.

law it is otherwise provided therein, have the meanings hereby assigned to them respectively, namely- . . .“ Section 5 of the British Interpretation Act of 1978 states that in any Act, unless the contrary intention appears, the words and expressions listed in Schedule 1 to the Act are to be construed according to that schedule.

2.16 Prof Hofman expresses the view that all references to “unless the contrary intention appears therein” should be removed from the Interpretation Act.⁶ He points out that the British Interpretation Act of 1889 consistently used the expression “unless the contrary intention appears therein” to qualify provisions. He states that it did not use the South African “unless the context otherwise indicates”. The wording of sections 3, 5, 7 and 10 of the South African Interpretation Act which are qualified by reference to the “contrary intention” rather than “context” is taken directly from sections 20, 34, 26 and 32 of the British Act. Prof Hofman states that it is not surprising to find inconsistencies of this sort in legislation drafted so closely on the British model. He is of the opinion that the drafters of the 1910 Act may have referred to both intention and context in section 1 *ex abundantia cautela*. They may never have meant them to be used as the basis for distinguishing between definitions in legislation and definitions in the Interpretation Act. Prof Hofman believes that the expression “unless the context otherwise requires or unless in the case of any law it is otherwise provided therein” should be used as in the current section. In *Röntgen v Reichenberg*⁷ Coetzee J said that he thought it was desirable to advert to the true meaning of the word "context" which according to the Oxford English Dictionary, means: "Connection, structure of a writing or composition" and which is described as follows: "The whole structure of connected passages regarded in its bearing upon any of the parts which constitute it; the parts which immediately precede or follow any particular passage or 'text' and determine its meaning". In his view this time-honoured phrase which appears in the definition sections of legislation ("unless the context otherwise indicates") means that another meaning is to be given to the particular word or phrase so defined only if the parts which precede or follow that particular word or phrase indicate that it is used in a different sense or with a different meaning. He stated that one therefore has to examine the language used in the particular section to determine whether the defined word is used clearly in a different sense in any related passage which precedes or follows the one that falls to be

⁶ Hofman Julien *Comments on revision of Interpretation Act 2003*.

⁷ 1984 (2) SA 181 (W).

interpreted and, if so, whether contextually the same meaning is intended in the passage in question.⁸

2.17 It is proposed that the introductory wording to the definition in the Bill should be as follows, namely “in this Act, unless inconsistent with the context or clearly inappropriate . . .”. It is proposed that the definition provision should read as follows:

2.17.1 Interpretation of this Act

1.(1) In this Act, unless inconsistent with the context or clearly inappropriate

–

. . . (The list of definitions are set out in subclause (1).)

(2) A definition of a word or expression in subsection (1) does not apply to legislation other than this Act except as part of another provision of this Act in which that word or expression is used.

(3) This Act must be interpreted in accordance with the provisions of this Act.

2.17.2 "assigned legislation" means –

(a) a provincial Act passed by a provincial legislature in terms of a power assigned to it by national legislation, and includes a provincial Act envisaged in section 104 (1) (b) (iii) of the Constitution, but excludes a provincial Act which is original legislation;⁹ or

⁸ See *Anhym Bpk v Oudtshoorn Munisipaliteit* 1990 (3) SA 252 (C) where the court explained that it is a well-established principle of interpretation of statutes that a Court will deviate from the meaning of a word or phrase, as defined in a statute, where it is evident that the word or phrase is being used in a context which is inconsistent with its statutory definition. It is, however, not enough that the defined word or phrase might have an alternative meaning; the defined meaning must enjoy precedence where more than one meaning is possible. Deviation from the statutory definition is furthermore only warranted where the Court is satisfied that the defined meaning is not the correct meaning. The presumption that the same words and expressions, when used in the same statute, and a fortiori in the same provision, have an identical meaning is also applicable.

⁹ 104 Legislative authority of provinces

(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power –

(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

(b) to pass legislation for its province with regard to –

(i) any matter within a functional area listed in Schedule 4;

- (b) a municipal by-law passed by a municipal council in terms of a power assigned to local government by national or provincial legislation in terms of section 156 (1) (b) of the Constitution, but excludes a municipal by-law which is original or subordinate legislation;

2.17.3 “duty” includes an obligation or responsibility to do something;

2.17.4 “extrinsic information” means any report, submission, comment or any other information which sheds light on the background to, or the purpose or scope of, legislation;¹⁰

2.17.5 “function” means a matter consisting of powers and duties;

2.17.6 “intrinsic information” means any marginal note, footnote, endnote, information statement, memorandum or other information published in or together with the text of legislation aimed at explaining the text;¹¹

2.17.7 “legislation” means –

- (a) a specific legislative enactment including this Act but excluding the Constitution; or
- (b) a provision of such a legislative enactment,

whether enacted before or after the commencement of this Act;

-
- (ii) any matter within a functional area listed in Schedule 5;
- (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
- (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and
- (c) to assign any of its legislative powers to a Municipal Council in that province.
- (2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.
- (3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.
- (4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

¹⁰ See the discussion below in this Chapter on extrinsic information.

¹¹ See the discussion below in this Chapter on intrinsic information.

2.17.8 "national legislation" means an Act of Parliament, and includes –

- (a) legislation which was in force when the Constitution took effect and which is administered by the national government; or
- (b) subordinate legislation issued by a national executive organ of state in terms of a legislative power conferred by –
 - (i) an Act of Parliament; or
 - (ii) legislation referred to in paragraph (a);

2.17.9 "old order legislation" means legislation enacted before the previous Constitution took effect;¹²

2.17.10 "organ of state" has the meaning assigned to it in section 239 of the Constitution;¹³

2.17.11 "original legislation" means –

- (a) legislation enacted in terms of a power derived directly from the Constitution, and includes –
 - (i) an Act of Parliament passed in terms of section 44 of the Constitution;

¹² The 1996 Constitution defines *old order legislation* in Schedule 6 in item 1 as follows: "old order legislation' means legislation enacted before the previous Constitution took effect". The concept *old order* has lately been used in legislation such as the Mineral And Petroleum Resources Development Act 28 of 2002 which defines for example *holder* as follows – 'holder' in relation to an old order right, means the person to whom such right was or is deemed to have been granted or by whom it is held or is deemed to be held, or such person's successor in title before this Act came into effect; and 'old order right' means an old order mining right, old order prospecting right or unused old order right, as the case may be; and the Communal Land Rights Act 11 of 2004 which sets out, inter alia, the meaning of 'old order right' in or to communal land.

¹³ **239. Definitions**
 In the Constitution, unless the context indicates otherwise –
 organ of state' means –
 (a) any department of state or administration in the national, provincial or local sphere of government; or
 (b) any other functionary or institution –
 (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 (ii) exercising a public power or performing a public function in terms of any legislation,

- (ii) a provincial Act passed in terms of section 104(1)(a) or (b)(i),(ii) or (iv) of the Constitution; and
 - (iii) a by-law passed by a municipal council in terms of section 156(2) of the Constitution regarding a local government matter referred to in section 156 (1) (a) of the Constitution;
- (b) legislation enacted in terms of a power derived directly from the previous Constitution, and includes –
- (i) an Act of Parliament passed in terms of section 37 of the previous Constitution; and
 - (ii) a provincial Act passed in terms of section 126 (1) of the previous Constitution; or
- (c) any old order legislation that was regarded as original legislation before the previous Constitution took effect;

2.17.12 “**power**” includes a right, entitlement, authority or competence to do something;

2.17.13 “**previous Constitution**” means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993);¹⁴

2.17.14 “**provincial legislation**” means a provincial Act, and includes –

- (a) legislation which was in force when the Constitution took effect and which is administered by a provincial government; and
- (b) subordinate legislation issued by a provincial executive organ of state in terms of a legislative power conferred by –
 - (i) a provincial Act;
 - (ii) legislation referred to in paragraph (a); or
 - (iii) national legislation;

but does not include a court or a judicial officer.

¹⁴ Defined in the Constitution in Schedule 6, Transitional Arrangements in item 1 as follows: “‘previous Constitution’ means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).”.

2.17.15 “**provision**”, in relation to legislation, means any of the constituent parts of the legislation, including –

- (a) the short or long title of the legislation;
 - (b) the enacting statement;
 - (c) the preamble;
 - (d) the table of contents;
 - (e) any of the segments into which the text of the legislation is divided;
 - (f) a segment heading;
 - (g) a schedule or annexure to the legislation; or
 - (h) any distinct part of or phrase contained in any of the constituent parts,
- but excludes any marginal note, foot note, end note, information statement, memorandum or any explanatory or other information published in or together with the text of legislation;

2.17.16 “**subordinate legislation**” means –

- (a) a proclamation, regulation, rule, notice, determination or any other secondary legislative enactment issued by an organ of state in terms of a legislative power conferred on it by national or provincial legislation;
- (b) a municipal by-law enacted before the Constitution took effect; or
- (c) any old order legislation that was not regarded as original legislation before the previous Constitution took effect;¹⁵

2.17.17 Clause 1(2): A definition of a word or expression in subsection (1) does not apply to other legislation except as part of another provision of this Act in which that word or expression is used.

¹⁵ Up to 1996 municipal by-laws were seen as mere subordinate legislation which is no longer the case. Today municipal by-laws could either be “original legislation” (by-laws emanating from Schedules 4B or 5B of the Constitution), “assigned legislation” (by-laws emanating from additional powers assigned by national or provincial legislation) or “subordinate legislation” (by-laws from the pre-1996 era). As such

E. PURPOSE OF THE ACT

2.18 Crabbe¹⁶ describes an Interpretation Act as a dictionary for all other Acts of Parliament of a particular jurisdiction. He states that the purposes of an Interpretation Act are:

- (a) to avoid repetition of a range of words and expressions;
- (b) to secure uniformity in the drafting of legislation in a particular jurisdiction;
- (c) to help in the construction of an Act of Parliament.

2.19 Thornton¹⁷ states that there are three principal objects of interpretation statutes:

- (a) to shorten and simplify written laws by enabling needless repetition to be avoided;
- (b) to promote consistency of form and language in written laws by including standard definitions of terms commonly used;
- (c) to clarify the effects of laws by enacting rules of construction.

2.20 Thornton cautions that while the benefits of shortening particular statutes by general interpretation provisions are clear, the process cannot be taken too far without risk of defeating its own ends.¹⁸ He states that although it might be reasonable to expect the informed reader of legislation to know of or refer to the contents of the Interpretation Act, in the case of legislation of day-to-day concern to ordinary people it is desirable that legislation should be as self-sufficient as is practical. It might be necessary to repeat in particular legislation certain provisions that are already in interpretation legislation, or alternatively to include a note beneath any section in which a term defined in interpretation legislation is used.

2.21 In its report on the Interpretation Act,¹⁹ the New Zealand Law Commission stated as follows:

- Interpretation statutes have been enacted in common law jurisdictions since at least the middle of the 19th century. The reasons for them are

municipal by-laws should be treated in the Interpretation Bill according to their new constitutional status.

¹⁶ Crabbe *Legislative Drafting* 168.

¹⁷ Thornton *Legislative Drafting* 112.

¹⁸ Thornton *Legislative Drafting* 113.

¹⁹ New Zealand Law Commission Report No 17 para 8.

well established and indeed some Interpretation Acts state them expressly. One of the first, Lord Brougham's Act of 1850, said it was "An Act for shortening the language used in Acts of Parliament". They shorten particular Acts by avoiding particular Acts by avoiding repetition in each of provisions of general application:

- they provide standard or even extended definitions of commonly used words and terms;
- they provide standard sets of provisions regulating aspects of the operation of all enactments (such as commencement); and
- they imply powers additional to those expressly conferred in particular statutes.

2.22 Since 1994 the inclusion of express purpose provisions in legislation has become fairly common. For instance, section 1 of the Labour Relations Act 66 of 1995 reads as follows:²⁰

1 Purpose of this Act

The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

²⁰ Another example is the National Water Act 36 of 1998 which provides as follows in section 2:

The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors –

- (a) meeting the basic human needs of present and future generations;
- (b) promoting equitable access to water;
- (c) redressing the results of past racial and gender discrimination;
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
- (e) facilitating social and economic development;
- (f) providing for growing demand for water use;
- (g) protecting aquatic and associated ecosystems and their biological diversity;
- (h) reducing and preventing pollution and degradation of water resources;
- (i) meeting international obligations;
- (j) promoting dam safety;
- (k) managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

to provide a framework within which employees and their trade unions, employers and employers' organisations can-

- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
- (ii) formulate industrial policy; and

to promote-

- (i) orderly collective bargaining;
- (ii) collective bargaining at sectoral level;
- (iii) employee participation in decision-making in the workplace; and
- (iv) the effective resolution of labour disputes.

2.23 Section 1 of the 1999 New Zealand Interpretation Act reads as follows:

Purposes of the Act

- 1. The purposes of this Act are
 - (a) to state principles and rules for the interpretation of legislation,
 - (b) to shorten legislation by avoiding the need for repetition, and to promote consistency in the language and form of legislation.

2.24 The purpose provision of the Australian Capital Territory Legislation Act provides as follows:

Objects

- (1) The main object of [this Act](#) is to make legislation more accessible.
- (2) This is to be achieved particularly by—
 - (a) encouraging access to legislation through the internet, while maintaining access to printed legislation; and
 - (b) restating the law dealing with the 'life cycle' of legislation, improving its structure and content, and simplifying its provisions where practicable; and
 - (c) assisting users of legislation to find, read, understand and use legislation by—
 - (i) facilitating the shortening and simplification of legislation; and
 - (ii) promoting consistency in the form and language of legislation; and
 - (iii) providing rules about the interpretation of legislation; and
 - (iv) facilitating the updating and republication of legislation to ensure its ready availability.

(3) For this section, the "life cycle" of legislation includes the making (where relevant), notification, commencement, presentation and disallowance (where relevant), operation, interpretation, proof, republication, amendment and repeal of legislation and instruments made under legislation.

2.25 The purpose provision of the Bill should make it clear that its purpose is to align the interpretation of legislation with constitutional supremacy as envisioned by the Constitution; to facilitate the interpretation and understanding of legislation; and to promote uniformity in the use of language in legislation. The following purpose provision is proposed:

Purpose of this Act

2. The purpose of this Act is –
 - (a) to align the interpretation of legislation with constitutional supremacy as envisioned by the Constitution;
 - (b) to facilitate the interpretation and understanding of legislation; and
 - (c) to promote uniformity in the use of language in legislation.

F. APPLICATION OF THE ACT

2.26 This section extends the application of the Interpretation Act to all other legislation (including the Interpretation Act itself) unless the context indicates otherwise. Sections 1 and 2 of the present Act read as follows:

1 Application of Act

The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein. (Emphasis added.)

2 Definitions

The following words and expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby assigned to them respectively, namely - . . . (Emphasis added.)

2.27 A number of sections of the Interpretation Act²¹ are also qualified by reference to the "contrary intention" rather than "context". This difference has led courts to distinguish between the weight to be attached to the Interpretation Act and definitions within the legislation being interpreted.²² In the case of *Röntgen v Reichenberg*²³, Coetzee J pointed out that there is a difference between the phrase "unless the

²¹ Sections 3, 5, 6, 7, 8, 10, 12 and 14.

²² Hofman Julien *Comments on revision of Interpretation Act 2003*.

context otherwise indicates” and the phrase “unless the contrary intention appears therein”. Coetzee J explained that the use of the words “unless the context otherwise indicates” –

. . . means that another meaning is to be given to the particular word or phrase so defined only if the parts which precede or follow that particular word or phrase indicate that it is used in a different sense or with a different meaning. One therefore has to examine the language used in the particular section to determine whether the defined word is used clearly in a different sense in any related passage which precedes or follows the one that falls to be interpreted and, if so, whether contextually the same meaning is intended in the passage in question.

This approach is narrower than that employed when an Act falls to be examined to determine whether a particular word, as defined in the Interpretation Act 33 of 1957, was intended by the legislature to bear a different meaning. There is therefore a difference between contextual meaning of words in the same statute and the concept of the intention of the legislature. . . .

When one deals with a word, as defined, in the same Act, it becomes a matter of language and context, in its strict sense. There is then very little scope for legislative intention as an aid to interpretation as it is normally applied in the construction of statutes, because in that very piece of legislation its meaning is irrebuttably fixed. Only if the context in a particular passage or section of that Act contradicts that meaning, may it be departed from for the purpose of that section.

2.28 Prof Hofman²⁴ expresses the view that all references to “unless the contrary intention appears therein” should be removed from the Interpretation Act. He points out that the British Interpretation Act of 1889 consistently used the expression “unless the contrary intention appears therein” to qualify provisions. He states that it did not use the South African “unless the context otherwise indicates”. The wording of sections 3, 5, 7 and 10 of the South African Interpretation Act which are qualified by reference to the “contrary intention” rather than “context” is taken directly from sections 20, 34, 26 and 32 of the British Act. Prof Hofman states that it is not surprising to find inconsistencies of this sort in legislation drafted so closely on the British model. He is of the opinion that the drafters of the 1910 Act may have referred to both intention and context in section 1 *ex abundanti cautela*. They may never have meant them to be used as the basis for distinguishing between definitions in legislation and definitions in the Interpretation Act. Prof Hofman believes that the expression “unless the context otherwise requires or unless in the case of any law it is otherwise provided therein” should be used as in the current section.

2.29 Section 3(1) of the Canadian Federal Interpretation Act reads as follows:

²³ 1984 (2) SA 181 (W).

²⁴ Hofman Julien *Comments on revision of Interpretation Act 2003*.

3.(1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

(2) The provisions of this Act apply to the interpretation of this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act.

2.30 The South Australia Acts Interpretation Act provides as follows:

Application of this Act to Acts or statutory instruments whenever passed or made

3A. Subject to this Act, this Act applies to, or in relation to, an Act or statutory instrument whenever passed or made.

2.31 The common law presumption that a statute does not apply with retrospective effect has found wide recognition in South African case law both for purposes of statutory interpretation and constitutional interpretation.²⁵ Section 35 of the Constitution states that new offences and higher penalties may not be introduced retrospectively. The most common explanation for the existence of the presumption against retrospectivity is that a retrospective interference with vested rights or the creation of new obligations or the creation of new obligations or a creation of new duties by the legislature is not lightly assumed. There is a fear that possible unfair treatment might result. An element of legal certainty is necessary. People should know what the law is in order to be able to act accordingly.²⁶

2.32 There are exceptions to the rule against the retrospective operation of legislation. In an article titled *Federal Rules of Statutory Interpretation* published in the Harvard Law Review in 2002 Nicholas Quinn Rosenkranz stated that general interpretive statutes may be retrospective, prospective, or both.

The Dictionary Act, for example, is general both retrospectively and prospectively; it governs in both temporal directions. It is retrospective in the sense that its definitions and instructions control the interpretation of all previous acts of Congress. It obliquely amended the entire United States Code. Whatever a previous Congress may have meant by "marriage," and whatever subsequent gloss the judiciary might have put on the word, its definition was changed, at one stroke, throughout the United States Code.

2.33 The New Zealand Interpretation Act 1999 is also intended to apply retrospectively. Section 4 reads as follows:

4. Application

(1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless –

²⁵ Du Plessis LM *Re-Interpretation of Statutes* 182.

²⁶ Du Plessis LM *Re-Interpretation of Statutes*.

- (a) the enactment provides otherwise; or
 - (b) the context of the enactment requires a different interpretation.
- (2) The provisions of this Act apply to the interpretation of this Act.

2.34 This approach is the same as that of the past New Zealand Interpretation Acts. From their enactment they have all applied in general to the existing body of legislation as well as that to be enacted.²⁷ The same approach should be applied in South Africa. The application provision should provide that the Interpretation of Legislation Act applies to the interpretation of all legislation, ie existing legislation and legislation to be enacted in future. There are a substantial number of statutes that refer to the Interpretation Act. Consequential amendments need to be effected to the existing legislation that refers to the Interpretation Act. (These amendments are reflected in the Schedule to the Bill (on page 493 in Annexure A to this paper)). Existing legislation needs to be scrutinized to ensure a proper application of the proposed Interpretation of Legislation Act. In some instances it will be obvious that the proposed provisions of the Interpretation of Legislation Bill need to apply to existing provisions, such as those provisions which refer to the tabling, approval and the effect of disapproval of regulations as provided for by the present Interpretation Act.²⁸ The corresponding new proposed provisions of the Bill on the transfer of legislation, powers and functions by the President to other Cabinet members clearly also need to apply to existing legislation and consequential amendments need to be effected to those statutes.²⁹ In other instances the question will arise whether the new provisions should apply with qualifications. Existing definitions might have a narrower application than the proposed definitions of the Bill. They might, for example, have the effect of binding the State whereas under present definitions it might not be the case. Legislation which define *person* therefore need to be carefully considered to determine whether the intention ought to be to include, for example,

²⁷ New Zealand Law Commission Report No 17 para 254.

²⁸ See Schedule 1 to the Bill which sets out the legislation to be amended and repealed. Tabling is referred to in section 9(10) of the Deeds Registries Act of 1937, in section 3(5) of the International Health Regulations Act of 1974, in section 3(4) of the International Convention for Safe Containers Act, section 3(4) of the International Convention for the Prevention of Pollution from Ships Act of 1986, in section 3(4) of the Convention on Agency in the International Sale of Goods Act, in section 9(2) of the Liquor Act of 1989, in section 1(2)(b) of the Banks Act of 1990, in section 88 and 108 of the Abolition of Racially Based Land Measures Act of 1991, in section 16(2) of the Magistrates Act of 1993, in section 3 of the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993, in section 3(4)(b) of the Development Facilitation Act of 1995; and in section 5(4) of the Hague Convention on the Civil Aspects of International Child Abduction Act of 1996.

organs of State. (See further in Chapter 3 below on the discussion of the extent to which legislation binds the State.)

2.35 It is proposed that the application provision should provide that the Interpretation of Legislation Act applies to the interpretation of all legislation, and if a provision of the Act is inconsistent with any specific legislation, that provision must, to the extent of the inconsistency, be disregarded in the interpretation of that legislation; or if a provision of the Act is excluded from applying to any specific legislation, that provision must, to the extent of its exclusion, be disregarded in the interpretation of that legislation. The following application clause is proposed:

Application of this Act

- 3.(1) This Act applies to the interpretation of all legislation.
- (2) If a provision of this Act –
- (a) is inconsistent with any specific legislation, that provision must, to the extent of the inconsistency, be disregarded in the interpretation of that legislation; or
 - (b) is excluded from applying to any specific legislation, that provision must, to the extent of its exclusion, be disregarded in the interpretation of that legislation.
- (3) When interpreting legislation –
- (a) section 4 must be applied despite anything to the contrary in subsection (2) or any other legislation; and
 - (b) all other provisions of this Act must be applied but only to the extent indicated in subsection (2).

G. PRINCIPLES OF INTERPRETATION

(a) Supremacy of the Constitution

2.36 The South African Constitution is the supreme law of the land (sections 1(c) and 2). Section 2 must be read with section 7 of the Constitution, which states, inter alia, that the Bill of Rights is the cornerstone of the South African democracy, and that the state must respect, protect, promote and fulfil the rights in the Bill of Rights; with section 8(1), which states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state; and with section 8(2), which provides that the Bill of Rights applies to both natural and juristic persons. If all these provisions are read together, one principle is indisputable: the Constitution is

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Section 24A(10) of the Upgrading of Land Tenure Rights Act, 1991 which deals with the assignment and reassignment of the administration of the Act to a Minister.

supreme.³⁰ This means that the Constitution cannot be interpreted in the light of the Interpretation Act or the Roman-Dutch common law or traditional customary law. Everything and everybody, all law and conduct,³¹ all traditions³² and dogmas³³ and rules³⁴ and methods of interpretation are qualified by the Constitution.

2.37 In 1992 Devenish³⁵ articulated the reasons for a new interpretative paradigm in a future South African constitutional democracy as follows:

The constitutional doctrine of parliamentary sovereignty, the jurisprudence of positivism, and the political hegemony of Afrikaner Nationalism have greatly influenced the methodology and theory of interpretation in South Africa. Steyn's advocacy of the subjective or intention theory of interpretation facilitated a sympathetic interpretation of apartheid and draconian security legislation . . . The demise of the apartheid state and the emergence of a new political and legal order involving a negotiated and legitimate constitution with a entrenched and justiciable bill of rights must of necessity influence the process and theory of interpretation. The courts will be able, in the new constitutional and political dispensation, (which will of necessity be cleansed of all race discrimination laws) to exercise their powers to test and invalidate legislation. In order to do this all statute law will have to be interpreted to be compatible with the letter and the spirit of the constitution. This means that a

³⁰ See also *Minister of Health v New Clicks South Africa (Pty) Ltd* where Chaskalson CJ remarked as follows: [313] Counsel for the applicants . . . contended that courts are ill equipped to deal with economic matters and ought not to sit in judgment on what are essentially political decisions taken by the executive in making regulations. I do not agree that a court should refrain from examining the lawfulness of the dispensing fee simply because the decision as to what it should be involves economic and political considerations. The exercise of all public power is subject to constitutional control and it is the duty of courts if called upon to do so to determine whether or not power has been exercised consistently with the requirements of the Constitution and the law.”(Footnote omitted)

³¹ Cameron J (as he then was) put in very succinctly in *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W) at 863: “The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa.” See also Botha “Administrative justice and interpretation of statutes: a practical guide” in Lange & Wessels (eds) *The Right to Know* (2004) 14-30.

³² In *Kalla v The Master* 1995 (1) SA 261 (T) at 269C-G Van Dijkhorst J held that the traditional rules of interpretation still formed part of the “law of the land” and that they were not affected by the supreme (1993) Constitution.

³³ In *Swanepoel v Johannesburg City Council* 1994 (3) SA 789 (A) at 794B the Appellate Division referred with approval to the orthodox “plain meaning” approach to statutory interpretation: “[T]he rules of statutory [exegesis] are intended as aids in resolving any doubts as to the Legislature’s true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought.”

³⁴ Smalberger JA held in *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A) at 934J “[I]t must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it.”

³⁵ Devenish *Interpretation of Statutes* (1992) 290-1. See also *Daniels v Campbell* 2003 (9) BCLR 969 (C) at 985 where the court referred to the “...’new’ method of interpreting statutory provisions ushered in by the enactment of first the interim Constitution and, later, of the Constitution of the Republic of South Africa Act 108 of 1996.”

value-coherent theory of interpretation should become increasingly prevalent. In effect the introduction of a justiciable bill of rights is likely to herald a new methodology and theory of interpretation of statutes.³⁶

³⁶

See also GE Devenish “*African Christian Democratic Party V Electoral Commission: The New Methodology and Theory of Statutory Interpretation in South Africa*” 2006 *South African Law Journal* Vol 123 Issue 3 399 – 408 at 401 – 402:

“O’Regan J therefore commences the process of interpretation by considering the text and construing it ‘on its ordinary language’ (para 24). However, she completes the process of interpretation by adopting a holistic approach, and states that in so doing ‘[a] narrowly textual and legalistic approach is to be avoided’ (para 25). The crux of the question is whether the rule stating that payment was to be made at the Commission’s local office is ‘a peremptory provision that prevented the Commission from providing an alternative location for payment, in this case, the national office of the Commission’ (para 27).

It is clear that O’Regan J’s approach to the matter of interpretation is purposive and value-based rather than literal. Had it not been, she would have invoked the so-called intention of the legislature as the cardinal rule of interpretation, together with three other kindred rules: the primary, golden (*Grey v Pearson* (1857) 6 HL Cas 61) and mischief (*Heydon’s Case* (1584) 3 Rep 7a) rules (see Devenish op cit 28). Her rejection of the literal approach is further clear from her statement that ‘[t]he purpose of s 14 (and s 17) is to ensure that a deposit is paid by a political party . . . to establish that they have a serious intention of contesting the election. There is no central legislative purpose attached to the precise place where the deposit is to be paid’ (para 27). To do otherwise, according to O’ Regan J, would be ‘to read the provision unduly narrowly and to misunderstand its central purpose’ (ibid).

This is par excellence an objective purposive approach informed by the foundational values set out in s 1 of the Constitution, since O’ Regan J states that ‘the importance of promoting multi-party democracy and political rights of citizens should be borne in mind’ in ‘considering whether the surplus payment held by the Commission should be considered to be in compliance with the provisions of ss 14 and 17’ (para 31). The reason for the application of the purpose of the legislation, as Froneman J perceptively explained in *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) at 597F, is that the ‘intention of the legislature’ does not apply in a system of judicial review based on the supremacy of the Constitution, as the Constitution and not Parliament is sovereign. Recognition of this point effects a metamorphosis in relation to the purpose and method of statutory interpretation, which is now to test legislation against the values and principles encapsulated in the Constitution. Constitutional interpretation must be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of ordinary legislation must be directed at ascertaining whether legislation is capable of sustaining an interpretation which is compatible with the foundational values or principles of the Constitution. According to Froneman J at 597H-I, ‘[c]onstitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of the statute’.

It is therefore clear that O’ Regan J does not use the subjective concept of ‘the intention of the legislature’ as a criterion, but rather the objective concept of the purpose or design of the legislation. She comes to the conclusion that there has been compliance with the statutory provisions ‘viewed in the light of their purpose’ (para 25). In effect this is the application of the doctrine of substantial compliance (see *Commercial Union Assurance Company of South Africa, Ltd v Clarke* 1972 (3) SA 508 (A) and *Municipality of Butterworth v Bezuidenhout* 1986 (3) SA 543 (Tk) at 547E.)”

2.38 In view of the supremacy of the Constitution in general, and section 39(2) in particular, the traditional and orthodox common law-based methodology of interpretation must necessarily be adapted to be in line with the new constitutional order. Two systems of interpretation in South Africa (ie a flexible value-based methodology for constitutional interpretation, and an orthodox textual methodology based on the sovereignty of parliament) cannot be justified. Although the difference between constitutional interpretation and the interpretation of “ordinary” legislation must be acknowledged, it must be stressed that the two methodologies of interpretation should in principle be based on the supremacy of the Constitution. Unfortunately not all the courts in South Africa hold this view, and continue to follow a literalist approach to interpretation, without reference to the supreme Constitution and its values. In *Commissioner, SARS v Executor, Frith’s Estate*³⁷ the Supreme Court of Appeal reiterated the well-known traditional rule of interpretation:

The primary rule in construction of a statutory provision is (as is well established) to ascertain the intention of the legislator and (as is equally well established) one seeks to achieve this, in the first instance, by giving the words under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it.

2.39 However, the interpretation clause in the supreme South African Constitution requires more than mere passing reference to the Constitution. Section 39(2) of the Constitution (the interpretation of statutes in general) provides:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

2.40 In *Fourie and Another v Minister of Home Affairs and Others*³⁸ Cameron JA explained the effect of the Constitution in the development of the common law. He noted that the Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account the interests of justice. He stated that section 8(3) of the Bill of Rights provides that when applying a provision of the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, ‘must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that

³⁷ 2001 (2) SA 261 (SCA) at 273. See also, amongst others, *Azisa Pty Ltd v Azisa Media* CC 2002 (4) SA 377 (C) at 385J-386A and *Geyser v Msunduzi Municipality* 2003 (5) SA 19 (N) at 32D-E where it was emphasised that that the primary rule of interpretation is that the courts must give effect to the literal or grammatical meaning of the legislation, and that deviation from this rule will only be allowed in exceptional circumstances.

³⁸ 2005 (3) SA 429 (SCA).

right' (though it may develop the rules of the common law to limit the right in accordance with the limitations provision in s 36(1)) and that when developing the common law, a court 'must promote the spirit, purport and objects of the Bill of Rights' (s 39(2)). He said that taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice, and where the common law is deficient, the courts are under a general obligation to develop it appropriately. He remarked that development of the common law entails a simultaneously creative and declaratory function in which the Court perfects a process of incremental legal development that the Constitution has already ordained. Once the Court concludes that the Bill of Rights requires that the common law be developed, it is not engaging in a legislative process, nor, in fulfilling that function, does the Court intrude on the legislative domain:

[40] It is precisely this role that the Bill of Rights envisages must be fulfilled, and which it entrusts to the Judiciary. . . . Section 8(3) envisages just the situation this appeal presents - that legislation to give effect to a fundamental right is absent. In this circumstance, the Constitution deliberately assigns an imperative role to the court. Subject to limitation, it is obliged to develop the common law appropriately. And this role is particularly suited to the Judiciary, since the common law and the need for its incremental development are matters with which lawyers and Judges are concerned daily.

[41] In this case the equality and dignity provisions of the Bill of Rights require us to develop the common law. This is because legislation 'does not give effect' to the rights of same-sex couples In such a situation the incremental development that the Bill of Rights envisages is entrusted to the courts. It will be rarely, if ever, that an order pursuant to such incremental development can or should be subjected to suspension.

2.41 The Constitution does not expressly prescribe a specific methodology or approach to the interpretation of legislation. However, section 39(2) is a peremptory provision, which means that all courts, tribunals and forums must review the aim and purpose of legislation in the light of the Bill of Rights: plain meanings and so-called clear, unambiguous texts are no longer sufficient. Moreover, interpreters do not have a choice or discretion in the matter. Even before a particular legislative text is read, section 39(2) requires the interpreter to promote the fundamental values underlying the Bill of Rights. This inevitably means that the interpreter is consulting extra-textual factors before the legislative text is even considered. Factors and circumstances outside the legislative text are immediately involved in the interpretation process. In short, interpretation of statutes must start with the Constitution, and not with the

legislative text. Froneman J illustrated this influence of the supreme Constitution on statutory interpretation in *Matiso v Commanding Officer, Port Elizabeth Prison*:³⁹

The interpretive notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994.

2.42 At issue in *Zondi v MEC for Traditional and Local Government Affairs*⁴⁰ was whether provisions of the Pound Ordinance of KwaZulu-Natal were capable of being read as being consistent with the Constitution. Also at issue was the validity of provisions allowing for immediate seizure and impoundment of trespassing animals by a landowner, without notice to the livestock owner; and assessment of damages only by those with the right to vote under the repealed Electoral Act 45 of 1979 or by landowners. Ngcobo J noted that one of the qualifications for eligibility to assess damages under s 29(1) is the right to vote under the Electoral Act, and that the reference to the Electoral Act was deliberate and intended to ensure the exclusion of black people from assessing damages. The alternative qualification for assessment of damages in terms of the Ordinance was land ownership which clearly discriminated against those who are landless.

[95] But the discrimination was not just against the landless; it was against landless black people. Landless white persons were eligible for appointment because they still would qualify under the franchise requirement. By contrast landless black people could not qualify, as they were hit by the franchise requirement. Thus white people could always qualify under the section, whether as landowners or voters, while black people could not. The object and effect of the qualifications in s 29(1) were to exclude black people from the scheme of the ordinance. The franchise requirement in my view gives up the game. If it had been intended to allow all races to be eligible for the assessment of damages, the franchise requirement would not have been included in the provision.

[96] Section 29(1) is therefore manifestly and fundamentally racist in its purpose and effect. Its purpose and effect are to discriminate on the basis of race, a ground listed in s 9(3) of the Constitution. Its purpose cannot be reconciled with our Constitution, in particular, our Bill of Rights. A provision such as this, the object of which is manifestly racist, is incapable of being read in conformity with our Constitution. The object of the section is a function of the intent of those who drafted and enacted the provision at the time. The section carries the stamp of its time.

[97] Section 29(1) therefore limits the right to equality as guaranteed in s 9(3) of the Constitution. Such a limitation can hardly be reasonable or justifiable under our new constitutional order. It follows therefore that s 29(1) of the ordinance read together with, and seen against the backdrop of the impounding scheme of which it is an integral part, perpetuates an impounding scheme that is inconsistent with the right to equality guaranteed by s 9(3) of the Constitution

³⁹ 1994 (4) SA 592 (SE) at 597F.

⁴⁰ 2005 (3) SA 589 (CC).

2.43 Ngcobo J remarked as follows in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*⁴¹ where allocations of fishing quotas in terms of the Marine Living Resources Act of 1998 were at issue:

[92] I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words 'have regard to'. That approach tends to isolate s 2(j) and determine its meaning in the ordinary meaning of the words 'have regard to'. It 'ignores the colour given to the language by the context'. That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as a whole. The process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitution's goal of creating a society based on equality in which all people have equal access to economic opportunities.

[93] It has never been in issue that prior to 1994 the fishing industry was grossly unrepresentative of race and gender due to past discrimination. Nor is the need to transform the industry disputed. All of this is abundantly clear from the foundational policy of the Act. It declares that 'all natural marine living resources in South Africa . . . are assets and the heritage of all its people' and should be managed and developed for the benefit of all. This language reflects the affirmation of the founding constitutional value of equality. This same commitment to equality was affirmed in the Preamble to the Act. Control over marine living resources must be exercised 'in a fair and equitable manner to the benefit of all the citizens of South Africa', declares the Preamble.

[94] The Act recognises that it is insufficient merely to eliminate causes of past unfair discrimination but also that there is a need to redress the imbalance caused by such discrimination. As one reads on, therefore, one finds provisions that plainly show a commitment to redressing the historical imbalance and to achieving equality. Thus in granting fishing rights the Minister is required: to have regard to the need to redress historical imbalance; and to have particular regard to admitting new entrants from those communities that were previously discriminated against. In addition, provision is made for the establishment of the Fisheries Transformation Council, whose object is to facilitate transformation.

2.44 In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*⁴² Langa DP explained the constitutional foundation of the "new" interpretation methodology as follows:

Section 39(2) of the Constitution means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

⁴¹ 2004 (4) SA 490 (CC).

⁴² 2001 (1) SA 545 (CC) para 21.

2.45 Every interpreter of legislation is obliged to ensure that the purpose and spirit of the Bill of Rights are actively promoted during the interpretation and application of legislation. Furthermore, when legislation is interpreted to determine its consistency with the Constitution, the *reading down* principle applies:⁴³ where the legislation can be interpreted in more than one way the reasonable interpretation that does not conflict with the Constitution must be followed.⁴⁴

2.46 Both section 39(2) of the Constitution and the reading down principle should therefore be reflected in an interpretation clause in the new Interpretation Act to ensure compliance with the requirements of the new constitutional order. It is an unfortunate fact that not all courts, forums and tribunals in South Africa fully understand the impact of section 39(2) on everyday interpretation. Section 39(2) should not be mere window-dressing⁴⁵: it has changed the way we think about legislative texts and their interpretation. Since the 1996 Constitution is a profoundly transformative document, this new interpretive paradigm must necessarily be reflected in a new Interpretation Act. In *Baloro v University of Bophuthatswana*⁴⁶ Friedman J explained these constitutional dynamics as follows:

This Constitution has a dynamic tension because its aims and purport are to metamorphose South African society in accordance with the aims and objects of the Constitution. In this regard it cannot be viewed as an inert and stagnant document. It has its own inner dynamism, and the Courts are charged with effecting and generating changes.

⁴³ Madam Justice Lynn Smith of the Supreme Court of British Columbia noted recently in a speech entitled “Constitutional Remedies” that in the Canadian case of *M v. H.*, [1999] 2 SCR 3.) the appellate court simultaneously engaged in reading down and reading in of legislation. In that case, the challenge was to the constitutionality of section 29 of the Ontario *Family Law* which prevented same-sex couples from seeking spousal support, through the definition of the word “spouse”. The appellate court read down the words “man and woman” and read in the words “two persons” in order to bring same-sex couples within the definition. The Supreme Court of Canada held that reading in was inappropriate; although it would make the challenged section constitutional, it could render other provisions unconstitutional. The court decided that severing the offending section but suspending the remedy for six months would allow the legislature time to act. Available at http://law.hku.hk/basic_law_conference/lynnsmith.htm (accessed on 7 September 2006).

⁴⁴ Rautenbach & Malherbe *Constitutional Law* (1999) 48. See also Chapter 3 below for a detailed discussion of implied repeal of legislation and reading legislation down and reading words into legislation.

⁴⁵ See *Holomisa v Argus Newspaper Ltd* at 844 where the court referred to section 35(3) of the interim Constitution (the forerunner of s 39(2) of the 1996 Constitution) that the interpretation clause in the Constitution is “... not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values.”

⁴⁶ 1995 (4) SA 197 (B) at 241B.

2.47 Section 15A of the Australian Acts Interpretation Act refers to the Australian Constitution as follows:

15A Construction of Acts to be subject to Constitution

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the extent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

2.48 The Australian provision is designed to signal to the courts that if the outer limits of a law risk constitutional invalidity, the Parliament intends that nonetheless those parts of the law which are within power should stand.⁴⁷ Another way of putting this is that Parliament intends that its statutes be 'read down' so as to operate to the extent that they are constitutional.

2.49 The following clause setting out the supremacy of the Constitution is proposed:

Supremacy of Constitution

4. When interpreting legislation –
 - (a) the supremacy of the Constitution is paramount;
 - (b) the spirit, purport and objects of the Bill of Rights in Chapter 2 of the Constitution must be promoted; and
 - (c) any reasonable interpretation that is consistent with the Constitution must be preferred over any alternative interpretation that is inconsistent with the Constitution.

(b) Purposive and value-coherent interpretation

2.50 Express purpose provisions provide a more detailed description of the legislative purpose than, for example, the long title or preamble, but it can never be decisive in isolation. To take such a view would merely be to create a new and sophisticated version of literal interpretation. The interpreter not only has to read the legislative text as a whole, but must also consult all available and relevant internal and external information or aids (dealt with in detail below) during interpretation. Although the interpreter cannot rely on the purpose provision to ascertain the purpose of legislation, it could be used as an additional tool to find the object and purpose of the enactment. However, the inclusion of a purpose provision will also be important in a more substantive sense: It will force judges, judicial officers and all

⁴⁷ Available at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD133.htm> (accessed on 7 September 2006).

interpreters of legislation to accept a purposive and value-coherent methodology of interpretation that is fully in line with the demands of the new constitutional order (more specifically s 39(2) of the Constitution). Froneman J explained these demands as follows in *Qozeleni v Minister of Law and Order*:⁴⁸

The only material difference between that common-law approach and the present approach is the recognition that the previous constitutional system of this country was the fundamental 'mischief' to be remedied by the application of the new Constitution. That Rubicon needs to be crossed not only intellectually, but also emotionally, before the interpretation and application of the present Constitution is fully to come into its own right . . . For the Constitution, and particularly chap 3 thereof, however, to fulfil its purpose it needs to become, as far as possible, a living document, and its contents a way of thinking, for all citizens of this country. The establishment of a culture of constitutionality can hardly succeed if the Constitution is not applied daily in our courts, from the highest to the lowest.

2.51 In *Minister of Health v New Clicks South Africa (Pty) Ltd*⁴⁹ Chief Justice Chaskalson applied a purposive interpretation of the Medicines Act:

[232] Unless the Medicines Act is construed as making provision for a fee to be charged by wholesalers or distributors for their services in marketing prescription medicines, it would be impossible for them to conduct their businesses. It seems to me that, if regard is had to this, section 22G(2)(c), construed purposively in the context of its history and the Medicines Act as a whole, means that the regulations may make provision for appropriate fees to be charged by distributors and wholesalers (who may sell all categories of medicines), and also for persons who may only sell Schedule 0 medicines. If this were not the proper construction of the language construed in the context of the Medicines Act, I would in any event adopt it, in accordance with the principle in *Venter v R* which allows a court to depart from the clear language of a statute where that would otherwise lead

'to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account'.

⁴⁸ 1994 (3) SA 625 (E) at 635 and 637. See also *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 600 where Marais JA, Farlam JA and Brand JA stated the following:

[12] We cannot agree with the approach of the Court a quo to the interpretation of the [Apportionment of Damages] Act [34 of 1956]. It entailed isolating s 1(1)(a) and attempting to accommodate contractual claims within what was said to be the plain language of the provision. Such an approach ignores the colour given to the language by the context of the Act read as a whole and by the long title, the use of the expression contributory negligence, and the other considerations raised in this judgment. The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D - E:

'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'

⁴⁹ 2006 (1) BCLR 1 (CC) and 2006 (2) SA 311 (CC) par 232.

2.52 In *Mgijima v Eastern Cape Appropriate Technology Unit and Another*⁵⁰ Van Zyl J remarked as follows on the Labour Relations Act and purposive interpretation:

Consideration must also, in my view, in this regard be given to the provisions of s 3 of the Act, which directs any person applying the Act to interpret its provisions (a) to give effect to its primary objects . . .

According to Du Toit et al (op cit at 43), the interpretation clause in the Act sanctions explicitly a purposive approach to the interpretation of the Act. At 44 the authors state that:

'By explicitly endorsing a purposive approach, the Act modifies the common law of interpretation of statutes, at least in so far as the interpretation of this Act is concerned. No longer are the objects of the statute simply textual aids to be employed where the language of the statute is ambiguous or obscure. Rather, they must inform the interpretive process from its inception. The Act, in other words, must be read in the light of its objects.

A further effect of the interpretation clause is the privilege of the objects of the Act in the hierarchy of "rules" governing the interpretation of statutes. Thus, where a particular provision of the Act is capable of two mutually destructive interpretations, one which advances the objects of the Act, and the other which respects a "presumption" of interpretation (for example that the Legislature did not intend to alter the common law more than is necessary), the courts must, all other things being equal, follow the mandate given to them in the interpretation clause and adopt the former interpretation.

The purposive approach is not unfamiliar to our labour law jurisprudence. The industrial court and Labour Appeal Court employed it liberally in their construction of the Labour Relations Act, particularly when giving content to the unfair labour practice concept.'

Applying a purposive approach and reading s 157(1) in the light of the objects of the Act, I agree with the conclusion reached by Van Dijkhorst J in the IMATU case supra, namely that it was the clear intention of the Legislature to create specialised fora to deal with labour-related matters wherever the Act provides for specific dispute resolution procedures.

2.53 Lord Johan Steyn recently discussed the interpretation of legal texts and, amongst others, literalism and purposive interpretation:⁵¹

The third proposition relates to the generalisation that there has been a shift from literal interpretation to purposive interpretation. What is literalism? This is straightforward. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered to him. He shed no blood. He buried them all alive. That is literalism. It has generally no place in modern law. On the other hand, it would be an over-simplification to say that there has been a homogenous shift towards a purposive interpretation of all legal texts. Much depends upon the particular text. A comparatively strict interpretation of a documentary credit issued in an international sale may be necessary because a third party (the bank) must be able to rely on a meaning gathered largely within the four corners of the text.

⁵⁰ 2000 (2) SA 291 (TkH) at 306.

⁵¹ In the John Lehane Memorial Lecture 2002 on 25 September 2002 at the University of Sydney on the subject "The Intractable Problem of The Interpretation of Legal Texts" available at <http://www.austlii.edu.au/au/journals/SydLRev/2003/1.html> (accessed on 7 September 2006).

In a network of contracts governing a construction project, parties ought generally to be able to rely on the obvious meaning of the interlocking texts. Similarly, fiscal legislation may sometimes require a stricter approach than social welfare legislation. By contrast, in a consumer transaction the purchaser of a fridge in a consumer sale may be entitled to a more generous interpretation of a right to reject a fridge which cannot make ice.

The fourth proposition I have already foreshadowed. Interpretation is not a science. It is an art. It is an exercise involving the making of choices between feasible interpretations. Structural arguments must be considered. Competing consequentialist arguments must be taken into account. Broader policy considerations may be relevant. Educated intuition may play a larger role than an examination of niceties of textual analysis. The judge's general philosophy may play a role. Ultimately, however, a judge must be guided by external standards in making his choice of the best contextual interpretation. He must put aside his subjective views and consider the matter from the point of view of the reasonable person.

2.54 Section 12 of the Canadian Federal Interpretation Act sets out a liberal framework for interpretation. All statutes and regulations are to be interpreted in a manner that best ensures that the object of the enactment is met. The Canadian Supreme Court remarked as follows in *R v Gladue*:⁵²

25 As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment . . .

26 Also of importance in interpreting federal legislation is s. 12 of the federal *Interpretation Act*, which provides:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

2.55 In *Chieu v. Canada (Minister of Citizenship and Immigration)*⁵³ the Canadian Supreme Court considered the meaning of the phrase "having regard to all the circumstances of the case":

Did Parliament intend it to be broad enough to allow the Immigration Appeal Division to consider potential foreign hardship when deciding whether to quash or stay a removal order made against a permanent resident? This Court has stated on numerous occasions that the preferred approach to statutory interpretation is that set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

. . .

⁵² [1999] 1 SCR 688.

⁵³ [2002] 1 SCR 84.

28 While the interpretive factors enumerated by Driedger need not be applied in a formulaic fashion, they provide a useful framework through which to approach this appeal, given that the sole issue is one of statutory interpretation. However, I note that these interpretive factors are closely related and interdependent. They therefore need not be canvassed separately in every case.

1 Grammatical and Ordinary Sense

29 An ordinary reading of "all the circumstances of the case" leads to a broad interpretation of s. 70(1)(b). The first consideration is that these words appear in a provision establishing a discretionary or equitable jurisdiction. The words do not provide detailed guidelines as to how this discretionary jurisdiction is to be exercised, but instead leave the scope of the discretion open-ended.

30 The second factor favouring a broad reading of s. 70(1)(b) is the grammatical sense of the phrase "all the circumstances of the case". The word "all" is defined by the *Concise Oxford Dictionary* (8th ed. 1990), at p. 29, as "entire number of" or "greatest possible". In this context, it would therefore mean considering the greatest possible number of factors relevant to the removal of a permanent resident from Canada. It is evident that one such factor is the conditions an individual would face upon removal. This is a natural consideration, because it is difficult to decide if it would be equitable to remove an individual from Canada without engaging in a comparative analysis of the conditions the individual would face if allowed to remain in the country and the conditions he or she would face if removed to a foreign state. For instance, an individual with two relatives in Canada but no relatives in the likely country of removal is in a different position from an individual with two relatives in Canada but an extensive family network in the likely country of removal. Similarly, an individual whose likely country of removal is at peace is in a different situation from an individual whose likely country of removal is in the midst of a civil war.

...

34 The grammatical and ordinary sense of the words employed in s. 70(1)(b) is not determinative, however, as this Court has long rejected a literal approach to statutory interpretation. Instead, s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

2.56 *R. v. Hasselwander*⁵⁴ provides further clarity on the application of the purposive approach applied in Canada:

This Court, in *R. v. Covin*, [1983] 1 S.C.R. 725, determined that a purposive approach should be taken in interpreting the definition of "firearm". In that case, the issue was whether a pellet gun from which several essential parts were missing could be considered a firearm within the meaning . . . of the *Criminal Code*. The definition of "firearm" in s. 84(1) includes "anything that can be adapted for use as a firearm". In deciding whether the instrument in question fell within the definition of a "firearm", Lamer J., as he then was, employed the purposive approach to determine the acceptable amount of adaptation required in order for something to be considered a firearm. At page 729 of that case Lamer J. stated:

In my view the acceptable amount of adaptation and the time required therefore for something to still remain within the definition is dependent upon the nature of the offence where the definition is involved. The purpose of each section should be identified and the amount, nature and the time span for adaptation determined so as to support Parliament's endeavour when enacting that given section.

⁵⁴

[1993] 2 SCR 398.

It is equally appropriate to utilize the purposive approach in order to determine the meaning of the phrase "capable of firing bullets in rapid succession during one pressure of the trigger".

3. *The Appropriate Interpretation of the Definition of Prohibited Weapon*

What then, should "capable" mean as it is used in the s. 84(1) definition of prohibited weapon? It should not be restricted to the narrow meaning of immediately capable. Such a definition would mean that the simple removal of a part which could be replaced in seconds would take the weapon outside the definition. This surely could not have been the intention of Parliament. If it were, the danger from automatic weapons would continue to exist just as strongly as it did before the prohibition was enacted.

The word "capable" as it is defined in the *Oxford English Dictionary* (2nd ed. 1989) includes an aspect of potential capability for conversion. It is defined as:

3. Able or fit to receive and be affected by; open to, susceptible
5. Having the needful capacity, power, or fitness for (some specified purpose or activity).

From this, it is clear that "capable" does in fact include a potential for conversion. It is then fair and reasonable to interpret the definition of "prohibited weapon" as including a gun that has the potential to be readily converted to a fully automatic weapon.

. . . It is the proper role of the court to define the meaning of "capable" as it is used in the definition of "prohibited weapon" in s. 84(1). In my view, it should mean capable of conversion to an automatic weapon in a relatively short period of time with relative ease. There can be no doubt that on the findings of the Provincial Court judge, which are well supported by the evidence, this weapon comes within that definition.

Nor can it be a valid defence that a collector such as Mr. Hasselwander would never convert the weapon. Collectors are attractive targets for thieves who are seeking these weapons with every intention of using them or selling them to others who wish to make use of them. Members of the community are entitled to protection from the use of automatic weapons. This can be accomplished by giving the word capable given the definition set out above.

Major J. notes that a conviction for possession of a prohibited weapon under s. 90 of the *Criminal Code* may now result in imprisonment for a term of up to ten years. (In 1989, the maximum term of imprisonment was five years.) In his view, the potential of imprisonment requires a strict construction of the statute. With respect, I disagree. Automatic weapons or those which may be easily and quickly converted to automatic status have such potential for killing and indeed, mass killing, that their possession may properly bring consequences of imprisonment. It is because of their lethal potential that the definition of "prohibited weapon" requires a reasonable interpretation based upon the wording of the section and the aim or purpose of the legislation. Furthermore, s. 90 permits the Crown to proceed by way of indictment or summary conviction. Therefore, an individual who is found to be in possession of a weapon which he may not have realized was prohibited may be charged with a summary offence and thus, if convicted, be eligible for an absolute discharge. Thus, I do not think that a strict interpretation of para. (c) of the definition of "prohibited weapon", as it stood at the time of the trial, was appropriate.

Nor can I agree with Justice Major's contention that the latest amendment to the section indicates that the word "capable" should be given a narrow or strict interpretation. Rather, it should be viewed as a response to the perceived need to remove any doubt as to the meaning of the word.

The reasoning in other cases support the position that I have taken. . . .

Thus it appears that in the majority of the decided cases the courts have properly considered the purpose of the legislation. That purpose is to protect the public from these dangerous weapons that are designed specifically to kill or maim people. Where a weapon can be quickly and readily converted to automatic status, then that weapon must fall within the definition of "prohibited weapon". To come to any other conclusion would undermine the very purpose of the legislation.

2.57 In 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, Madam Justice L'Heureux-Dubé discussed legal interpretation as follows:⁵⁵

170 The fact that this Court is wavering at random between the former "plain meaning" method and the "modern" contemporary method introduces uncertainty into the law as far as this methodological point is concerned. What method should jurists use? As things stand at the moment, the answer is at best obscure. If the courts randomly choose one of the two interpretation methods depending on the desired result, then the activity of legal interpretation is reduced to an arbitrary exercise whose result is unpredictable. In so far as such an undesirable situation prevails, the comment on methodology made by Philp J.A., writing for a unanimous panel of the Manitoba Court of Appeal in *Judges of the Provincial Court (Man.) v. Manitoba* (1995), 102 Man. R. (2d) 51, at p. 69, is appropriate:

The . . . argument is a Humpty-Dumpty-like exercise in making words mean what they want them to mean ("When I use a word", Humpty-Dumpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less." Lewis Carroll, *Through the Looking-Glass*, Chapter 6). [Emphasis added.]

171 . . . A Humpty-Dumpty-like interpretation exercise is actually nothing more than an interpretation based on random or vague rules or solely on intuition or unrationalized impressions, or one that fails to consider the underlying premises of legal reasoning. It goes without saying that the courts must avoid this type of interpretation exercise.

172 In light of the dynamic development of our law, the plurality of perspectives on legal analysis, the methodological problems presented by the "plain meaning" and the growing international recognition of all these factors, I believe that it is time to abandon the former "plain meaning" method in Canada and, from now on, to use the "modern" method as the basic approach to legal interpretation. That is what I now intend to do in the case at bar. . . .

2.58 Section 5 of the New Zealand Interpretation Act states that the meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context. The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment. Examples of those indications are preambles, the analysis, a table of contents, headings to parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment. Section 15AA of the Australian Acts Interpretation Act states that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

2.59 Anne Winckel explains that the 1981 amendment to the Australian Commonwealth *Acts Interpretation Act* which inserted section 15AA(1) into the Act requires that a purposive approach to statutory interpretation be preferred by courts.⁵⁶ She notes that all States and the Australian Capital Territory have enacted similar, if not identical, provisions. She states that section 15AA can be interpreted in two ways: either to represent the equivalent of the ‘mischief rule’ of interpretation — allowing the purpose to be considered where an ambiguity exists — or establishing that the Act’s purpose is to be considered even if the enactments are clear. It is this second broader understanding that seems to be consistent with the current approach of the High Court such as Dawson J’s analysis of the equivalent Victorian provision in *Mills v Meeking*⁵⁷ which is an example of the view that the purpose of an Act ought be considered even in the absence of an ambiguity who explained that the interpretive approach imposed by s 35 of the *Interpretation of Legislation Act 1984* (Vic), ‘needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.’⁵⁸

2.60 Anne Winckler notes that South Australia is one State which possibly could be found to have a more limited approach to interpretation, as the South Australian equivalent to s 15AA of the *Acts Interpretation Act 1901* (Cth) begins with the words ‘where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose’. This phrase could suggest that an ambiguity must already be present before the context or purpose of the Act becomes relevant. She remarks that the Australian High Court has affirmed that the context of the whole Act is significant to determining the ordinary meaning of the words construed. Pointing out that sections 33 and 34 of the *Interpretation Act 1987* (NSW) are equivalent to the Commonwealth’s sections 15AA and 15AB, she states that in

⁵⁵ [1996] 3 SCR 919.

⁵⁶ “The Contextual Role of a Preamble in Statutory Interpretation” available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MULR/1999/7.html> (accessed on 7 September 2006).

⁵⁷ (1990) 169 CLR 214, 235.

⁵⁸ She notes that the High Court’s approach to interpretation in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 is also consistent with the principle that an ambiguity is not needed for consideration to be given to the purpose of an Act, or the mischief which the Act aims to remedy: “[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy.

Saraswati v The Queen,⁵⁹ the High Court had to consider the interpretation of the *Crimes Act 1900* (NSW), and in so doing McHugh J commented that ss 33 and 34 of the *Interpretation Act 1987* (NSW) confirmed that, “it is always necessary in determining ‘the ordinary meaning’ of a provision ... to have regard to the purpose of the legislation and the context of the provision as well as the literal meaning of the provision.” She also says that McHugh J further explained in this case that the purpose of legislation could sometimes only be discovered by an ‘examination of the legislation as a whole’.

2.61 The Legislation Act of 2001 of the Australian Capital Territory deals as follows with *working out* the meaning of legislation:

137 Purpose and scope of chapter 14

- (1) The purpose of this chapter is to provide guidance about the interpretation of Acts.
- (2) This chapter is not intended to be a comprehensive statement of the law of interpretation applying to Acts.
- (3) In particular, this chapter assumes that common law presumptions operate in conjunction with this chapter.
- (4) Subsection (3) also applies to common law presumptions that come into existence after the commencement of this chapter.

138 Meaning of working out the meaning of an Act

In this part:

“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.

139 Interpretation best achieving Act's purpose

- (1) In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.
- (2) This section applies whether or not the Act's purpose is expressly stated in the Act.

140 Legislative context

⁵⁹ (1991) 172 CLR 1.

In working out the meaning of an Act, the provisions of [the Act](#) must be read in the context of [the Act](#) as a whole.⁶⁰

2.62 The North Dakota Code sets out the Rules of Interpretation as follows:

1-02-39. Aids in construction of ambiguous statutes. If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble.

2.63 Section 311.023 of the Texas Code Construction Act provides as follows on statute construction aids.

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:(1) object sought to be attained;(2) circumstances under which the statute was enacted;(3) legislative history;(4) common law or former statutory provisions, including laws on the same or similar subjects;(5) consequences of a particular construction;(6) administrative construction of the statute; and(7) title (caption), preamble, and emergency provision.

⁶⁰ The Act provides the following examples:

1 The long title of an Act provides that it is an Act to give certain benefits to the holders of pensioner cards. [Section 4](#) provides 'This Act applies to a holder of a pensioner card'. [Section 22](#) provides that the commissioner may grant 'a person' an exemption from payment of rates. The Act does not contain a definition of 'person'. [Section 22](#) must be read in the context of [the Act](#) as a whole so that the commissioner may only grant exemptions to people who are holders of pensioner cards.

2 The *Drug Testing Regulation 2001* (made under the *Drug Testing Act 2000* (hypothetical)), section 6 contains the following heading:

6 Corresponding law—Act, s 100, def *corresponding law*

The heading indicates that the section has been made for the definition of ***corresponding law*** in the *Drug Testing Act 2000*, section 100.

3 Section 12(1) of a subordinate law refers to 'an order under the [Crimes Act 1900](#) , section 402. No other kind of order is mentioned in the section and the word 'order' is not otherwise defined in the subordinate law. Subsections (2), (4), (7) and (9) of the same section, which only refer to 'the order', are to be understood as referring to the order mentioned in subsection (1).

2.64 In Canada in *Delisle v Canada (Deputy Attorney General)*⁶¹ L'Heureux-Dubé J remarked that the contextual approach to Charter analysis must also take into account the history of the need for government intervention to make effective the rights of workers to associate together. She agreed with her colleagues that both intrinsic and extrinsic sources are admissible and significant in determining legislative purpose and effects, and with their comments on the fact that an invalid purpose is sufficient to find a violation of a Charter right. Baudouin JA said in *Delisle* that in determining the purpose of an impugned legislative provision, a court should look to intrinsic and admissible extrinsic sources regarding the provision's legislative history and the context of its enactment:⁶²

In some cases, it is possible for a court to determine the purpose of a particular provision by looking solely to sources intrinsic to the legislation itself, for example by considering the provision in light of the surrounding provisions, including definitions, analogous provisions, and the organization of the Act as a whole. Looking to intrinsic sources may be particularly important where there is little admissible extrinsic evidence of legislative purpose. However, in all cases a court is entitled to consider admissible extrinsic sources if they exist, and indeed is duty-bound to consider such evidence where it is presented by the parties. This accords with the modern contextual approach to statutory interpretation that has been endorsed by this Court. It accords, too, with the contextual manner in which this Court has interpreted and applied the *Charter*. Indeed, in *Charter* cases where a claimant asserts that a law has an invalid purpose, it is to be expected that most if not all of the relevant evidence of legislative purpose will be extrinsic to the statute *per se*.

2.65 The new purposive and value-coherent methodology of interpretation of legislation (as required by the Constitution), has been applied by some South African courts since 1994. The following *dictum* from *Minister of Land Affairs v Slamdien*⁶³ illustrates the new approach very well:

The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;

⁶¹ [1999] 2 SCR 989 available at <http://www.canlii.org/ca/cas/scc/1999/1999scc45.html> (accessed on 7 September 2006).

⁶² See also *R v Gladue* [1999] 1 S.C.R. 688 available at <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-688/1999rcs1-688.html> (accessed on 7 September 2006).

⁶³ 1999 (4) BCLR 413 (LCC) para 17.

- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision . . .

2.66 This new interpretation paradigm entails value judgements and obliges courts to adopt a different attitude towards text, context and constitutional values, as explained by Justice Mokgoro in *S v Makwanyane*:⁶⁴

With the entrenchment of the Bill of Fundamental Rights and Freedoms in a supreme Constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context, in which the text was adopted and which help to explain the meaning of the text. The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end, common values of human rights protection the world over and foreign precedent may be instructive.

2.67 Du Plessis & Corder⁶⁵ discuss five very practical aspects or techniques of statutory (and constitutional) interpretation which are complementary and should be applied in conjunction with one another.⁶⁶

⁶⁴ 1995 (3) SA 391 (CC) at 498H-I. See also Ngcobo J's remarks in his concurring judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) (emphasis added): "The starting point in interpreting **any** legislation is the Constitution ... first, the interpretation that is placed upon a statute must where possible be one that would advance **at least an identifiable value enshrined in the Bill of Rights**; and second, the statute must be capable of such interpretation" (para 72); legislation "... must be interpreted purposively **to promote the spirit, purport and objects of the Bill of rights**" (para 80); and "... the emerging trend in statutory construction is to have regard to the context in which words occur, even where the words to be construed are clear and unambiguous" (para 90).

⁶⁵ Understanding South Africa's Transitional Bill of Rights 73-74. See also Du Plessis (note 1 above).

⁶⁶ In *Levack v The Regional Magistrate, Wynberg* 1999 (2) SACR 151 (C) at 155 Davis J also alluded to a multi-faceted and comprehensive interpretation methodology: "In following this [purposive] approach to interpretation it is as well to emphasise that this is but one of a repertoire of approaches which a court may employ in order to give meaning to the text. As Frank Michelman has written, albeit within a constitutional context, various interpretative approaches ' cannot be alternatives, among which a judge chooses; they are multiple poles in a complex field of forces, among which judges navigate and negotiate. I don't believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors: perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated social consequences, perceived and intuited normative theories or unifying visions.' 1995 (11) *SAJHR* 477 at 483." The Constitutional Court also accepted, albeit implicitly, these interrelated facets of interpretation, as illustrated by Mahomed J in para 266 of the *Makwanyane* case (supra): "What . . . is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the

(i) Grammatical interpretation

2.67.1 This aspect acknowledges the importance of the role of the language of the legislative text. It focuses on the linguistic and grammatical meaning of the words, phrases, sentences and other structural components of the text.

(ii) Systematic (or contextual) interpretation

2.67.2 This aspect is concerned with the clarification of the meaning of a particular legislative provision in conjunction with the legislative text as a whole, as well as all other contextual considerations.

(iii) Value-coherent (teleological) interpretation

2.67.3 This entails a value-coherent construction – the aim and purpose of the provision must be ascertained against the fundamental constitutional values. The fundamental values in the Constitution form the foundation of a normative jurisprudence during which legislation and actions are evaluated against (and filtered through) those constitutional values.⁶⁷

(iv) Historical interpretation

2.67.4 This aspect refers to the use of the “historical” context of the legislation, including factors such as the circumstances that gave rise to the adoption of the legislation (mischief rule) and preceding discussions.

problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.”

⁶⁷ In *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) para 46 Sachs J explained the teleological dimension of interpretation (emphasis added): “The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus **not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct . . . [W]e should not engage in purely formal or academic analysis, nor simply restrict ourselves to ad hoc technicism**, but rather focus on what has been called

(v) **Comparative interpretation**

2.67.5 This refers to the process during which the court examines international law and the constitutional decisions of foreign courts. This must be done with due regard to the unique domestic context of the South African Constitution.⁶⁸

2.68 It is proposed that the Bill should provide that when interpreting legislation the meaning of a provision in that legislation must be determined by its language and its context in the legislation read as a whole.⁶⁹ Furthermore, any reasonable interpretation of a provision that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation of that provision that is inconsistent with the purpose and scope of that legislation. The constituent parts of a provision to be taken into account in determining the meaning of legislation are the short or long title of the legislation, the enacting statement, the preamble, the table of contents, any of the segments into which the text of the legislation is divided, a segment heading, a schedule or annexure to the legislation, or any distinct part of or phrase contained in any of the constituent parts, but not any marginal note, foot note, end note, information statement, memorandum or any explanatory or other information published in or together with the text of legislation. A provision in assigned or subordinate legislation must be interpreted also in the context of its enabling legislation.

2.69 The following provision is proposed on the determination of the meaning of legislation:

“provision”, in relation to legislation, means any of the constituent parts of the legislation, including –

- (a) the short or long title of the legislation;

the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.”

⁶⁸ See Chaskalson P in *S v Makwanyane* para 39: “In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”

⁶⁹ See *S v Yolelo* 1981 (1) SA 1002 (A) where the court remarked that an interpretation of a statutory provision which is simply based on the division of a provision into paragraphs must yield to an interpretation based on the intention of the Legislature which is clearly expressed if the provision is read as a whole. The question whether the rule of English law that, in the interpretation of statutory provisions, the division thereof into paragraphs must, just like punctuation, be ignored applies in our law was not decided.

- (b) the enacting statement;
- (c) the preamble;
- (d) the table of contents;
- (e) any of the segments into which the text of the legislation is divided;
- (f) a segment heading;
- (g) a schedule or annexure to the legislation; or
- (h) any distinct part of or phrase contained in any of the constituent parts,

but excludes any marginal note, foot note, end note, information statement, memorandum or any explanatory or other information published in or together with the text of legislation;

Determination of meaning of legislation

5.(1) When interpreting legislation –

- (a) the meaning of a provision in that legislation must be determined by –
 - (i) its language; and
 - (ii) its context in the legislation read as a whole; and
- (b) any reasonable interpretation of a provision in accordance with paragraph (a) that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation of that provision that is inconsistent with the purpose and scope of that legislation.

(2) A provision in assigned or subordinate legislation must for purposes of subsection (1) (a) be interpreted also in the context of its enabling legislation.

Reading legislation as a whole

6. When reading legislation as a whole in order to determine the meaning of a provision –

- (a) all the provisions of the legislation must be taken into account, including –
 - (i) their sequence, segmentation and punctuation; and
 - (ii) the general organisation and structure of the legislation;
- (b) any provisions of the legislation that have been repealed may be taken into account;
- (c) any amended provisions of the legislation as they read before their amendment may be taken into account; and
- (d) any intrinsic information may be taken into account, but only as an opinion on the information it conveys.

(c) **Legislation to be interpreted in the light of changing circumstances**

2.70 Steyn⁷⁰ states that time-bound words and expressions, as well as archaisms encountered especially in older statutes, should be understood in accordance with the usage and linguistic conventions at the time the statute came into existence.

2.71 The Canadian Federal Interpretation Act provides that the law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning. Section 7 of the Interpretation Act of British Columbia and section 21 of the Acts Interpretation Act of South Australia contain a similarly worded provision.⁷¹

2.72 Keeshan and Steeves⁷² state in their commentary on the Canadian Federal Interpretation Act that the law is not static, and the provisions of all Acts are to be applied to circumstances as they arise in the present. They note that this presumption avoids the need for the constant and express amendment of statutes to take into account changing conditions and permits the courts to apply judicial interpretation consistent with contemporary events. They refer to the case of *R v McMullen*⁷³ as an example of the application of this principle. The court held that the fact that computerized bank records could not have been in the contemplation of Parliament when section 29 of the Canada Evidence Act was first enacted in 1927 was no reason to deny the provision's application to computer records today if such evidence reasonably came within its language and purpose. The court held that the section should be considered as "always speaking" and "be applied to the circumstances as they arise" in accordance with section 10 of the Interpretation Act.

2.73 The New Zealand Interpretation Act provides that an enactment applies to circumstances as they arise. Section 6 reflects the "dynamic" or "ambulatory" approach to interpretation that was contained in section 5(d) of the Acts Interpretation Act 1924. Under this approach, the enactment is considered as always speaking and,

70 *Uitleg van Wette* 7.

71 Act deemed always speaking.

21. Every Act will be considered as speaking at all times, and every enactment, whether expressed in the present or the future tense, will be applied to the circumstances as they arise, so that effect may be given to each Act and every provision according to its spirit, true intent and meaning.

72 *The 1996 Annotated Federal and Ontario Interpretation Acts* 8.

73 (1979), 25 O.R. (2d) 301, 100 D.L.R. (3d) 671 (Ont.C.A.).

regardless of the passage of time, an old enactment may be applied to new circumstances. This is in contrast to the "historical" or "static" approach to interpretation, which required legislation to be interpreted in accordance with its meaning at the time of enactment. For example, the word "document" in a 1963 statute might not, under the historical approach, necessarily include a videotape.⁷⁴ The New Zealand Law Commission recommended⁷⁵ that a clause be inserted in the draft Interpretation Bill providing that an enactment applies to circumstances as they arise so far as its text, purpose and context permit. The New Zealand Law Commission stated that this clause would remove any doubt over the legitimacy of a court's taking a dynamic rather than static view of legislation where it is appropriate. It would also reduce the need for miscellaneous small amendments "necessitated by the courts' perceived inability to take appropriate account of change when applying and interpreting the law",⁷⁶ and regardless of the passage of time, an old enactment may be applied to new circumstances.⁷⁷

2.74 The Irish Law Reform Commission recommended a statutory provision which would authorise a court to make allowances for any changes which have occurred since the Act was passed, without going so far as to encroach on the province of the legislature.⁷⁸ They explained that in choosing this formulation, the Commission had

⁷⁴ *Guidelines on Process & Content of Legislation 2001 edition* available at http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html (accessed on 7 September 2006). The earlier version of this provision in the Acts Interpretation Act 1924 (section 5(d)) contained the indicative phrase that the law "shall be considered as always speaking". This recognises the fact that many Acts have been in force for many years and operate today in a society very different from those in which they were originally enacted. Sometimes Judges are required to engage in a fairly liberal interpretation to ensure that the purpose of an old Act is fulfilled in today's different conditions. Thus, it has been held that a computer programme is a "document" for the purposes of the fraud provisions in the Crimes Act 1961, that computer hacking is "damage to property"; that Internet images are "photographs", and that the phrase "member of the family" includes a gay partner. If courts were unable to take such an approach, Parliament would need constantly to be amending old Acts. Nevertheless, there are limits on the updating or "ambulatory" approach. The activity under scrutiny must be within the purpose of the original legislation; the words of the Act must be able to bear the meaning, albeit a very liberal one, which is placed upon them; and the interpretation given must not be such a dramatic change in the law that it should have been left to Parliament rather than the courts.

⁷⁵ New Zealand Law Commission Report No 17 para 75.

⁷⁶ New Zealand Law Commission Report No 17 para 86.

⁷⁷ New Zealand Legislative Advisory Committee *Guidelines on Process and content of Legislation 2001 edition* available at http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2001/chapter_3.html (accessed on 7 September 2006)

⁷⁸ *Statutory Drafting and Interpretation, Report on: Plain Language and the Law* (LRC 61-2000).

borne in mind the cases where this issue has arisen and they have also considered the provision contained in the New Zealand Interpretation Act. However, because they considered that the New Zealand provision was flawed, and also in the interests of consistency with the general provision for a purposive approach proposed in their Report, they recommended a new formulation, which drew on the remarks of Hamilton CJ in the *Keane* case.⁷⁹ They regarded Bennion's analysis, given judicial approval in *Keane*, as a good summary of desirable law. They explained that they would borrow from it the formulation: "the interpreter is to make allowances for any changes which have occurred, since the Act's passing in law, social conditions, technology, the meaning of words, and other matters." The Irish Commission pointed out that as regards the second element of the provision there are two options, the first was Bennion's version: "[I]f, however, the changed technology produces

⁷⁹ *Keane v. An Bord Pleanála* [1997] 1 IR 184 dealt with the issue of updated construction of the wording of statutes. The case concerned an appeal by the plaintiff from a decision of the board to grant planning permission for the erection of a mast as part of a new type of radar system on the coast of County Clare. The case turned on whether the Commissioners of Irish Lights were empowered to erect the mast under [sections 634 and 638](#) of the [Merchant Shipping Act, 1894](#), which gave them power to erect "lighthouses, buoys or beacons". In the Supreme Court, in a three : two majority decision, Hamilton CJ held that 'beacon', in the ordinary sense in which the word is used today, would include a radar system, but the meaning of 'beacon' in [the Act](#) should be assessed by reference to the intention of the legislators who created the 1894 Act. In other words, he seemed to make a distinction between a 'legal' literal meaning, decided by reference to normal language usage at the time of enactment, and an 'ordinary' literal meaning, as defined by current linguistic norms. He declared himself in favour of a literal interpretation, but referred to the true original intention of the legislature. Blayney J and Barrington J concurred, although they took slightly different approaches. O'Flaherty J, however, in his dissenting judgment, addressed the issue of whether, even if 'beacon' in its current, ordinary sense does not include radar, the wording should be reconstrued so as to include it. He stated: "[W]e do no injustice to anyone if we allow [the Act] to operate in the light of new discoveries in science or elsewhere which can be taken to be within the ambit of what the particular Act seeks to achieve." He quoted a passage from Maxwell where the latter stated that the language of a statute was generally extended "to new things which were not known and could not have been contemplated when [the Act](#) was passed, when [the Act](#) deals with a genus and the thing which afterwards comes into existence was a species of it." O'Flaherty J went on to state that it would be asking too much of the legislature to be on the alert to amend old legislation to take account of every new development. The guiding principle here, in his view, was that "statutes should be put to work, not let work to rule". Denham J referred to the Oxford English Dictionary definition of 'beacon' as including "a radio transmitter whose signal helps fix the position of a ship or aircraft". She also noted that the definition of 'buoys and beacons' in the Act stated that "all other marks of the sea" were included. While she emphasised that dictionary definitions were distinct from legal meanings, the test she applied was whether there was any pressing reason why the ordinary meaning should not apply. The Irish Commission remarked that it was noteworthy, however, that her understanding of the 'ordinary meaning in this case differed from that of Murphy J. Denham J also made reference to the aforementioned cases of *McCarthy v. O'Flynn* and *Derby & Co. v. Weldon (No.9)*, but she invoked them to lend support to the wider meaning which she favoured, as in her view, the word 'beacon' was sufficiently generic.

something which is altogether beyond the scope of the original enactment, the Court will not treat it as covered." The second possibility was the proposal of the New Zealand Law Reform Commission: "An enactment applies to circumstances as they arise so far as its text, purpose and context permit."

2.75 The Irish Commission preferred this second alternative because it made it clear that in setting the limits of this 'updated construction' approach, a court should take into account the 'text, purpose and context' of the measure. It emphasises that the problem is, at base, a particular question about context. They noted that Irish courts have always been prepared to approach the question of interpretation from the perspective of the context within which a provision operates. Accordingly, in taking into account the factors identified in the New Zealand proposal, a court would be doing no more than applying this traditional approach to the problem under consideration here, ie the application of statutory provisions in altered circumstances, with the passage of time. The Irish Commission recommended the following provision: "In construing a provision of an Act, a court may make allowances for any changes, in law, social conditions, technology, the meaning of words used in the Act and other relevant matters, which have occurred since the date of the passing of the Act, so far as its text, purpose and context permit".⁸⁰

⁸⁰ Note also H. P. Ranina "Construction of law: Is there a disconnect?" available at <http://www.thehindubusinessline.com/2005/08/06/stories/2005080600111000.htm> (accessed on 7 September 2006): "The principles of construction of a statute have evolved over a period of time. While some of these principles have stood the test of time and continue to hold the field, new tools of construction are honed by the need of modern times. It is now being increasingly accepted by courts that a current law like the Income-Tax Act, 1961 has to be interpreted taking note of the advances in technology.

A landmark decision on this point is of the Supreme Court in State (through CBI, New Delhi) versus S. J. Chaudhary (1996; 2 S.C.C. 428). The court relied on Francis Bennion 's classic [publication *Statutory Interpretation*] which laid down the principle that while construing a statute the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred in law, social conditions, technology, the meaning of words, and other matters. . . .

An enactment of past is thus to be read today in the light of dynamic changes over time, with such modification of the current meaning of its language as will give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment.

In another decision, the Supreme Court in M. C. Mehta versus Union of India (1987; 1 S.C.C. 395) laid down the proposition that, as new situations arise, the law has to be evolved in order to meet the challenge. Law cannot afford to remain static. New principles have to evolve and new norms must emerge to deal with the problems that arise in a highly industrialised economy.

2.76 At issue in the UK in *Regina v. Secretary of State for Health ex parte Quintavalle (on behalf of Pro-Life Alliance)*⁸¹ was whether live human embryos created by cell nuclear replacement (CNR) fell outside the regulatory scope of the Human Fertilisation and Embryology Act 1990 and whether licensing the creation of such embryos was prohibited by section 3(3)(d) of that Act. Lord Steyn remarked as follows:

22. That leads to the question whether it is appropriate to construe the 1990 Act in the light of the new scientific knowledge. In the case law two contradictory approaches are to be found. It reminds one of the old saying that rules of interpretation "hunt in pairs": that for every rule there is a rule to the contrary effect: In the older cases the view often prevailed that a statute must be construed as if one were interpreting it on the day after it was passed: . . . This doctrine was dignified by the Latin expression *contemporanea expositio est optima et fortissima in lege*. But even in older cases a different approach sometimes prevailed. It was the idea encapsulated by Lord Thring, the great Victorian draftsman, that statutes ought generally to be construed as "always speaking statutes". In the Court of Appeal, Lord Phillips of Worth Matravers MR cited the early illustration of *Attorney General v Edison Telephone Co of London* (1880) 6 QBD 244. The Telegraph Act 1869 gave the Postmaster-General an exclusive right of transmitting telegrams. Telegrams were defined as messages transmitted by telegraph. A telegraph was defined to include "any apparatus for transmitting messages or other communications by means of electric signals". When the Act was passed the only such means of communication was the process of interrupting and re-establishing electric current, thereby causing a series of clicks which conveyed information by morse code. Then the telephone was invented. It conveyed the human voice by wire by means of a new process. It was argued that because this process was unknown when the Act was passed, it could not apply to it. The court held "that absurd consequences would follow if the nature and extent of those powers and duties [under the Act] were made dependent upon the means employed for the purpose of giving the information": p 255. Another illustration is *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441 when Lord Diplock observed, at p 501 E-H:

'Unless the Sale of Goods Act 1893 is to be allowed to fossilise the law and to restrict the freedom of choice of parties to contracts for the sale of goods to make agreements which take account of advances in technology and changes in the way in which business is carried on today, the provisions set out in the various sections and subsections of the code ought not to be construed so narrowly as to force upon parties to contracts for the sale of goods promises and consequences different from what they must reasonably have intended. They should be treated rather as illustrations of the application to simple types of contract of general principles for ascertaining the common intention of the parties as to their mutual promises and their consequences, which ought to be applied by analogy in cases arising out of

. . . in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, social conditions, technology, the meaning to words, and other matters since the Act's passing in law.

⁸¹ [2003] UKHL 13 available at <http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030313/quinta-1.htm> (accessed on 7 September 2006).

contracts which do not appear to have been within the immediate contemplation of the draftsman of the Act in 1893.'

...

23. How is it to be determined whether a statute is an always speaking statute or one tied to the circumstances existing when it was passed? In *R v Burstow*, supra, the House of Lords held, at p 158:

'In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the 'always speaking' variety: see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 for an example of an 'always speaking' construction in the House of Lords.'

...

Applying a statute to new technology

24. The critical question is how the court should approach the question whether, in the light of a new scientific development, the Parliamentary intent covers the new state of affairs. In a dissenting judgment in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 Lord Wilberforce analysed the position with great clarity. He observed, at p 822 B-E:

'In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot be asking the question 'What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?' attempt themselves to supply the answer, if the answer is not be found in the terms of the Act itself."

In *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 Lord Wilberforce's analysis was approved: . . . The analysis of Lord Wilberforce can now be regarded as authoritatively settling the proper limits of the type of extensive interpretation now under consideration.

25. In such a case involving the application of a statute to new technology it is plainly not necessary to ask whether the express statutory language is ambiguous. Since

nobody suggests the contrary, I say no more about the point. Reference was made to authorities . . . which deal with the limited circumstances in which a court may correct a clear drafting mistake. Here there was no drafting mistake. But in order to give effect to a plain parliamentary purpose a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament.

The Primary Argument

26. The Master of the Rolls dealt with the primary argument in trenchant terms. He said (at para 38)

'To the question of whether it is necessary to bring embryos created by cell nuclear replacement within the regulatory regime created by the Act in order to give effect to the intention of Parliament, there can only be one answer. It is essential. There is no factor that takes embryos created by cell nuclear replacement outside the need, recognised by Parliament, to control the creation and use of human organisms. The consequence of Crane J's judgment is that anyone is free to create embryos by cell nuclear replacement and to experiment with these without limitation of time or any other restriction. There is no bar to placing a human embryo created in this way inside an animal. There is no bar to placing an animal embryo created in this way inside a woman. Until the Government intervened with the Human Reproductive Cloning Act 2001 it was legal to use the process of cell nuclear replacement to produce and use an embryo to create a human clone. It is clear that these results are wholly at odds with the intention of Parliament when introducing the 1990 Act.'

I agree. I would summarise my reasons as follows. The long title of the 1990 Act makes clear, and it is in any event self-evident, that Parliament intended the protective regulatory system in connection with human embryos to be comprehensive. This protective purpose was plainly not intended to be tied to the particular way in which an embryo might be created. The overriding ethical case for protection was general. Not surprisingly there is not a hint of a rational explanation why an embryo produced otherwise than by fertilisation should not have the same status as an embryo created by fertilisation. It is a classic case where the new scientific development falls within what Lord Wilberforce called "the same genus of facts" and in any event there is a clear legislative purpose which can only be fulfilled if an extensive interpretation is adopted. As Lord Bingham has demonstrated the makeweight arguments based on the difficulty of applying some regulatory provisions to the new development cannot possibly alter the clear legislative purpose. In the result I would either treat the restrictive wording of section 1(1) as merely illustrative of the legislative purpose or imply a phrase in section 1(1) so that it defines embryo as "a live human embryo where [if it is produced by fertilisation] fertilisation is complete". If it is necessary to choose I would adopt the former technique. It fits readily into section 1(1) since the words of 1(1)(b) plainly make otiose the words "where fertilisation is complete" in section 1(1)(a). Treating the latter as merely illustrative requires no verbal manipulation.

27. For my part I am fully satisfied that cell nuclear replacement falls within the scope of the carefully balanced and crafted 1990 Act.

2.77 In *Smeaton v Secretary of State for Health*⁸² the court also applied the principle of updating construction. This case concerned the legality of the prescription, supply and use of the morning-after pill. Mr Justice Munby held that the

⁸² [2002] EWHC 610 (Admin) (18th April, 2002).

Society for the Protection of Unborn Children (SPUC) was wrong in law in seeking to tie the meaning of the word “miscarriage” to the sense in which it was understood in 1861 (whatever that was) and in the limited effect it allows to the principle of updating construction. He stated that there was nothing in the 1861 Act to demonstrate a Parliamentary intention to protect “life” from the point of fertilisation, and the construction for which the defendants contended did not involve any alteration in the conceptual reach of the 1861 Act. He noted that Parliament’s intention in 1861 was to criminalise the procuring of “miscarriages” and that the content of that Parliamentary intention had, as a matter of law, to be assessed by reference to the current – not nineteenth century – understanding of what the word means:

329. Lord Hoffmann in *Oakley* referred, as we have seen, to “advancing knowledge, technology or social standards”. The cases in fact suggest that there are at least four different types of change in what Lord Wilberforce in the *Royal College of Nursing* case called “the state of affairs existing, and known by Parliament to be existing, at the time” and which the doctrine of the “always speaking” statute may have to accommodate when an elderly statute is to be applied in modern conditions: first, changes in our understanding of the natural world (for example, the developments in psychiatry considered in *Ireland, Frost and Morris*); secondly, technological changes (the invention of the telephone considered in *Edison and Ireland* or of the new types of vehicle referred to by Lord Hoffmann in *Oakley*; the changes and advances in medical technology considered in the *Royal College of Nursing* case and in *Quintavalle*); thirdly, changes in social standards (the improving standards of hygiene considered in *Oakley*); and, fourthly, changes in social attitudes (the attitudes to homosexuality considered in *Fitzpatrick* and to punishment referred to by Lord Hoffmann in *Oakley*).

330. Superficially it might be thought that the present case involves – and in the most acute form – at least three of these categories of change: changes in our understanding of medical science, in particular of the processes of pregnancy; astonishing changes and advances in medical technology, in particular in the technology of contraception; and equally dramatic changes in social attitudes towards both contraception and abortion. That, no doubt, is so as a matter of fact. It is not so, however, as a matter of law.

331. The search for the true solution has, in my judgment, to proceed on a much narrower front and, moreover, not on the basis upon which much of the current debate is conducted. For it is important to realise that the terms in which the current debate is often carried on are utterly anachronistic. Let me explain why and also explain why it is important to appreciate the significance of the observation.

332. The world of 1803 or even of 1861 was very different from our own. A society which could believe that the pillory and the gallows were appropriate punishments for abortion is so utterly alien to our own as to make it almost impossible to bridge the gulf of incomprehension. Even in 1861 our society was only on the brink of the beginnings of the modern world. What, not least in this context, were probably two of the most important of all the books written in that remarkable century – John Stuart Mill’s *‘On Liberty’* and Charles Darwin’s *‘On the Origin of Species’* – had only just been published, both, as it happens, in 1859. Bishop Samuel Wilberforce’s famous confrontation with T H Huxley at the meeting of the British Association for the Advancement of Science at Oxford had taken place as recently as June 1860. One has only to look at the *Bradlaugh-Besant* litigation in the 1870s to see a society which in matters sexual was almost unimaginably different from ours. Not for nothing did Mill when writing in 1869 on *‘The Subjection of Women’* suggest that

“If married life were all that it might be expected to be, looking to the laws alone, society would be a hell upon earth”.

333. A poet famously suggested that “Sexual intercourse began / In nineteen sixty-three”. That caustic comment, which Larkin mordantly related to what he called “the end of the *Chatterley* ban”, conceals an important truth. The simple fact is that, as in so many other matters sexual, so far as concerns contraception, in both its technological and its social aspects, the modern world – our world – is a world which has come into being during the lifetime of many of us alive today. It is a development of the 1960s – whether 1963, the poet’s *Annus Mirabilis*, or 1967, Parliament’s year of activity, matters not for present purposes.

334. But that does not mean that a judge can simply re-write the 1861 Act in the light of all these medical, social and cultural changes. On the contrary, the very fact that the world of 1861 is almost irrecoverable to us – “there lies a gulf of mystery which the prose of the historian will never adequately bridge. They cannot come to us, and our imagination can but feebly penetrate to them” – makes it all the more important, as it seems to me, to resolve the issue at hand *not* by conducting the debate either on some assumption, almost certainly erroneous, as to how the wider debate was being conducted in 1861, or in the modern terms in which it is currently so often pursued, but rather, strictly and faithfully, within the narrow parameters of the debate which is enjoined on us by the language in which in 1861 Parliament chose to legislate. That, after all, as I read such cases as *Ireland*, *Fitzpatrick* and *Oakley*, is the judicial duty mandated by our system of Parliamentary democracy.

335. The modern debate, as we have seen, is typically conducted by asking such questions as whether the morning after pill is truly a contraceptive or whether it is rather an abortifacient. Now I do not doubt that in the context of the contemporary medical, social, moral and ethical debate, the answers to such questions are very important. But they are, as it seems to me, almost wholly irrelevant to anything I have to decide.

336. As I have already remarked, the society which legislated on this issue from 1803 to 1861 was very different from our own. The truth is that, at least in relation to such issues as those which I have to grapple with, it is so utterly alien to our own that speculations – and that is all they can be – as to what lay behind the nineteenth-century Parliamentary process would be both inappropriate and dangerous. There are, as it seems to me, two – and only two – things that one can quite clearly and safely derive from the legislative history from 1803 to 1861. But they are enough.

337. The first is that Parliament never had the question of contraception in mind at all. By this I do not mean merely that Parliament did not have in mind all those contraceptive techniques which, however familiar to us now, in 1861 lay far away in what I strongly suspect would then have been an almost inconceivable future. No, what I really mean is that Parliament in 1861 simply would not have seen the debate in terms of contraception at all. The *Bradlaugh-Besant* litigation shows clearly enough, as it seems to me – and this is its importance – that even in the late 1870s the issue of contraception was simply beyond the bounds of permissible debate not merely in polite society but also in legal and Parliamentary circles. Indeed, the subsequent history as I have summarised it above shows that in some influential circles such attitudes persisted well into the last century. So the terms of the modern debate are utterly anachronistic. In 1861 – unlike in 1967 – Parliament was not legislating to ban abortion whilst permitting contraception. It was simply legislating to punish abortion – albeit not with the savagery which had characterised the statute book down to 1837. So, if I am to be faithful to *Ireland* and *Oakley* what I have to focus on is the law of abortion and that alone.

338. The other thing is this. As I have already remarked, the one consistent feature of all the legislation from 1803 to 1861 is the criminalisation of abortion by reference to the same fundamental principle: that the gist of the offence lies in the doing of certain acts intending (or knowing that someone else intends) “to procure a

miscarriage". The procuring of a "miscarriage" is thus what Lord Hoffmann (adopting Professor Dworkin's terminology) would call the "concept" employed by Parliament for this purpose. My task, therefore, is to ascertain what Lord Hoffmann would call the "content" – Professor Dworkin the "conception" – of that concept, always remembering that, as Lord Hoffmann was at pains to point out, I cannot construe the 1861 Act "to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended." And as I have already observed, the word "miscarriage" as used in the 1861 Act is not 'value sensitive'. So I cannot, as it seems to me, construe its meaning simply by having regard to the enormous changes and advances in medical and contraceptive technology since 1861 or to the equally dramatic changes in social and sexual attitudes since then. As Mr Gordon points out, the relevant type of up-dating is not that which was in issue in *Fitzpatrick*.

...

This is a conclusion which I have arrived at by what is, I believe, nothing more than a strict application of the principles of statutory construction clearly established by cases such as *Ireland*, *Fitzpatrick* and *Oakley*. There has been no need for me in this case, as there was for the Court of Appeal in *Quintavalle*, to strain the Parliamentary language. Far from my having impermissibly usurped Parliament's function I have merely performed my judicial duty in striving to give effect to what I believe was Parliament's clear intention. Nonetheless I have to confess that this is a conclusion which I have come to without any regret. Quite the contrary.

394. There would in my judgment be something very seriously wrong, indeed grievously wrong with our system – by which I mean not just our legal system but the entire system by which our polity is governed – if a judge in 2002 were to be compelled by a statute 141 years old to hold that what thousands, hundreds of thousands, indeed millions, of ordinary honest, decent, law abiding citizens have been doing day in day out for so many years is and always has been criminal. I am glad to be spared so unattractive a duty. . . .

395. There is another point. I say nothing about abortion, as that word would commonly be understood by the man on the Clapham omnibus or the woman on the Underground, nor about the use of contraceptives by those under the age of discretion. These are matters which raise very different issues – issues which I am not in any way concerned with to-day. But I have to say that I cannot see that it is any part of the responsibilities of public authorities – let alone of the criminal law – to be telling adult people whether they can or cannot use contraceptive devices of the kind which I have been considering.

396. It is, as it seems to me, for individual men and woman, acting in what *they* believe to be good conscience, applying those standards which *they* think appropriate, and in consultation with appropriate professional (and, if they wish, spiritual) advisers, to decide whether or not to use IUDs, the pill, the mini-pill and the morning-after pill. It is no business of government, judges or the law.

2.78 In *Minister of Water Affairs and Forestry and others v Swissborough Diamond Mines (Pty) Ltd and Others*⁸³ subpoenas were issued in a foreign State against officials and representatives of the Republic of South Africa. The subpoenas were endorsed in terms of section 7 of the Foreign Courts Evidence Act 80 of 1962. The Act was passed in 1962 and the court considered whether a necessary implication that the State intended itself to be bound by that Act could be read into the Act in

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1999 (2) SA 345 (T).

view of the circumstances pertaining at that time. At the time the Act was passed the doctrine of absolute sovereignty formed part of the South African law. The restricted immunity doctrine was accepted in our courts only in 1980. The court held that from the circumstances pertaining at the time the Act was passed, it was clear that the State did not intend itself to be bound by the Act. It held that the intention of the legislature must be determined at the time when the relevant provision was enacted. In *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*⁸⁴ the court held that the words of a statute must be construed (unless subsequent legislation declares otherwise) as they would have been interpreted on the day when the statute was passed.

2.79 In *Fourie and Another v Minister of Home Affairs and Others*⁸⁵ Farlam JA discussed updated construction of legislation as follows:

. . . Parliament is not to be taken as having intended to approve the common law definition and, as it were, to prohibit same-sex marriages by failing (or refusing) to provide a formula for use thereat. That is why I say that Parliament's intention was to provide a formula for the use of those capable of marrying each other and wishing to do so.

[136] Francis Bennion, refers to a presumption that an updating construction is to be given to statutes except those comparatively rare statutes intended to be of unchanging effect, which he calls 'fixed-time Acts'. All other Acts he calls 'ongoing Acts'.

He explains the law as follows:

'It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.'

This, he says,

'states the principle, enunciated by the Victorian draftsman Lord Thring, that an ongoing Act is taken to be always speaking. While it remains in force, the Act is necessarily to be treated as current law. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. As Lord Woolf MR said of the National Assistance Act 1948

'That Act had replaced 350 years of the Poor Law and was a prime example of an Act which was "always speaking". Accordingly it should be construed by continuously updating its wording to allow for changes since the Act was written.'

Later on Bennion says:

⁸⁴ 1985 (4) SA 773 (A).

⁸⁵ 2005 (3) SA 429 (SCA).

Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from an Act's legislative history, necessarily becomes less relevant as time rolls by. Yet their words remain law. Viewed like this, the ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as "a living Constitution", so an ongoing British Act is regarded as "a living Act". That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording.'

[137] Among the examples he gives of the application of the working of the presumption are the following:126

'Changes in the practices of mankind may necessitate a strained construction if the legislator's object is to be achieved.

Example 288. The Carriage by Air Act 1961 gives legislative force to the Warsaw Convention as amended at The Hague in 1955, which is set out in Sch 1. The Convention limits liability for loss of or damage to 'registered baggage', but does not explain what "registered" means or what "registration" entails. Lord Denning MR explained that originally airlines kept register books in which all baggage was entered, but that this had been discontinued. He added: "What then are we to do? The only solution that I can see is to strike out the words 'registered' and 'registration' wherever they occur in the articles. By doing this, you will find that all the articles work perfectly, except that you have to find out what a 'baggage check' is.'

Example 288. A reference in an enactment originating in 1927 to a business which a company "was formed to acquire" was held to cover an off the shelf company, even though such companies were unknown in 1927.

...

Developments in technology The nature of an ongoing Act requires the court to take account of changes in technology, and treat the statutory language as modified accordingly when this is needed to implement the legislative intention.

Example 288. Section 4 of the Foreign Enlistment Act 1870 makes it an offence for a British subject to accept any engagement in "the military or naval service" of a foreign state which is at war with a friendly state. The mischief at which s 4 is aimed requires this phrase to be taken as now including air force service. Textual updating of the 1870 Act was recommended in the Report of the Committee of Privy Councillors appointed to inquire into the recruitment of mercenaries, but has not been done. Even so it seems that a modern court should treat "military or naval service" in s 4

as including any service in the armed forces of the state in question.’
(Footnotes omitted.)

[138] If one applies this presumption to the marriage formula in s 30(1) of the Marriage Act, it is clear that, in order to give effect to Parliament’s intention, it would not only be permissible but appropriate to regard the words ‘lawful wife (or husband)’ as capable of including the words ‘lawful spouse’ if the common law definition were to be extended so as to cover same-sex marriages. It follows that s 30(1) of the Marriage Act does not afford a basis for denying the appellants relief in this matter.

2.80 Lourens du Plessis⁸⁶ states that:

In constitutional interpretation, this qualification to the ordinary-meaning rule is to be relied on with the utmost circumspection (and is best avoided), lest “original-intent” thinking (which has been discredited by the Constitutional Court) frustrates an adaptation of the constitutional text to “present circumstances”.

2.81 The Commission proposes that a provision be included in the Interpretation of Legislation Act to the effect that enactments apply to circumstances as they arise, in accordance with the contemporary meaning of its language as this will enable the courts to take account of changing circumstances in interpreting the law. However this should only apply as far as the purpose and scope of the legislation permits. The following clause is proposed:

Legislation to be interpreted in the light of changing circumstances

7.(1) Legislation must be interpreted –

(a) as applying to circumstances as they arise; and

(b) in accordance with the contemporary meaning of its language.

(2) Any interpretation of legislation in terms of subsection (1) must be consistent with the purpose and scope of the legislation.

(d) Inconsistencies between provisions in the same legislation

2.82 The South African Constitution deals in section 240 with inconsistencies between different texts of the Constitution. “In the event of an inconsistency between different texts of the Constitution, the English text prevails”. A number of recent statutes address conflict arising between different statutes. The wording of these provisions are generally as follows: “If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail”. The wording does not seem to present difficulties from the perspective of the Interpretation Act. The following provisions are examples of such conflict provisions:

86 Bill of Rights Compendium *Interpretation of Statutes and the Constitution* para 2C34.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

5 Application of Act

(1) This Act binds the State and all persons.

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.

Labour Relations Act 66 of 1995

210 Application of Act when in conflict with other laws

(1) If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.

Employment Equity Act 55 of 1998

63 Application of Act when in conflict with other laws

If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act prevail.

Marine Living Resources Act 18 of 1998

4 Conflict with other Acts

If any conflict relating to marine living resources dealt with in this Act arises between this Act and the provisions of any other law, save the Constitution or any Act expressly amending this Act, the provisions of this Act shall prevail.

2.83 In Oregon where apparently inconsistent provisions occur in the same Act, it is the duty of the courts to harmonize them.⁸⁷ The rule that, where there is an irreconcilable conflict between the provisions of the same Act, the last provision in order of position prevails, does not apply where the earlier provision conforms to the obvious policy and intent of the legislature.⁸⁸ The North Dakota Code provides in section 1-02-07 that whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail. Section 1-02-08 provides that except as otherwise provided in section 1-02-07, whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

⁸⁷ Todd v. Bigham, 238 Or. 374, 395 P.2d 163 (1964).

⁸⁸ Gilbertson v. Culinary Alliance, 204 Or. 326, 282 P.2d 632 (1955); 21 *Oregon Digest*, Statutes §207.

2.84 Bennion explains inconsistencies in two texts as follows:⁸⁹

When two relevant texts contradict each other, both cannot be given a literal application without contravening the logical principle of contradiction or *principium contradictionis*. This was stated by Aristotle in the form that contradictory statements cannot both at the same time be true. Thus one cannot without defect of reasoning advance both a universal affirmative proposition ("all S is P") and a particular negative proposition ("some S is not P"). Equally one cannot legitimately advance both a universal negative proposition ("no S is P") and a particular affirmative proposition ("some S is P").

A common application of the logical principle of contradiction is in relation to contradictory enactments within the same Act. In itself enactment A may be clear and unambiguous. So may enactment B, located elsewhere in the Act. But if they contradict each other they cannot both be applied literally. A undoes B, or B undoes A. The court must do the best it can to reconcile them, but this can be achieved only by giving one or both a strained construction.

Judges often complain of such inconsistency within an Act. Lord Hewart CJ said of the Shops (Sunday Trading Restrictions) Act 1936 Schs 1 and 2: "Sir William Jowitt, appearing on one side in this case, frankly admitted that the provisions of these two Schedules, taken together, and compared and contrasted with each other, were, to his mind, unintelligible." *London County Council v Lees* [1939] 1 All ER 191 at 196.

An Act is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the Act. As the American Justice Holmes said, "you let whatever galvanic current may come from the rest of the instrument run through the particular sentence".

Where, on the facts of the instant case, the literal meaning of the enactment under inquiry is inconsistent with the literal meaning of one or more other enactments in the same Act, the combined meaning of the enactments is to be arrived at. An amalgamated text must notionally be produced before the interpreter can advance towards the legal meaning. The way this is done is similar to the producing of a "corrected version" of the text in a case of semantic obscurity. . . .

The essence of "construction as a whole" is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act. Coke referred to this as construction *ex visceribus actus* (from the guts of the Act). (1 Co Inst 381 1b.)

Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are (1) every word in the Act should be given a meaning, (2) the same word should be given the same meaning, and (3) different words should be given different meanings. Lord Herschell LC said that where there is a conflict between two sections in the same Act: "You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other". (*Institute of Patent Agents v Lockwood* [1894] AC 347 at 360.)

Failing any other way of reconciliation, the court may under the rule in *Wood v Riley* adopt the principle that the enactment nearest the end of the Act prevails. {*Wood v Riley* (1867) LR 3 CP 26 at 27 ("the known rule is that the last must prevail").} Nicholls LJ said in 1990 that this rule was obsolete. "Such a mechanical approach . . . is altogether out of step with the modern, purposive, approach to the interpretation of statutes and documents". (*Re Marr and another (bankrupts)* [1990] 2 All ER 880 at

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See Francis Bennion *Threading the Legislative Maze* – 5 available at <http://www.francisbennion.com/pdfs/fb/1998/1998-011-threading-5.pdf> (accessed on 5 September 2006).

886.) This overlooks the possibility that there may be no means of deciding between conflicting provisions on purposive grounds, when a rule of thumb is needed. Moreover it used to be the practice, and in the case of private and personal Acts still is, to place saving clauses at the end, with the intent that they should override anything inconsistent in the earlier part of the Act.

Where the literal meaning of a general enactment covers a situation for which specific provision is made elsewhere in the Act, it is presumed that it was intended to be dealt with by the specific provision. This is expressed in the maxim *generalibus specialia derogant* (special provisions override general ones). Acts often contain general provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation. The more detailed a provision is, the more likely is it to have been tailored to fit the precise circumstances of a case falling within it.

Under the doctrine of implied repeal, if a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed. In an early case it was held that a statute creating a capital offence was impliedly repealed by a later Act imposing a penalty of ,20 for the like offence. (*R v Davis* (1783) 1 Leach 271.)

The courts presume that Parliament does not intend an implied repeal. This is stronger where modern precision drafting is used. It is also stronger the more weighty the enactment. Lord Wilberforce said he was reluctant to hold that an Act of such constitutional significance as the Union with Ireland Act 1800 was subject to implied repeal.

A similar doctrine applies to amendment. Where the provisions of a later Act are repugnant to those of an earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency. Parliament (though it has not said so) is taken to intend an amendment of the earlier provision. Again this is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction.

2.85 If there is a conflict in the provisions of two statutes dealing with the same subject, the general rule in South African law is that the later statutory provision should be followed.⁹⁰ In *R v Brener*⁹¹ the court said the following about inconsistent sections in a statute:

Where two inconsistent sections or provisions appear in a statute, the later one is usually taken to govern, but in the present case the two inconsistent sets of words appear in the same sentence and are thus simultaneous. In such a case it should be held, in my opinion, that the process of elimination should be applied to that set of words against which a presumption exists, or which is less in harmony with the intention of the lawgiver as appearing from the section as a whole or from the statute as a whole.

2.86 In *S v Weinberg*⁹² the court remarked as follows:

. . . the starting point in considering this argument is to emphasize the general well-known principle that, if possible, a statutory provision must be construed in such a

⁹⁰ See Steyn *Die Uitleg van Wette* at 190 and Kellaway *Principles of Legal Interpretation* at 159 – 160.

⁹¹ 1932 OPD 45.

⁹² 1979 (3) SA 89 (A) at 98 – 99.

way that effect is given to every word or phrase in it: or putting the same principle negatively, which is more appropriate here:

‘a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant...’

per Cockburn CJ in *The Queen v Bishop of Oxford* (1879) 4 QB 245 at 261. This dictum was adopted by Kotzé JA in *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436. The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly, and it will therefore not use any words that are superfluous, meaningless, or otherwise otiose (see Steyn *Die Uitleg van Wette* 3rd ed at 16). That supposition is a fortiori justifiable where, as here, the statutory provision in question is in a definition section governing the meaning of the words used in the body of the Act.

It is true, however, that occasionally and contrary to the above general principle, Courts have, in construing a statutory provision, treated a word or phrase therein as being superfluous, meaningless, or otherwise otiose or as having been included therein erroneously, and they have in consequence ignored it in giving due effect to the manifest intention of the lawgiver. It seems to have been accepted that this particular technique of amendment by judicial interpretation can be resorted to in appropriate, exceptional cases. See these various authorities: Maxwell *Interpretation of Statutes* 12th ed at 230 - 1; Craies *Statute Law* 7th ed at 106 - 7; Steyn (supra) who, after drawing attention (at 65 - 68) to certain judicial dicta that maintain that amending a statute is the function of the lawgiver and not of the Courts, nevertheless favours the above technique (at 69); the majority judgment in the *Attorney-General* case supra in which it was held that certain words in a statutory provision must have been included by the Legislature per incuriam and should therefore be ignored; the Privy Council decision in *Salmon v Duncombe* (supra), in which the last nine words of a section in a statute were ignored in order to give full effect to the manifest object of the section which would otherwise have been nullified; and *R v Brener* 1932 OPD 45 at 50 - 1, where an irreconcilable conflict between two provisions in a statute led to one being ignored. But, because of the very nature and object of the technique, it is obvious from the above authorities that it can only be used as a last resort in construing the provision in question (see especially the *Attorney General* case supra at 436).

2.87 In *Lindsay Keller & Partners v AA Mutual Insurance Association Ltd*⁹³ the court remarked as follows:

Logically, the time-honoured principles which have been adopted in the construction of conflicting statutory provisions (be they in the same Act or in different Acts) are also apposite in a case such as the present. In *Ex parte Minister of Justice: In re R v Jekela* 1938 AD 370 at 377, Feetham AJA says:

‘One of the presumptions applicable to the interpretation of statutes is (Maxwell 7th ed at 71) ‘that the Legislature does not intend to make substantial alteration in the law beyond what it expressly declares either by express terms or by clear implication’. The same authority dealing with this point in a later passage says (ibid at 136): “The work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it.’

⁹³

1988 (2) SA 519 (W) at 523.

2.88 It is proposed that in the event of any inconsistency between a long title, enacting statement, preamble, table of contents, segment heading, schedule or annexure in any legislation and any other provision of that legislation, that other provision prevails. The following provision is proposed on inconsistencies in same legislation:

Inconsistencies between provisions in same legislation

9. In the event of any inconsistency between a long title, enacting statement, preamble, table of contents, segment heading, schedule or annexure in any legislation and any other provision of that legislation, that other provision prevails.

H. MATERIALS WHICH DO NOT FORM PART OF THE LEGISLATIVE TEXT, AND STRUCTURAL ELEMENTS OF THE LEGISLATION AS AIDS TO INTERPRETATION

(a) Introduction

2.89 According to the orthodox common-law approach to interpretation, the paramount rule is to ascertain the “intention of the legislature”, and the interpretation process should proceed along the following lines:

(a) The primary rule of interpretation is that if the meaning of the words is clear, it should be put into effect and, indeed, equated with the legislature's intention.⁹⁴

(b) If the so-called “plain meaning” of the words is ambiguous, vague or misleading, or if a strict literal interpretation would yield absurd results, then the court may deviate from the literal meaning to avoid such an absurdity.⁹⁵ This is also known as the “golden rule” of interpretation. Then the court will turn to the so-called secondary aids to interpretation to find the intention of the legislature (eg the long title of the statute, headings to chapters and sections, the text in the other official language, etc).

(c) Should these secondary aids to interpretation prove insufficient to ascertain the intention, the courts will have recourse to the so-called tertiary aids to construction, ie the common-law presumptions.

2.90 This methodology of interpretation is not only outdated, but also not in line with the demands of interpretation of legislation in a constitutional state under a

⁹⁴ *Principal Immigration Officer v Hawabu* 1936 AD 26.

⁹⁵ *Venter v R* 1907 TS 910 at 914.

supreme, justiciable Constitution. Since most interpreters of legislation in South Africa still follow the orthodox methodology, a new Interpretation Act must make it clear to all end-users of legislation that interpretation is no longer based on the foundations of sovereignty of Parliament and the common law, but should comply with the demands and requirements of the supreme Constitution.⁹⁶ In *President of the Republic of South Africa v SARFU (SARFU III)*⁹⁷ the Constitutional Court stated expressly that South African administrative law is, first and foremost, grounded in the Constitution.⁹⁸ The same paradigm-shift must also apply to the interpretation of legislation.

2.91 During statutory interpretation the interpreter has a wide range of aids to use in establishing the purpose and object of the enactment. Those elements which form part of the structure of the text of the legislation are also known as intrinsic or internal aids. All possible materials which do not form part of the text of the enactment (eg surrounding circumstances, dictionaries, the Constitution, explanatory material, reports and other extrinsic material) are also known as extrinsic or external aids to interpretation. As pointed out above, in the past the court referred to certain intrinsic aids (such as preambles, long titles, headings to chapters and sections) and extrinsic aids as “secondary aids”. This practice negated not only the structural interrelated “wholeness” of the legislative text, but also largely ignored the very important role of context during the interpretation of legislative texts. As a result aids to construction were categorised in an artificial, hierarchical structure, ostensibly reducing interpretation to a mechanical process. One reason for this methodology was (or is) a

⁹⁶ See also De Ville *Constitutional and Statutory Interpretation* 60: “The constitutional theory which inspires the interpretation of the Constitution should . . . also inform statutory interpretation. **The principles for the interpretation of statutes are to be derived from the Constitution**” (emphasis added).

⁹⁷ 1999 (10) BCLR 1059 (CC).

⁹⁸ Para 135: “Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see s 33 as a mere codification of common-law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important, though not necessarily decisive, in determining not only the scope of s 33, but also its content.” See also Du Plessis (note 1 above) vii-viii: “Statute law, because it is both the product and a source of state action, is the kind of law most directly and indisputably susceptible to the power of the supreme Constitution. Transformative legislation drafted (like the Constitution) in an untraditional style, has moreover necessitated a reconsideration of conventional modes of statutory interpretation. The law relating to the interpretation of statute law is therefore irrevocably caught up in South Africa’s political and constitutional transformation. The Constitution determines and shapes statutory interpretation in all-pervading manner.”

very rigid view of the separation of powers. This led courts to consider certain structural elements of the legislative text as a last resort, since in their opinion those elements had not actually been considered by the legislature but were subsequently included by the drafters.

2.92 The traditional and orthodox argument that certain parts of the legislative text (such as marginal notes) were not considered by the legislature or, as is often said of preambles, that they do not form part of the legislation, is based on the fiction of the “intention of the legislature”. The interpreter engages in the promulgated legal text, which has been adopted, signed and published in terms of all the various constitutional and other statutory requirements. However, the interpreter is traditionally bound by the fiction of the legislature’s intention, which should apparently relate only to those provisions actually considered by the legislature in question. This is a paradox: the final promulgated text is considered to be a legally enforceable document, but part of it may not be considered during interpretation since it was not perused by the body whose fictional intention is to be ascertained by the judiciary. In South Africa at least, the parliamentary legislative process is largely driven by the Cabinet, the state law advisors and legislative drafters, and the various parliamentary portfolio committees. Intention denotes a subjective state of mind, an individual formation of will directed towards a specific result. Such a subjective state of mind is, however, inconceivable when it comes to all the members of a legislative body. The reality is that the legislature is composed of a large number of persons, all of whom take part in the legislative process. Some of the members of this body usually oppose the legislation for various reasons, with the result that the legislation ultimately reflects the intention of the majority of the legislature only. Some members will support legislation for the sake of party unity, though they may be personally opposed to a Bill. (This would mean that the will of the legislature is subject to what the individual members of the legislative body, under pressure from their party caucus, were compelled to intend.) In reality not all members of the legislature can be expected to understand complex and highly specialised technical legislation. Indeed, the Bill before the legislature is not drafted by the politicians themselves, but by draftsmen acting on the advice of bureaucrats from state departments and various legislative committees. Some members of the legislative body may even be absent when voting on a Bill takes place. In other words, the “intention of the legislature” refers to the fictional collective intent of the majority of the legislative body present at the time when the vote took place; formulated by legal drafters on the advice of the executive, portfolio committees and state law advisors; and expressed within the

voting guidelines of the caucus discipline of the various political groupings in the legislature.

(b) Elements of the legislation to be considered during interpretation (intrinsic information)

(i) Preambles

2.93 In the past the courts followed the orthodox viewpoint that the preamble may only be considered if the legislative text is ambiguous.⁹⁹ This pre-constitutional approach is narrow and textually oriented, and is no longer valid.

2.94 The Canadian Interpretation Act 1985 provides that the preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object. The British Columbia Interpretation Act provides similarly in section 9 that the title and preamble of an enactment are part of it and are intended to assist in explaining its meaning and object. The Oregon Rules of Construction of Statutes provide that the title of a statute may not be used to contradict clear provisions in the body of the Act, but where it is necessary to construe ambiguous language, the title of the Act, being a part of the statute, can be considered to ascertain the meaning of the statute.¹⁰⁰ These Rules also provide that the preamble of a statute is not an essential part thereof and neither enlarges nor confers powers, but in a doubtful case, the preamble may be considered in construction.¹⁰¹

2.95 The Oregon Rules of Construction of Statutes provide in section 174.020 as

⁹⁹ In *Colonial Treasurer v Rand Water Board* 1907 TS 479 the court referred to the preamble of the relevant Act, inter alia to ascertain the intention of the legislature. In *Jaga v Dönges* 1950 (4) SA 653 (A) Schreiner JA was prepared to consider the preamble as part of the context of the legislation. However, in *Green v Minister of the Interior* 1968 (4) SA 321 (A) it was held that if the provisions are clear and unambiguous, the court may not resort to the preamble. In *S v Davidson* 1988 (2) SA 259 (Z) the Zimbabwean court also followed the orthodox textual approach in deciding that the preamble may be referred to only if the provisions of the Act are ambiguous and vague. In *Kauesa v Minister of Home Affairs and Others* 1995 (1) SA 51 (NM) Judge O'Linn of the Namibian High Court said that he had no doubt that the preamble to the Constitution of Namibia is an important internal aid to the construction of provisions of the Constitution, particularly where those articles are ambiguous, but not restricted to articles which are ambiguous. He shared the view that the preamble is 'an unqualified part of the text' and that the Court had to decide what weight should be attached to it.

¹⁰⁰ *State v. Zook*, 27 Or. App. 543, 556 P.2d 989 (1976); *Portland v. Duntley*, 185 Or. 365, 203 P.2d 640 (1949); 21 *Oregon Digest*, Statutes §211.

¹⁰¹ *Curly's Dairy, Inc. v. State Dept. of Agriculture*, 244 Or. 15, 415 P.2d 740 (1966); *Sunshine Dairy v. Peterson*, 183 Or. 305, 193 P.2d 543 (1948); 17 Op. Att'y Gen. 429 (1935); 21 *Oregon Digest*, Statutes §210.

follows on legislative intent; general and particular provisions; and consideration of legislative history:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

2.96 Anne Winckel explains that a preamble is a useful guide to the intention of the Parliament in that it may detail the mischief to which the Act is directed; explain the reason, purpose, object or scope of the Act; and detail facts or values which are relevant to the Act.¹⁰² She says that preambles can be seen to have both a contextual and a constructive role in statutory interpretation: the contextual role is where the preamble assists with confirming the ordinary meaning of the enactments, and assists with determining if there is any ambiguity in the Act. The constructive role is where the preamble is effectual in clarifying or modifying the meaning of ambiguous enactments. While there is substantial consensus on the function of a preamble in relation to the latter role, the contextual role of a preamble has had the more contested history. Recent judicial comment in Australia clarified the significance of a preamble as part of the context of a whole Act.

2.97 Anne Winckel remarks that the contextual role of a preamble in statutory interpretation relates to the manner in which, as part of the context of a whole Act, a preamble may assist in confirming the ordinary meaning of enactments, or indeed, be suggestive of alternative meanings which are consistent with the intentions of the legislature. She explains that the current state of the law was definitively expressed in 1957 by the House of Lords in *A-G v Prince Ernest Augustus of Hanover*,¹⁰³ was

¹⁰² “The Contextual Role of a Preamble in Statutory Interpretation” available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MULR/1999/7.html> (accessed on 7 September 2006).

¹⁰³ [1957] AC 436 at 463.

mentioned by in the Australian High Court case of *Wacando v Commonwealth*.¹⁰⁴ and is further clarified by the amendments to most Australian Interpretation Acts in the 1980s and subsequent High Court precedents¹⁰⁵ providing for purposive approaches to statutory interpretation. She comments that these authorities all support the idea that the preamble may be surveyed as part of the wider context of a statute when determining the meaning of any section, and they also suggest that the preamble, as part of the context, may be used for checking to see if an ambiguity is present, and that it is suggested that it is 'unsafe to construe the enactment without reference to the preamble'.¹⁰⁶

2.98 Anne Winckel notes that while *A-G v Prince Ernest Augustus of Hanover* is an example of a situation where the preamble was of no assistance in construing the statute because the preamble was itself unclear, nevertheless the judges gave some definitive explanations of the role of a preamble in statutory interpretation. Included in these explanations were a number of references to the preamble's role as part of the context. In particular, the case is authority for the proposition that an Act cannot be said to be unambiguous until it is read as a whole, including the preamble if there is one. The contextual role of the preamble in assisting with the ordinary meaning of the enactments, and in clarifying if the Act is clear or ambiguous, is consistent with current interpretation legislation passed by most Australian Parliaments.

2.99 Since the advent of the new constitutional order, preambles are back in fashion. The preamble of the Promotion of Administrative Justice Act 3 of 2000 is a good example of a modern preamble. It not only emphasises the core concerns and values of the Act, but also expressly refers to the Constitution:

Preamble

WHEREAS section 33 (1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;

AND WHEREAS section 33 (3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to-

* provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

¹⁰⁴ (1981) 148 CLR 1, 23.

¹⁰⁵ Eg *Saraswati v The Queen* (1991) 172 CLR 1; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

¹⁰⁶ FAR Bennion *Statutory Interpretation: A Code* 2nd ed, 1992 at 483.

- * impose a duty on the state to give effect to those rights; and
- * promote an efficient administration;

AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33 (3) must be enacted within three years of the date on which the Constitution took effect;

AND IN ORDER TO –

- * promote an efficient administration and good governance; and
- * create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

2.100 In a number of recent cases dealing with constitutional interpretation (such as *Qozeleni v Minister of Law and Order*¹⁰⁷ and *Khala v The Minister of Safety and Security*¹⁰⁸) the courts have acknowledged the unqualified application of the Constitution's preamble. In *National Director of Public Prosecutions v Seevnarayan*¹⁰⁹ the court rejected the argument the preamble (as well as the long title and short title) may be considered only if the text of the legislation is not clear and ambiguous as an "... antiquated approach to the process of interpretation."¹¹⁰ Although preambles tend

¹⁰⁷ 1994 (3) SA 625 (EC).

¹⁰⁸ 1994 (2) BCLR 89 (W).

¹⁰⁹ 2003 (2) SA 178 (C).

¹¹⁰ [58]. . . As pointed out by Du Plessis:

'One issue in respect of which the law of statutory interpretation as it stands today differs most markedly from the law as it stood prior to 27 April 1994 is the admissibility and manner of invoking preambles as interpretive aids. . . . The more unqualified use of preambles in constitutional interpretation has met with response in statutory interpretation too. . . . Generally speaking Courts other than the Constitutional Court, namely the Supreme Court of Appeal and High Courts, have shown a readiness to invoke preambles to legislative instruments irrespective of the perceived clarity and/or ambiguity of the language of individual provisions that stand to be construed.'

[59] The short title of the Act already holds a clue as to the mischief aimed at by the Legislature: it is directed at the prevention of 'organised' crime. Not by the wildest stretch of the imagination could the evasion of personal income tax by a single individual be categorised as 'organised crime', even where it may have been perpetrated over a few successive tax years.

[60] This conclusion is reinforced when regard is had to the long title: the Act is intended to combat 'organised crime, money laundering and criminal gang activities'. This triad of social evils forms a recurrent theme throughout the Act. Although it was submitted somewhat tentatively on behalf of the applicant that the respondent's conduct with regard to the rolling investments described above 'amounts to money-laundering, or at least closely resembles money-laundering', this was not the basis on which the application has been presented. I am in any event satisfied that the unlawful activities in question fall outside the ambit of the above categorisation.

[61] With reference to the preamble, one reads, inter alia, the following:

to be programmatic and couched in general terms, they ought to be used during interpretation of legislation since the text as a whole should be read in its context. Although a preamble on its own can never provide the final meaning of the legislative text, post-1994 preambles should provide the interpreter with a starting point, albeit wide and general. Read with the long title, as well as the purpose provision and the interpretation guidelines (which tend to be included in new legislation), the preamble could steer the interpreter towards a more detailed and particular understanding of the legislation.

2.100 It is therefore proposed above that the Bill should provide that “provision”, in relation to legislation, means any of the constituent parts of the legislation, including, amongst others the preamble, and that when interpreting legislation the meaning of a provision in that legislation must be determined by its language; and its context in the legislation read as a whole.

(ii) *The long title*

2.101 South African courts are entitled to refer to the long title of a statute in order to establish the purpose of the legislation.¹¹¹

2.102 The Oregon Rules of Construction of Statutes provide that the title of a statute may not be used to contradict clear provisions in the body of the Act, but where it is necessary to construe ambiguous language, the title of the Act, being a part of the statute, can be considered to ascertain the meaning of the statute.¹¹²

. . . And whereas there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;

. . . And whereas the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;. . .'

These, as well as other statements in the preamble in similar vein, convey the clear impression that the Act was never intended to be applied in situations such as the present. Not only is there no apparent trace of 'organised crime, money laundering and criminal gang activities' in the present scenario; but tax evasion and tax fraud is one area where South African statutory law actually does manage to deal quite 'effectively' with offenders through elaborate provisions and severe penalties in the Income Tax Act.

¹¹¹ *Bhyat v Commissioner for Immigration* 1932 AD.

¹¹² *State v Zook* 27 Or App 543 556 P 2d 989 (1976); *Portland v Duntley* 185 Or 365 203 P 2d 640 (1949); 21 *Oregon Digest*, Statutes §211.

2.103 In 1999 the Irish Law Reform Commission (Irish Commission) explained that a distinction is sometimes drawn between, on the one hand, the short title, the long title and preamble, and, on the other, the marginal notes, cross-headings and punctuation.¹¹³ The first three of these are distinguished on the basis that they may be amended by the Oireachtas¹¹⁴ during the legislative process and are thus under its control. Consequently, the *Interpretation Act, 1937* and the *Interpretation Bill, 2000* are both silent on the use of the long title, the preamble or the short title of an Act as aids to construction and the issue has been left to the courts. On the other hand marginal notes and cross-headings (punctuation is not mentioned) are specifically excluded from consideration by a court by s.11 (g) of the *Interpretation Act, 1937*; “No marginal note placed at the side of any section or provision to indicate the subject, contents, or effect of such section or provision and no heading or cross-line placed at the head or beginning of a Part, section or provision or a group of sections or provisions to indicate the subject, contents or effect of such Part, section, provision or group shall be taken to be part of the Act or instrument or be considered or judicially noticed in relation to the construction or interpretation of the Act or instrument or any portion thereof. The Irish Commission pointed out that an equivalent provision, with similar wording, had been included in the *Interpretation Bill 2000*.

2.104 The Irish Commission pointed out that the general rule relating to consideration of the long title of an Act was enunciated in the leading case of *East Donegal Co-operative Marts v. Attorney General*¹¹⁵ which established that a court should be able to look to the long title in order to confirm the context of a provision within an Act. They remarked that *East Donegal* may admittedly be viewed as a special case, in that it was a judicial review, concerning the control of discretionary powers,¹¹⁶ although reference was also made to a long title in *DPP v. Quilligan*,¹¹⁷ where the Supreme Court decided that the long title of the *Offences against the State Act, 1939* could be relevant to the interpretation of a provision within the Act, but only where the text of the relevant provision was ambiguous or equivocal, Griffin J stating:

¹¹³ *Report on Statutory Drafting And Interpretation: Plain Language And The Law.*

¹¹⁴ The National Parliament (Oireachtas) consists of the [President](#) and two Houses: Dáil Éireann (the House of Representatives) and Seanad Éireann (the Senate) whose powers and functions derive from the [Constitution of Ireland](#) enacted by the People on 1 July 1937.

¹¹⁵ [1970] IR 317.

¹¹⁶ The significance of the case being a judicial review lies in the fact that there is a presumption in favour of construing discretionary powers restrictively.

“[I]n my opinion, the plain language used in ss.30 and 36 is so clear and unequivocal that the long title may not be looked at, or used for the purpose of limiting or modifying that language.” The Irish Commission stated that McCarthy J went further in his judgment, however, expressing agreement with the view that the long title “is the plainest of all guides to the general objectives of a statute”. In *East Donegal*, Walsh J had stated that the question of whether or not the relevant provision was ambiguous did not arise, as a judge could not properly ascertain whether a provision was ambiguous, without first looking to the context of that provision in the Act as a whole. Since then, the Irish Commission pointed out that there had been several cases,¹¹⁸ in each of which the courts made use of a long title in interpreting an Act. McCarthy J's comments in the *Quilligan* case reflect the liberal approach generally taken; “It is not, in my opinion, a question of ambiguity in the construction of particular provisions; it is a question of giving a schematic interpretation where such is the plain intent of the statute.”

2.105 The Irish Commission noted that the long title may not often be of use, but where it can be of assistance they were of the view that it should be utilised. They stated that this common sense approach is most clearly stated in the decision of Lord Simon of Glaisdale of the House of Lords in *Black-Clawson Ltd. v Papierwerke AG*: “In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in the case of ambiguity – it is the plainest of all guides to the general objectives of a statute. But it will not always help as to particular provisions.” The Irish Commission explained that although it is difficult to envisage a situation where the short title would be of any assistance to a judge in interpreting the provisions of an Act, there would appear to be no good reason why it should not be open to a judge to have reference to it. They remarked that the short title is also one of those parts of an Act which come before the Oireachtas and the arguments in favour of its use as an intrinsic aid are therefore the same as in the cases of long titles and preambles.

2.106 In *S v Neel*¹¹⁹ it was held that the long title may be used only when the wording of a particular provision is vague or ambiguous. The wording of the long title, it was

¹¹⁷ [1987] ILRM 606.

¹¹⁸ Including *Lawlor v. Mr Justice Feargus Flood* Supreme Court 8 October 1999; *An Blascaod Mór Teoranta v. Commissioner of Public Works* Supreme Court 27 July 1999; and *In Re Article 26 and the Employment Equality Bill 1996* Supreme Court 15 May 1997.

¹¹⁹ 1987(4) SA 276 (O).

held, can never alter the clear prescriptions of the relevant section.¹²⁰ Decisions such as these merely reinforce the narrow approach to interpretation. In a number of recent cases courts considered long titles of statutes in interpreting legislation such as *Mbambo v Minister of Defence*,¹²¹ *Msiza v Uys*,¹²² *Mashavha v President of the Republic of South Africa*¹²³ *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang; Pharmaceutical Society of South Africa v Tshabalala-Msimang*¹²⁴ and

¹²⁰ *S v Kock* 1975 (3) SA 332 (O).

¹²¹ 2005 (2) SA 226 (T) where Du Plessis J considered whether the Military Discipline Supplementary Measures Act 16 of 1999 could be interpreted so as to create a right of appeal to the High Court. He remarked that there are further considerations militating against the implication of a right of appeal to the High Court. He pointed out that section 200 of the Constitution establishes the Defence Force, that Counsel for the appellant argued that there was such a right of appeal and that s 33(7)(c) of the Military Discipline Supplementary Measures Act had to be interpreted so as to create such a right of appeal. He said that in terms of s 200(1) of the Constitution it 'must be structured and managed as a disciplined military force', and that it was to assist in attaining that constitutional obligation that the Act was enacted. He noted that the Act's long title makes that clear in the following terms: 'To provide for a new system of military courts with a view to improved enforcement of military discipline; and to provide for incidental matters.' Section 2(a) and (b) of the Act further develop this theme by stating that the objects of the Act are to (a) provide for the continued proper administration of military justice and the maintenance of discipline; and (b) create military courts in order to maintain military discipline'.

¹²² 2005 (2) SA 456 (LCC). Moloto J held, that there was no reason to impose a restrictive and narrow an interpretation on 'family member', such an interpretation would seriously undermine the Constitutional imperative to promote secure tenure to this class of people and the long title of the Act stated that the aim of the Act was '(t)o provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants'. It was contended, on behalf of the defendants, that if the plaintiffs do succeed in their claim, then in relation to cropping land, they ought to succeed only to the extent of one parcel of land in extent 600 x 50 paces, being the piece actually used by the deceased. The basis for this contention was that in terms of s 3(1) read with s 16(1), a labour tenant is entitled to claim that portion of the farm 'which he or she or his or her associate was using and occupying' on 2 June 1995. An 'associate', so the argument went, is defined as a family member and a 'family member' is, in turn, defined as the 'labour tenant's grandparent, parent, spouse (including a partner in a customary union, whether or not the union is registered), or dependant'. Based on this argument it was submitted that the parcels of land allocated to the other members of the family must be excluded from the claim. The deceased's grandparents, parents and spouse having passed away and all the children of the deceased being adults and working, there was no one to be an associate of the deceased.

¹²³ 2005 (2) SA 476 (CC):

[43] The short title of the [Social Assistance Act 59 of 1992] SAA refers to 'social assistance'. The purpose of the SAA, as stated in the long title, is to 'provide for the rendering of social assistance to persons, national councils and welfare organisations; and to provide for matters connected therewith'. 'Social assistance' is defined in the SAA as 'a social grant, a supplementary grant, a grant-in-aid, a foster child grant, a child support grant, a care-dependency grant, or a financial award granted under this Act'.

¹²⁴ 2005 (2) SA 530 (C) at par [8]: The purpose of the Act is further echoed in the long title where it is stated to aim at – (a) providing for the control of medicines; (b) providing for measures for the supplies of more affordable medicines in certain

*Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health.*¹²⁵

2.107 The Commission considers that the long title (and all the other intra-textual and extra-textual information) ought to be used from the outset to determine the purpose of the legislation, whether the meaning of the text is ostensibly clear or not.

(iii) Marginal notes

2.108 Traditionally, marginal notes have not been considered to be part of the legislation, because they are not inserted by the legislature but by the drafters.

2.109 Section 14 of the Canadian Interpretation Act 1985 provides that marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only. The Australian Acts Interpretation Act states in section 13(1) that the headings of the parts, divisions and subdivisions into which any Act is divided shall be deemed to be part of the Act. It provides in section 13(3) that no marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act. The Interpretation of Legislation Act of Victoria deals in section 36 with the interpretation of headings, schedules, marginal notes and footnotes:

(3) No marginal note, footnote or endnote in an Act or subordinate instrument and no heading to a provision of an Act or subordinate instrument (not being a heading that forms part of the Act or subordinate instrument by force of subsection (1), (1A) or (2A)) shall be taken to form part of the Act or subordinate instrument.

(3A) An example (being an example at the foot of a provision under the heading "Example" or "Examples"), diagram or note (being a note at the foot of a provision and not a marginal note, footnote or endnote) in an Act or subordinate instrument forms part of the Act or subordinate instrument if –

- (a) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; or
- (b) the example, diagram or note is inserted into an Act passed, or subordinate instrument made, before 1 January 2001 by an Act passed, or subordinate instrument made, on or after that date.

(3C) A provision number in an Act or subordinate instrument (whether passed or made before, on or after 1 January 2001) forms part of the Act or subordinate instrument.

circumstances; (c) regulating the purchase and sale of medicines by manufacturers distributors, wholesalers, pharmacists and people licensed to dispense medicines.

¹²⁵

2005 (3) SA 238 (SCA) at par [46] where it was noted that the Medicines Act has no preamble and its long title is singularly uninformative.

(3D) An explanatory memorandum or table of provisions printed with an Act or subordinate instrument before the title of the Act or subordinate instrument does not form part of the Act or subordinate instrument.

(3E) An index or other material printed with an Act or subordinate instrument after the endnotes to the Act or subordinate instrument does not form part of the Act or subordinate instrument.

(4) Nothing in sub-section (3) shall be construed as preventing in the interpretation of a provision of an Act or subordinate instrument, the consideration pursuant to section 35(b) of any marginal note, footnote, endnote or heading not forming part of that Act or subordinate instrument.

2.110 The Irish Commission explained that the issue of whether or not a court can or should be able to refer to marginal notes and cross-headings of Acts is somewhat complicated. They noted that section 11(g) of the *Interpretation Act, 1937* goes further than merely stating that marginal notes and cross-headings are not part of an Act; it states that they should not be “considered or judicially noticed in relation to the construction or interpretation” of the statute. They remarked that this exclusion from the process of construction was not a necessary consequence of their not constituting part of the Act, and it meant that marginal notes, headings and cross-lines are the only material of any kind, intrinsic or extrinsic, that are specifically excluded as aids to interpretation. The Irish Commission pointed out that probably the most noteworthy decision on the use of marginal notes was that by O’Higgins CJ in *Rowe v. Law*,¹²⁶ where it was disputed whether section 90 of the *Succession Act, 1965* had altered the rules governing construction of wills from the common law position (which would have excluded parol evidence of a testator’s intention). In expressing the view that section 90 had effected such a change, the judge commented that a marginal note described it as a new section and he inferred that a change in the existing law had been intended. Neither Henchy J nor Griffin J referred to the significance or otherwise of the marginal note, but it should be noted that they reached a different result on the effect of the relevant section. This might be taken to suggest that the Chief Justice’s reference to the marginal note was significant in forming his dissenting view.

2.111 The Irish Commission noted that there have been several cases where Irish Superior Courts have made express use of marginal notes, and there have also been several cases in recent years where judges have made passing reference to marginal notes in the course of cases in the Superior Courts. They stated that not

¹²⁶ [1978] IR 55, 66.

only have judges been willing to ignore section 11(g) of the *Interpretation Act, 1937*¹²⁷ and look at the marginal notes in Irish legislation; some have even referred to marginal notes in English legislation, although in some cases the courts have expressed a reluctance to advert to marginal notes.

2.112 The Irish Commission noted that there is no statutory prohibition in England on the use of marginal notes, although there have been cases where a bar on their use in interpretation was held to exist, based on the theoretical objections set out above. Generally, however, English case-law demonstrates a willingness on the part of the judiciary to refer to marginal notes and a number of cases provide a clear statement of the position being advanced here. The Irish Commission pointed out that that one example is the case of *R v. Schildkamp*,¹²⁸ where the House of Lords took a pragmatic approach to the issue. In that case Lord Upjohn stated that even though the marginal note was an 'unsure' guide to construction, he could conceive of cases where "very rarely it might throw some light on the intentions of Parliament". In the same case Lord Reid took the view that while, strictly speaking, the marginal note might not be the product of Parliament, it was more realistic to treat all of a printed Act as being the product of the whole legislative process, and to give due weight to everything found in it.

2.113 The Irish Commission pointed out that Bennion outlines what he perceives as the common law position in the United Kingdom very succinctly: "Any suggestion that certain components of an Act are to be treated, for reasons connected with their parliamentary history, as not being part of the Act is unsound and contrary to principle." The Irish Commission noted that he states boldly that while there is a line of precedent in English law, stemming from *R v. Hare*,¹²⁹ to the effect that marginal notes should not be considered by the courts to be part of an Act, Bennion believes this is wrong in principle. He argues that courts should not place themselves in the position of questioning the procedures of Parliament by which legislation comes into being. The Irish Commission stated that the argument that the marginal notes are

¹²⁷ No marginal note placed at the side of any section or provision to indicate the subject, contents, or effect of such section or provision and no heading or cross-line placed at the head or beginning of a Part, section or provision or a group of sections or provisions to indicate the subject, contents, or effect of such Part, section, provision, or group shall be taken to be part of [the Act](#) or instrument or be considered or judicially noticed in relation to the construction or interpretation of [the Act](#) or instrument or any portion thereof.

¹²⁸ [1971] AC 1.

¹²⁹ [1934] 1 KB 354.

inserted by 'irresponsible persons',¹³⁰ and therefore do not have the authority of the Oireachtas, is met by pointing out that whoever does draft them is subject, in theory at least, to the authority of the Oireachtas. There is no reason, then, they remark to assert that the marginal notes are not the voice of parliament. As regards the argument that the notes are unreliable because they are not updated to reflect amendments, they note the old Latin maxim *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*— all things are presumed to be rightly and dutifully performed unless the contrary is proved. Constitutionally, they considered that it is not for the courts to inquire as to whether the Act as published has been drawn up correctly by the servants of the legislature. The Irish Commission pointed out that in 1969, partly prompted by concern at conflicting judicial dicta in this area, the English Law Commission recommended a draft *Bill on Interpretation*, including a provision on the use of intrinsic aids to construction, and at that time they proposed that all material published with a Bill as it was presented to Parliament should be used in interpretation.¹³¹

2.114 The Irish Commission pointed out that their general approach has been that courts should have the discretion to take into account all potentially helpful material in a consistent manner, save where there is a good reason why this should not be permitted, and accordingly, in construing a provision, its context should be considered. They considered that as is the case with other sources of information about the purpose of statutes, to allow judges to look at marginal notes is merely to confer on them a discretion to use the notes in instances where they may be of assistance. They pointed out that although the notes are not to be considered part of the Act, it would seem that (along with the long title) the marginal notes may represent a useful source of information for a court, and provide a clear indication of an intention which is not obvious from the substantive provisions of an Act.

2.115 The Irish Commission suggested that it is also worth noting, as a matter of practice, that it is inconceivable that judges would not notice material which is, after all, on the same printed page as the substantive provision being interpreted. They said that not to do so would almost require blinkers and the impossibility of such an approach can be inferred from the way in which most of the cases have been

¹³⁰ As Phillimore LJ said in *Re Woking UDC* [1914] 1 Ch 300, 322.

¹³¹ The Irish Commission noted that the Law Commission's Bill was not implemented, but its proposals were resurrected in draft Clause 1 of the Renton Report in 1975, which advocated that all intrinsic aids be used in interpretation. Again, this Report was not

decided, and if the actual practice is to refer to marginal notes, it would be better that this would be openly acknowledged, rather than maintaining the pretence demanded by section 11(g) of the *Interpretation Act, 1937*. In general, the Irish Commission believed that judges are prepared, and should be allowed, to allocate to various sources of enlightenment their due weight, whether great or small, and that this is equally true in respect of material which is published alongside the substantive sections of a statute. The interpretation of different parts of a statute by a court should be governed by the principle which has been enunciated as a 'functional construction' rule, and explained as follows; "It is a rule of law ... that in construing an enactment the significance to be attached to each type of component of the Act ... must be assessed in conformity with its legislative function as a component of that type."¹³² The Irish Commission stated that this is also the approach which has been advocated by the New Zealand Law Commission, and therefore section 5 (g) of the New Zealand *Interpretation Act, 1924*, does not expressly prohibit reference to marginal notes, but it excludes them from being deemed "part of" an Act. The New Zealand Law Commission considered whether this had the effect of prohibiting their use as aids to construction. The New Zealand Law Commission cited the case of *Daganayasi v. Minister of Immigration*¹³³ where it was said that marginal notes might assist, but should not control, interpretation as suggesting that the silence of the section as to whether they could be used in interpretation constituted an "implied licence to do so".

2.116 The Irish Commission suggested that there are many arguments, both conceptual and practical, in favour of the view that marginal notes should be considered part of an Act. They considered that bearing in mind the functional approach to interpretation, many of the concerns of those who advocate the exclusion of marginal notes from interpretation could be met. They believed that the precise status of intrinsic aids, and the question of whether or not they should be viewed as part of an Act, or merely as useful information published alongside an Act, were probably not that significant. In practice, they said, one may consider intrinsic aids to be some of the most valuable sources of material for interpretation outside of an Act, or view them as being some of the least useful components of the Act itself; which approach is taken matters little. They would emphasise, however, that their

implemented, though Lord Scarman tried twice, unsuccessfully, to re-introduce it (in 1980 and 1981).

¹³² Bennion at 547.

¹³³ [1980] 2 NZLR 130, 142.

proposal was merely to allow courts a discretion to have regard to marginal notes, and it was difficult to see any justification for singling out for exclusion from the interpretation process, the material that is closest to the active provisions of an Act.

2.117 The Irish Commission noted the following arguments against allowing reference to marginal notes:

- Parts of an Act which are intended merely for guidance, and which may not have been carefully formulated, could potentially override carefully drafted, enacting provisions of the same statute;
- Only provisions debated and fully considered by the Oireachtas should be given the force of law.

2.118 The Irish Commission noted the following arguments for allowing reference to marginal notes:

- The principle of functional construction and the discretionary nature of the power being granted to the judiciary mean that there can be no necessity for maintaining the bar on reference to intrinsic aids, whether or not one advocates a change to their status.
- It is clearly anomalous that the only material which Irish courts are specifically prevented from using in interpretation is published by the Oireachtas itself. If the general purposive approach is accepted, it is illogical that the court should be allowed to look at other sources of contextual evidence of the purpose of an Act, but not at material published with the Act itself.
- In practice, judges will inevitably see the marginal notes and to claim that they do notice their contents is to engage in a fiction that serves no useful purpose.

2.119 The Irish Commission recommended that all intrinsic aids should be available for use in interpretation and that their use should not be contingent on establishing, as a prerequisite, that there is some ambiguity in the text. In order to enable this to be achieved, the Irish Commission proposed that section 11(g) of the Interpretation Act, 1937, should be repealed. But, because of the uncertainty of the common law in this area, the repeal of section 11(g) would not be sufficient to establish the general principle that all intrinsic aids may be referred to by a court in appropriate

circumstances. They also recommended, therefore, the enactment of a provision which would positively authorise a court to use intrinsic aids: In construing the provisions of an Act, a court may make use of all matters that are set out in the document containing the text of the Act as officially printed.

2.120 In *Durban Corporation v Estate Whittaker*¹³⁴ the court held that marginal notes could not be used in construing a vague provision. In two later Natal cases, *Ex Parte Badat*¹³⁵ and *R v Sitole*,¹³⁶ the courts deviated from this view and used marginal notes to clarify a provision. In *S v Imene*¹³⁷ the Appellate Division used a marginal note to interpret section 3 of the Terrorism Act 83 of 1967. It was noted above that the main historical objection against the use of marginal notes during interpretation is that marginal notes are not considered by the members of the legislature during the adoption of the legislation, but are inserted by drafters afterwards. As a result these marginal notes cannot be amended by subsequent legislation. Badenhorst¹³⁸ is of the opinion that there should be no distinction between headings and marginal notes, and that both should be used during the interpretation process. The legislation in its final form (as published and promulgated) must be used as whole. The manner in which the legislation was debated, adopted and passed should not influence the interpretation of the final product.

(iv) Headings to chapters or sections

2.121 In the past the courts took the view that the courts could only use headings to establish the purpose of the legislation if the rest of the provision was not clear.¹³⁹ In *Turffontein Estates v Mining Commissioner Johannesburg*¹⁴⁰ the court pointed out that the value attached to headings would depend on the circumstances of each case.

¹³⁴ 1919 AD 201.

¹³⁵ 1927 NPD 439.

¹³⁶ 1944 NPD 313.

¹³⁷ 1979 (2) SA 710 (A).

¹³⁸ Badenhorst "Die hedendaagse aanwending van kantskrifte en atikelopskrifte by wetsuitleg" (1986) *THRHR* 322.

¹³⁹ *Chotabhai v Union Government* 1911 AD 24.

¹⁴⁰ 1917 AD 419.

2.122 It was explained in the Australian *Review of the Commonwealth Acts Interpretation Act 1901*¹⁴¹ that section 13(1) provides that the headings of the parts, divisions and subdivisions into which an Act may be divided shall be deemed to be part of the Act. However, subsection 13(3) provides that no heading to a section of an Act shall be taken to be part of the Act. This provision is based on the common law rule that marginal notes are not part of an Act, and should not generally be taken into account in interpreting an Act (a rule flowing from the old English practice of inserting such notes after the passage of the Bill). In 1980, marginal notes in Commonwealth Acts were replaced by section headings, but the rule that these were not part of the Act was specifically continued. It was said that section 13 is unsatisfactory for the following reasons: neither subsection 13(1) nor subsection 13(3) makes reference to chapter or subsection headings; the status of these is therefore unclear; longer Acts are often divided into chapters as well as parts, and the use of subsection headings is becoming more frequent. It was stated that more importantly, there is no rational basis for providing that section headings are not part of an Act, but that other headings are. It was proposed that all headings in an Act should have the same status, and they should all be part of the Act. Such headings can be relevant to the interpretation of legislation, and some Australian courts have had regard to marginal notes and section headings in appropriate circumstances. In the case of Commonwealth Acts, paragraph 15AB(2)(a) of the Interpretation Act now permits a court to use any headings to construe an Act. Such headings are included in the Bill which is considered by Parliament. Marginal notes and section headings have been included in Bills presented to the Commonwealth Parliament since federation. Further, if such headings were part of the Act, the appropriate method of amending them would be clear.

2.123 The Interpretation of Legislation Act of 1984 of Victoria deals as follows with the interpretation of headings, schedules, marginal notes and footnotes:

36. Headings, Schedules, marginal notes and footnotes

(1) Headings to –

- (a) Chapters, Parts, Divisions or Subdivisions into which an Act or subordinate instrument is divided; or
- (b) Schedules to an Act or subordinate instrument-

¹⁴¹ Available at [http://www.ema.gov.au/agd/Department/Publications/part_3.htm#Section %2013](http://www.ema.gov.au/agd/Department/Publications/part_3.htm#Section%2013) (accessed on 7 September 2006).

form part of the Act or subordinate instrument.

(1A) Headings to Parts, Divisions or Subdivisions into which a Schedule to an Act or subordinate instrument is divided form part of the Act or subordinate instrument if –

- (a) the Act is passed, or the subordinate instrument is [made](#), on or after 1 January 2001; or
- (b) the heading is inserted into an Act passed, or subordinate instrument [made](#), before 1 January 2001 by an Act passed, or subordinate instrument [made](#), on or after that date.

(2) A Schedule to an Act or subordinate instrument forms part of the Act or subordinate instrument.

(2A) Headings to –

- (a) sections, clauses, regulations, rules or items into which an Act or subordinate instrument, or a Schedule to an Act or subordinate instrument, is divided; or
- (b) tables, columns, [examples](#), diagrams, notes (being notes at the foot of provisions and not marginal notes, footnotes or endnotes) or forms in an Act or subordinate instrument –

form part of the Act or subordinate instrument if-

- (c) the Act is passed, or the subordinate instrument is [made](#), on or after 1 January 2001; or
- (d) the heading is inserted into an Act passed, or subordinate instrument [made](#), before 1 January 2001 by an Act passed, or subordinate instrument [made](#), on or after that date.

(2B) Headings to –

- (a) Orders into which a subordinate instrument containing rules or orders regulating the practice and procedure of a court or tribunal is divided; or
- (b) Parts into which an Order referred to in paragraph (a) is divided –

form part of the subordinate instrument if –

- (c) the subordinate instrument is [made](#) on or after 1 January 2001; or
- (d) the heading is inserted into a subordinate instrument [made](#) before 1 January 2001 by a subordinate instrument [made](#) on or after that date.

2.124 In *S v Liberty Shipping and Forwarding (Pty) Ltd*¹⁴² Didcott J considered the difference between marginal notes and headings and their value:

. . . The proposition that the 'damage' in question is not limited to damage to property but encompasses all kinds of damage means, if it is sound, that a Court convicting someone of assault, rape, crimen injuria or criminal defamation may itself proceed to

¹⁴²

1982 (4) SA 281 (D) at 284 – 286.

award the victim general damages as compensation for the injury to person, dignity or reputation he or she has suffered. Never, as far as I am aware, has such an award been made or even sought under s 300 (1) or either of its predecessors. The likelihood that Parliament had this in mind does not seem strong. It postulates an enquiry of the sort and scope making it an unsuitable epilogue to criminal proceedings.

That Parliament intended damage to property to be all that was cognisable under s 300 (1) is positively proved by one fragment of evidence, if it amounts to such and one may therefore heed it. I refer to the caption to s 300. With the utmost clarity, this tells one that -

'Court may award compensation where offence causes damage to or loss of property.'

The Afrikaans version, to the same effect, is:

'Hof kan vergoeding toeken waar misdryf skade aan of verlies van goed veroorsaak.'

Both s 363 and 357, by comparison, had the more laconic legend:

'Court may order accused to pay compensation.'

The relevance of such captions depends, according to a trio of early judgments by the Appellate Division, on whether they take the form of headings or marginal notes. The heading to a section may be brought into account, so it has been said, to resolve an ambiguity in or doubt raised by the text. That was decided in *Chotabhai v Union Government and Another* 1911 AD 13 at 24 and in *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431. The same does not apparently go for marginal notes, however, which were put beyond the pale in *Durban Corporation v Estate Whittaker* 1919 AD 195 at 201 - 2. The distinction was drawn because, in those days at any rate, headings to sections were regarded as integral parts of the statute itself, of the legislation Parliament had actually considered and passed, while marginal notes were not. The topic is discussed in Steyn's *Uitleg van Wette* 5th ed at 147 - 9.

The rule gives me no trouble. Its application, however, does. The reason is this. I am no longer sure that, simply by looking at the caption to a section, I can tell whether Parliament approved of it, whether it has the status of a heading, or whether it is to be dismissed as a mere marginal note which Parliament never endorsed. I thought I recognised the difference between the two when, in *PMB Armature Winders v Pietermaritzburg City Council* 1981 (2) SA 129 (N) at 135A - C, I had occasion to mention it. In all innocence I then supposed the heading to be what one found standing above the section's text, the marginal note to be that which flanked it. Using that straightforward test, I classified the caption to the statutory provision I was busy examining as a heading. I had consulted, however, only the official set of classified statutes Butterworths publishes. Not till afterwards, indeed not until the present application brought me back to the question, did it occur to me that nothing turned on the set's particular manner of presenting captions to sections. This I realised when I noticed that no single one of them resembled a marginal note, that all were uniformly printed as headings. Comparing the set with the annual volumes of statutes the Government Printer used to produce, I then discovered the reverse. These showed headings to chapters and parts of chapters, but none I could find above individual sections. All captions were placed alongside the text, as if they were marginal notes. The Government Printer follows the selfsame practice nowadays whenever he publishes statutes in the Government Gazette. The result is that the caption to s 300 (1) looks like a heading in the Butterworths set, but has all the appearance of a marginal note in the Government Gazette.

A further dimension is added to one's confusion when it dawns on one that Bills published in the Government Gazette are invariably accompanied by the captions to their clauses, occupying the usual position of marginal notes, to be sure, but displayed nevertheless. So, I believe, are those on Parliamentary order papers. Perhaps this means that Parliament must now be taken to have considered and approved of all captions to a statute's sections, even those rated as marginal notes. Perhaps, on the other hand, it does not.

The subject could surely do with reconsideration by the Appellate Division. Should the distinction between marginal notes and headings to sections be preserved, one would welcome guidance on how to tell them apart. Where the Government Printer chooses to put a caption scarcely seems an ideal criterion for differentiation between that which the Court may take into account when it interprets legislation and that which it may not, or even a rational basis for such.

It would be dangerous to allow myself to be influenced in the meantime by the caption to s 300 (1). I shall therefore ignore it. I thought it best to explain, however, why I was going to do so.

Nothing else that is apparent to me resolves the ambiguity in s 300 (1). I am thus left with it. Its treatment then becomes the problem.

The solution, to my mind, is to select the narrower construction in preference to the wider one. When the Court cannot discover how far Parliament meant to go in devising a special scheme like that of s 300 (1), when it finds Parliament's intention clear up to a point but open to doubt beyond such, it must construe the legislation conservatively, in my opinion, settling for that which seems certain and venturing no further.

I hold, it follows, that the only damage for which compensation is claimable under s 300 (1) is damage to property, and that the section does not cover any other damage which is suffered.

No damage to property was done in this case. The main claim therefore rests on the other leg to s 300 (1), on the proposition that the crime of the third accused resulted in 'loss of property... belonging to' ('verlies van goed... behorende aan') the Department.

2.125 In *President of the Republic of South Africa v Hugo*¹⁴³ Goldstone J remarked as follows:

[12] Textual support for the view that the powers exercised by the President under s 82(1) are executive powers is to be found in the heading to and contents of s 83(1) and (2). It is there provided as follows:

'83. Confirmation of executive acts of President

(1) Decisions of the President taken in terms of s 82 shall be expressed in writing under his or her signature.

(2) Any instrument signed by the President in the exercise or performance of a power or function referred to in s 82(3) shall be countersigned by a Minister.

For the purpose of elucidating a provision in a statute our Courts have referred to the headings of sections in a statute. A similar position has been

¹⁴³

1997 (4) SA 1 (CC).

adopted in England and Canada. In the case of headings which are part of a constitution which was the product of negotiations conducted by the drafters thereof, and those headings are part of the constitution as drafted, there is at least as much to be said for their relevance as a tool of interpretation as there is in the case of ordinary legislation. It follows, in my opinion, that the heading of s 83 can be referred to as support for the conclusion that the powers of the President under s 82(1) are executive powers. The President, as an executive organ of State, by reason of the supremacy clause, is subject to the provisions of the interim Constitution. (Footnotes omitted)

2.126 Headings to chapters or sections may be regarded as ‘preambles’ to those chapters or sections. Within the framework of the contextual approach all factors, including headings, should be considered to determine the purpose of the legislation.

(iv) Paragraphing and punctuation

2.127 Originally punctuation was not considered to be part of the legislation, and division into paragraphs was regarded in the same light as punctuation. The Irish Commission noted that punctuation is treated somewhat differently than marginal notes and cross-headings in that it is not mentioned in section 11(g) of the *Interpretation Act, 1937*, and has not been controversial in practice. They said that the reason why punctuation might be regarded as somewhat suspect, as an aid to construction, is historical, such as in England, there has been a traditional distrust of punctuation in statutes, due historically to unreliable procedures involved in the printing of statutes in the early years. The Irish Commission considered that these difficulties were probably overstated and certainly do not arise in regard to modern legislation. They noted that there would appear to be no Irish case where the question arose as to whether punctuation either forms part of an Act or is available as an aid to construction, although it seemed unlikely, given the generally realistic and perhaps less dogmatic outlook of the Irish judiciary, that there could be any serious objection to their use. Thornton dealt – they believed irrefutably – with the point by stating ; “It is a curious thing that judges, whose entire reading is punctuated, should, in carefully punctuated judgments, consider themselves obliged to proclaim that the punctuation in carefully punctuated statutes is no part of the law.”

2.128 The Oregon Rules of Construction of Statutes provide that punctuation is a part of the Act and it may be considered in the interpretation of an Act but may not be used to create doubt or to distort or defeat the intention of the legislature. Punctuation may be disregarded or rearranged to achieve the purpose of a statute.¹⁴⁴

¹⁴⁴ Fleischhauer v. Bilstad, 233 Or. 578, 379 P.2d 880 (1963); Pape v. Hollopeter, 125 Or. 34, 265 P. 445 (1928); State v. Banfield, 43 Or. 287, 72 P. 1093 (1903); 24 Or. L. Rev. 157 (1945); 21 *Oregon Digest*, Statutes §200.

The Interpretation of Legislation Act of 1984 of Victoria deals as follows with punctuation:

- (3B) Punctuation in an Act or subordinate instrument forms part of the Act or subordinate instrument if –
- (a) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; or
 - (b) the punctuation is inserted into an Act passed, or subordinate instrument made, before 1 January 2001 by an Act passed, or subordinate instrument made, on or after that date.

2.129 According to *Bosman's Trustee v Land and Agriculture Bank of SA and Registrar of Deeds (Vryburg)*,¹⁴⁵ the court may not assign any importance to the punctuation and paragraphing of legislation. In *R v Njiwa*¹⁴⁶ the court rejected this judgment and held that punctuation must be taken into account in interpretation. In *S v Yolelo*¹⁴⁷ the Appellate Division left open the question whether the rule, as derived from English law, that punctuation and paragraphing may not be used as aids to construction, should still have effect in South Africa. However, the court held that an interpretation based on the purpose of the legislation should take precedence over an interpretation based solely on the division into paragraphs. In *Skipper International v SA Textile and Allied Workers' Union*¹⁴⁸ it was held that the court must take punctuation into account during the interpretation process, because it was considered by the legislature during the passing of the legislation.

2.130 The Commission proposes that the Bill ought to reflect a more modern and flexible approach to the use of paragraphing and punctuation as intra-textual aids to interpretation. The Commission therefore proposes a provision providing that when reading legislation as a whole in order to determine the meaning of a provision all the provisions of the legislation must be taken into account, including their sequence, segmentation and punctuation, and the general organisation and structure of the legislation.

(v) Footnotes, endnotes, diagrams and examples

2.131 The structure of post-1994 legislation tends to be more user-friendly than in the past. Footnotes and endnotes are used to obviate confusing and tedious cross-

¹⁴⁵ 1916 CPD 47.

¹⁴⁶ 1957 (2) SA 5 (N).

¹⁴⁷ 1981 (1) SA 1002 (A).

references (see eg the Labour Relations Act 66 of 1995). This is a more streamlined reference technique and merely a change of style. Although footnotes, endnotes, diagrams and examples are printed and published with the rest of the legislation, they form part of the official material printed with legislation and should be used as the context of the legislation (like any other external aid to statutory interpretation).¹⁴⁹

(vi) Schedules

2.132 Schedules serve to shorten and simplify the content of sections in legislation. Their value in interpreting provisions in legislation will depend on the nature of the particular schedule: a schedule may differ in their scope and significance, its relation to the rest of the legislation, and the language in which it is referred to in the legislation itself.

2.133 The Interpretation of Legislation Act of 1984 of Victoria provide in section 36(2) that a Schedule to an Act or subordinate instrument forms part of the Act or subordinate instrument. The Australian Acts Interpretation Act states in section 13(2) that every schedule to an Act shall be deemed to form part thereof.

2.134 The general rule of South African law is that schedules which explain sections of an Act have the same force of law as the content of a section of the legislation. In the case of conflict between the schedule and a section of the legislation, the section prevails.¹⁵⁰ In certain cases the particular schedule will state that it is not part of the Act and does not have the force of law, in which case it may be considered as part of the context. An example of this is Schedule 4 to the Labour Relations Act 66 of 1995, which consists of flow diagrams explaining the procedures for dispute resolution set out in the Act.¹⁵¹

2.135 It is proposed that the Interpretation of Legislation Bill ought to reflect a more modern and flexible approach to the unqualified use of schedules as intrinsic aids to interpretation. It is therefore proposed that the definition of *provision* should also include schedules as being one of the constituent parts of legislation.

¹⁴⁸ 1989 (2) SA 612 (W).

¹⁴⁹ See also Du Plessis 245-6.

¹⁵⁰ *African and European Investment Co v Warren* 1924 AD 360. (One exception to this rule was section 232(4) of the 1993 Constitution, which stated that the schedules were deemed to form part of the substance of the 1993 Constitution for all purposes.)

(vii) Legislative purpose

2.136 An example of a purpose clause is contained in chapter 1 (“Purpose, application and interpretation”) of the Labour Relations Act 66 of 1995, which contains an express legislative purpose clause, an application clause and interpretation guidelines. Although the express legislative purpose clause provides a more detailed description of the legislative purpose than the long title, for example, it can never be decisive. To take such a view would merely be to create a new and sophisticated version of literal interpretation. The interpreter has to read the legislative text as a whole, and must also consult the external aids in an attempt to strike a balance between text and context.

(viii) Interpretation guidelines

2.137 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 contains the following guiding principles which may be an invaluable aid to its interpretation:

4 Guiding principles

In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:

The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings;

access to justice to all persons in relevant judicial and other dispute resolution forums;

the use of rules of procedure in terms of section 19 and criteria to facilitate participation;

the use of corrective or restorative measures in conjunction with measures of a deterrent nature;

the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.

In the application of this Act the following should be recognised and taken into account:

The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and

the need to take measures at all levels to eliminate such discrimination and inequalities.

(x) Proposed provision on intrinsic information

2.138 It is proposed that *intrinsic information* should be defined as follows in the Bill, namely “intrinsic information” means any marginal note, footnote, endnote, information statement, memorandum or other information published in or together with the text of legislation aimed at explaining the text. It is further proposed that the following provision be included in the Bill clarifying that intrinsic information may be taken into account to determine the meaning of a provision:

When reading legislation as a whole in order to determine the meaning of a provision any intrinsic information may be taken into account, but only as an opinion on the information it conveys.

(c) EXTRINSIC INFORMATION AS AIDS TO INTERPRETATION**(i) Introduction**

2.139 Bennion explains that the *enacting history* of legislation is the surrounding corpus of public knowledge relative to its introduction into Parliament as a Bill, subsequent progress through, and ultimate passing by, Parliament.¹⁵² He notes that in particular it is the extrinsic material assumed to be within the contemplation of Parliament when it passed the Act. He says further that enacting history comprises reports and other material on which the legislation is based, the text of the Bill and amendments proposed to it, reports of parliamentary debates and explanatory memoranda officially issued in connection with the Bill, and other contemporaneous material upon which Parliament may be resumed to have acted.

The central idea of legislation is to provide the citizen or adviser with a structure which *in itself* constitutes a basis upon which the person bound can safely stand. Once a building is erected the scaffolding can be taken down, and should thereafter be irrelevant. This may be defeated in the field of legislation by the inadequacy of language, the fallibility of legislators and drafters, and the fact that the future they seek to regulate is unknown, and unguessable. The precise function of enacting history in interpretation is determined by where the line is currently drawn by the courts. . . .

. . . [O]n a strict view the enacting history should be irrelevant, since the object of Parliament is to express its will entirely within the definitive text of the Act itself. This eminently convenient doctrine has unfortunately proved too idealistic and theoretical in practice. The essence of statutory interpretation lies in resolving the dichotomy between the ‘pure’ doctrine that the law is to be found in the Act and nowhere else, and the ‘realistic’ doctrine that legislation is an imperfect technique requiring, for the social good, an importation of surrounding information. In the upshot, this information is generally regarded as admissible (according to the weight it deserves to carry) unless there is some substantial requiring it to be kept out. . . .

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Statutory Interpretation Butterworths: London 2002 at 520.

2.140 It was recently said that to a degree, accessible legislation will always be illusory, and a reader cannot go to a statute and safely assume that, having read the words, he or she will know what the law is on the subject the statute deals with.¹⁵³ The meaning of a statute is affected by interpretation legislation and by common law principles of interpretation, like the canons of construction. It was explained that in some jurisdictions, legislation expressly authorises recourse to extrinsic aids in the reading of statutes, whilst in others, reference to material outside the statute is permissible within limits determined by the courts. Whether recourse to material outside the statute should be permissible at all or, if so, to what extent, is not without controversy. It was noted that two eminent Judges writing over half a century apart and on opposite sides of the common law world have each spoken about the inherent problems of resorting to external sources to interpret legislation: In 1947 Justice Felix Frankfurter referred to the old adage that “only when legislative history is doubtful, do you go to the statute” and Justice Kirby voiced the same misgivings in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*¹⁵⁴ when he said:

In statutory construction, there is a tendency, noted in several recent cases, for judges and others to look first to a number of external sources for guidance, including judicial generalities or legal history. It is as if some who have the responsibility of interpretation of legal words find the reading and analysis of the texts themselves distasteful, like dentists happy to talk about the problem but loath to pull a tooth. In statutory construction this error of approach must be rooted out. The proper place to start is the statute. A wide range of other materials may now be accessed, if need be, to assist in the task. But the task remains that of finding meaning of the legislation from the text, not from other materials.

2.141 Richard A Danner notes that comparisons with other systems' approaches to the uses of legislative history in statutory interpretation can be only suggestive, but they do highlight the unusual amount of undifferentiated and dispersed material potentially available in the US setting:¹⁵⁵

The primary factor differentiating the usual approaches to the interpretation of statutes in the United States is captured in a question asked by Justice Jackson in 1948: “[S]hould a statute mean to a Court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?” Some approaches emphasize the primary, if not the exclusive, role of the meaning of the text of the statute to readers; the others

¹⁵³ George Tanner “Law Reform and Accessibility” Australasian Law Reform Agencies Conference Wellington 13 - 16 April 2004 Access To Justice: Rhetoric or Reality.

¹⁵⁴ [2002] HCA] 5.

¹⁵⁵ “Justice Jackson's Lament: Historical And Comparative Perspectives On The Availability Of Legislative History” available at <http://www.law.duke.edu/journals/djcil/articles/djcil13p0151.htm> (accessed on 7 September 2006).

begin with the text, but focus either on the law makers' intentions regarding the specific language at issue or on the general purpose of the statute. Intentionalist and purposive interpreters are more likely than text-based interpreters to examine and rely on sources outside the enacted text. Most modern writers have acknowledged this basic taxonomy of approaches while occasionally using other terminology to describe and elaborate the boundaries among them.

Prior to the twentieth century, U.S. courts generally limited their analyses to the statutory text, even if their stated goal was to identify the intent of the legislature. In the nineteenth century, what came to be known as the "plain meaning rule" was increasingly invoked by federal and state courts, at times to deny that there was any need to interpret statutory language deemed to be plain and unambiguous. In the early twentieth century, judges began to look more frequently at sources outside the statutory text as aids to interpretation, and by 1940 the Supreme Court had repudiated use of the plain meaning rule as a "filtering device" for statutory interpretation, stating that "there certainly can be no 'rule of law' which forbids [the use of legislative history], however clear the words may appear to be on 'superficial examination.'" In the 1980s, however, after decades in which U.S. courts regularly looked beyond the text to determine intent or purpose, text-centered approaches regained prominence due in large part to the influence of Justice Antonin Scalia.

...

Both in England, where courts have historically been limited in their uses of extrinsic sources in interpretation, and in civil law jurisdictions, where courts are allowed to consult legislative information when it is available, the materials needed are fewer and more focused than in the United States. Other legislatures do not have "the elaborate tradition of structured committee reporting" that characterizes the U.S. Congress. In parliamentary systems, the amount of material generated by the legislative process is smaller, the materials may be of superior quality, and the material relevant for interpretation may be more readily packaged for use by attorneys and judges. As a result, the problems of availability and accessibility of the materials may be less troubling for judges and lawyers in those countries than for their counterparts here.

The problems of understanding and weighing the likely authority of materials in the legislative record are unlikely to be solved with a technological fix. Indeed, as Vermeule has pointed out "cheaper technology makes it easier not only to research legislative history but also to generate it." In the twentieth century, successful legislative history research involved more than the establishment of more government documents depositories, and it now requires more than access to larger electronic databases of Congressional materials. Newer information delivery systems may have made it easier to locate relevant documents, but using them effectively remains difficult and costly because of the large number of possibly relevant documents, because they are poorly indexed internally, and because of the difficulties of determining in advance which parts of the history may be deemed relevant to questions of interpretation.

From this perspective, the greater availability of legislative information only increases the difficulties of retrieving information pertinent to questions of legislative history. The practical aspects of information retrieval that Justice Jackson identified in 1948 still create meaningful problems in the twenty-first century for judges deciding cases turning on statutory interpretation and for attorneys advising their clients. (Footnotes omitted)

2.142 *S v Makwanyane and Another*¹⁵⁶ provides a useful summary of the use of legislative history in legislative and constitutional interpretation in South Africa:

[12] The written argument of the South African Government deals with the debate which took place in regard to the death penalty before the commencement of the constitutional negotiations. The information that it placed before us was not disputed. It was argued that this background information forms part of the context within which the Constitution should be interpreted.

[13] Our Courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question.

'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.'

[14] Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new Bills have not been admitted as background material. It is, however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining 'the mischief aimed at (by) the statutory enactment in question'. These principles were derived in part from English law. In England the Courts have recently relaxed this exclusionary rule and have held, in *Pepper (Inspector of Taxes) v Hart and related appeals* that, subject to 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.'

[15] As the judgment in *Pepper's* case shows, a similar relaxation of the exclusionary rule has apparently taken place in Australia and New Zealand. Whether our Courts should follow these examples and extend the scope of what is admissible as background material for the purpose of interpreting statutes does not arise in the present case. We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts, as well as the fundamental rights of every person which must be respected in exercising such powers.

[16] In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. The United States Supreme Court pays attention to such matters, and its judgments frequently contain reviews of the legislative history of the provision in question, including references to debates, and statements made, at the time the

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1995 (3) SA 391 (CC) at [12] – [16].

provision was adopted. The German Constitutional Court also has regard to such evidence. The Canadian Supreme Court has held such evidence to be admissible, and has referred to the historical background, including the pre-confederation debates, for the purpose of interpreting provisions of the Canadian Constitution, although it attaches less weight to such information than the United States Supreme Court does. It also has regard to ministerial statements in Parliament in regard to the purpose of particular legislation. In India, whilst speeches of individual Members of Parliament or the Convention are apparently not ordinarily admissible, the reports of drafting committees can, according to Seervai, 'be a helpful extrinsic aid to construction'. Seervai cites Kania CJ in *A K Gopalan v The State* for the proposition that, whilst not taking

'. . . into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to debates may be permitted'.

The European Court of Human Rights and the United Nations Committee on Human Rights all allow their deliberations to be informed by travaux préparatoires. (Footnotes omitted)

(ii) *Preceding discussions and explanatory material*

2.143 Debates about a specific Bill before Parliament, before it has been passed, explanatory memoranda (made available by the Minister to members of Parliament), the debates and reports of the various committees which form part of the legislative process, and the reports of commissions of inquiry that gave rise to legislation all constitute preceding discussions.

2.144 In the past the South African courts did not allow the use of legislative debates during interpretation of legislation.¹⁵⁷ In *Ngcobo v Van Rensburg*¹⁵⁸ Dodson J said the following about the use of explanatory memoranda during the interpretation of statutes:

The weight of authority is very much against allowing such documents to be called in aid in the interpretation of a statute. This authority has received considerable academic criticism. There are also a few authorities which seem to suggest a softening of attitudes by South African Courts to certain of the documents which precede the passing of an Act.

2.145 In 1993 in the United Kingdom case of *Pepper (Inspector of Taxes) v Hart and Related Appeals*¹⁵⁹ the House of Lords held that resort to parliamentary

¹⁵⁷ In both *Bok v Allen* 1884 SAR 137 and *Mathiba v Moschke* 1920 AD 354 the use of preceding discussions in the interpretation process was rejected outright, although the court a quo in the *Moschke* case had in fact taken preceding debates into account. In *R v Ristow* 1926 EDL 168 the court expressed doubt about the use of such discussions.

¹⁵⁸ 1999 (2) SA 525 (LCC) para 27.

¹⁵⁹ [1993] All ER 42 (HL).

materials (including *Hansard* and explanatory memoranda) is permissible if the legislation is ambiguous or obscure or the literal meaning leads to an absurdity; if the material relied upon consists of a statement by a Minister or other promoter of the Bill which led to the enactment of the legislation, together, if necessary, with such other parliamentary material as is necessary to understand such statements and their effect; and if the statements relied on are clear.¹⁶⁰

2.146 One critical comment on *Pepper v Hart* raised the following issues:¹⁶¹

. . . One of the problems with *Pepper v Hart* is that it operates against an unscientific background and that, accordingly, its effect can be capricious. This arises because it is a matter of chance whether a minister is asked to clarify a particular issue as a Bill passes through Parliament. Some issues may be discussed and others may be ignored; and the issues discussed may be trivial while those ignored may be important. Worse than that, a minister may get his facts wrong; and it is even known for a minister dealing with a given point to read out by mistake a note designed to deal with an entirely different point. Even if a mistake is picked up and a statement is later made by way of correction, it might be missed by the reader of *Hansard*.

And that brings me to another of the problems with *Pepper v Hart* — the availability of material in *Hansard*. Put briefly, it is not easy to get swift and cheap access to *Hansard*. Moreover, several debates will take place at different stages as a Bill goes through Parliament, so that different issues of *Hansard* will have to be traced. And that is quite apart from the time it takes to study the material in order to find out whether or not anything useful was said.

There is another potential problem with *Pepper v Hart*. This problem would arise if we ever went over to drafting in general principles. This occurs where the whole legislative proposition is couched in generalities. It differs from the sort of purposive provision I have been discussing, where general words are *added to* the main legislative proposition. The interesting thing is that there are few practical examples of drafting in general principles. People cite "thou shalt not kill", but nobody believes that you could couch the modern law of homicide in four words. There is also "Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt". But again this could hardly form our law on race relations. Some people say we should adopt the European style, which is said to be in the form of statements of general principle without much detail. But Sir William Dale, who advocated the continental style, said in his book: "the common idea, that continental legislation is drafted only in terms of principle, is demonstrably mistaken".

But suppose we did go over to drafting in general principles. Would the courts regard such provisions as "ambiguous or obscure" within the principle in *Pepper v Hart*? I do not know. But if they did, there would be a great temptation for ministers to flesh out the general legislative provisions with statements in Parliament. The consequences would be potentially dangerous, because you would get a shift of legislative power from Parliament to the executive.

Altogether, then, *Pepper v Hart* is an unwelcome decision. Recently I attended a discussion held by the Statute Law Society and attended by two Law Lords. One said

¹⁶⁰ See De Ville 226-8. See also Du Plessis 269.

¹⁶¹ Geoffrey Bowman "The nature of legislation" available at [http://www.opc.gov.au/calc/docs/CALC-JUNE2000\(2\).pdf](http://www.opc.gov.au/calc/docs/CALC-JUNE2000(2).pdf) at 14 – 15 (accessed on 7 September 2006).

that *Pepper v Hart* is a bad decision and should be overturned by legislation. The other thought the decision would wither away because judges are tending to find that resort to *Hansard* makes no difference to the outcome anyway.

2.147 Francis Bennion remarked, amongst others, as follows on *Pepper v Hart*:¹⁶²

. . . I submit that the Minister had not in reality made a clear statement about the 'meaning' of the provision. He had said how the Revenue would exercise its power of judgment as to what was 'a proper proportion'. If the matter is seen in this way it is apparent how improper the finding of the House of Lords was. I submit that it was not for the court meekly to accept and apply this statement by the Minister. It was for the court itself, using its own judgment, to arrive at the proper proportion of expenses on the facts of the Malvern College scheme.

Conclusions

What conclusions can we draw from all this? I offer the following.

Legislative drafters should carry on as before, undeterred by the possibility that some uncomprehending Minister may put an unfortunate gloss on their work. Courts and practitioners should be better educated in the techniques and practices of legislative drafting. Then they would better understand the nature of the task they have to carry out when enactments fall to be construed.

Courts should use *Hansard* sparingly. Most, if not all, of the nine reasons I have given against using it are valid. Moreover, as T St J N Bates has pointed out in detail, admission of *Hansard* reports raises more problems than it is likely to solve.

Civil servants in departments promoting legislation should resist the temptation to 'plant' in their Ministers' briefs statements about what they want the Act to mean. These are likely to rebound on them. Whether they do or not, the practice will feed what I believe to be an unhealthy and undesirable constitutional development, though doubtless well-intentioned.

Let us keep *Hansard* where it belongs. (Footnote omitted)

2.148 In a lecture given in 2002 Lord Johan Steyn considered the implications of *Pepper v Hart* and the use of *Hansard* in the interpretation of legislation:¹⁶³

. . . As in Australia, English courts regularly use reports which led to or preceded legislation, in aid of interpretation. It is part of the setting of a statute. Australian and English lawyers would agree that there is no reason why *Hansard* materials should not be used to identify the mischief against which the statute is aimed. It helps to explain the background of the statute. Far more troublesome is the use in aid of interpretation of statements of a government minister in the promotion of a bill as reflecting the desired intent of the government. Section 15A–B of the Acts Interpretation Act 1901, as inserted in 1984, permits the use of such material where

¹⁶² "Hansard - Help or Hindrance? A Draftsman's View of *Pepper v Hart*" In a paper delivered to the conference of the Commonwealth Association of Legislative Counsel held in Cyprus in May 1993.

¹⁶³ "The Intractable Problem of The Interpretation of Legal Texts" John Lehan Memorial Lecture 2002 on 25 September 2002 at the University of Sydney available at <http://www.austlii.edu.au/au/journals/SydLRev/2003/1.html> (accessed on 7 September 2006) see also Johan Steyn "*Pepper v Hart*: A Re-examination" *Oxford Journal of Legal Studies*, Vol 21 No 1 (2001) p 59.

the legislation is ambiguous or obscure or where its literal meaning leads to an absurdity. In England *Pepper v Hart* heralded a parallel development. Doubts about the reach of that decision have arisen in England. It may be of interest if I explained the reservations which are now emerging in England.

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.

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.

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.

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.

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 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.

2.149 In *McDonnell (FC) (Appellant) v. Congregation of Christian Brothers Trustees* Lord Steyn remarked as follows on a broader and narrower application of *Pepper v Hart*:¹⁶⁴

29. I would, however, add a comment on the attempt in this case to rely on statements made in Parliament. It is permissible to use Hansard to identify the mischief at which a statute is aimed. It is, therefore, unobjectionable to use ministerial and other promoters' statements to identify the objective background to the legislation to the extent that *Pepper v Hart* [1993] AC 593 permits such use of Hansard the point is uncontroversial. A difficulty has, however, arisen about the true ratio of *Pepper v Hart*. It is certainly at least authority for the proposition that a categorical assurance given by the government in debates as to the meaning of the legislation may preclude the government vis-à-vis an individual from contending to the contrary. This may be seen as an estoppel or simply a principle of fairness. This view of *Pepper v Hart* restricts its ratio to the material facts of that case. There is, however, a possible broader interpretation of *Pepper v Hart*, viz that it may be permissible to treat the intentions of the government revealed in debates as reflecting the will of Parliament. This interpretation gives rise to serious conceptual and constitutional difficulties which I summarised elsewhere: "Pepper v Hart: A Re-examination" (2001) 21 OJLS 59. In *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2003] 3 WLR 568, 586, para 59, Lord Nicholls of Birkenhead discussed this distinction. In my view the narrower interpretation of *Pepper v Hart* ought to be preferred.

2.150 Michael Zander recently considered the question whether litigants have to pay additional costs resulting from *Pepper v Hart*:¹⁶⁵

There is no way of assessing how often litigants have to pay additional costs resulting from *Pepper v Hart* for the research done by lawyers amongst parliamentary materials. The fact that in respect of statutes that went through parliament since 1996 the parliamentary proceedings are now available online (www.parliament.uk or www.hmsso.gov.uk) is obviously helpful. But it will be a long time before the bulk of statutes being considered in the courts were passed post 1996.

Failure to conduct the necessary research might found an action for negligence so lawyers should feel as much obliged to check *Hansard* as to check the law in statute and case law. As has been seen, the courts generally take a broad rather than a narrow view of the implications of the decision in *Pepper v Hart*. The broader the licence to use parliamentary materials, the greater the costs to litigants.

It is of course possible that in some cases access to the parliamentary record could have the effect of stopping litigation that would otherwise have taken place – as both sides accept that a categorical ministerial statement regarding the meaning of the provision in question would dispose of the dispute. In such cases costs would have been saved. There could never be a way of discovering the number of such cases.

2.151 Michael Zander also posed the question how often does recourse to *Hansard* reveal legislative intent:¹⁶⁶

¹⁶⁴ Available at www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd031204/donnel-1.htm (accessed on 7 September 2006).

¹⁶⁵ *The Law Making Process* 6th edition Cambridge University Press: Cambridge 2004 at 173.

¹⁶⁶ *The Law Making Process* at 173 – 175.

There is no substantial empirical study which shows how often recourse to *Hansard* throws useful light on the statutory interpretation problem before the court. A small-scale study conducted by Vera Sacks before *Pepper v Hart* was decided suggested that it would not be often. The study took 34 cases on employment law, land law, family law, criminal law and housing law. There was some positive benefit from looking at *Hansard*. In some cases it threw light on the general legislative purpose. But reference to *Hansard* would very rarely have solved the problem before the court: 'In every case studied the disputed clause was either undebated or received obscure and confusing replies from the Minister'.

In preparing this section of the fifth edition of this work, the writer, . . . undertook a small follow-up study. We first did a Lexis search of all mentions of *Pepper v Hart* in the six years from the date of the House of Lords decision in November 1992 to October 1998. This produced a total of 232 cases. We started by looking at the reported cases in the first one hundred in the Lexis print-out (excluding those reported in newspaper law reports) – beginning with the most recent. There were sixty such cases. What we found was so consistent that it seemed pointless to continue the exercise beyond the first one hundred listed cases. The results strikingly confirmed the results of the survey carried out by Vera Sacks. In every case, by definition, *Pepper v Hart* had been cited by counsel in argument as the basis for introducing parliamentary material. But looking for a case in which parliamentary material appeared to have made any difference to the result was like looking for a needle in a haystack. Often the judgment(s) did not even mention *Pepper v Hart* or parliamentary material. Presumably, in the great majority of those cases the court did not permit the material to be introduced. When *Pepper v Hart* argument and/or material were mentioned in the judgment(s), the mention was usually a variation on one or more of the following themes: (a) The rules laid down in *Pepper v Hart* as to the preconditions for admissibility were not fulfilled. Either there was no ambiguity in the statutory text or the parliamentary materials sought to be introduced were not directed to the specific statutory provision under consideration. . . . (b) We did look at the *Pepper v Hart* material – either because there was ambiguity in the statute, or because we were persuaded to do so *de bene esse* – but it was of no assistance in that it threw no clear light on the matter. (c) We looked at the *Pepper v Hart* material, there was a clear statement by the minister which was to the point but it only confirmed the court in the view it had already taken of the matter anyway. . .

Thus even in cases where the court agrees to look at *Pepper v Hart* material, it appears to be exceedingly rare that the material affects the outcome. When considering the balance of advantage flowing from the decision one also has to put into the scale not only the considerable number where the court refuses even to look at the material, but the presumably much greater number of cases where *Hansard* has been scoured by the lawyers in vain. . . .

In short, it seems that the Lord Chancellor, Lord Mackay, who, as has been seen, dissented in *Pepper v Hart* mainly out of concern that the costs of the reform would outweigh the likely benefits, was probably right. . . .

2.152 In *Westminster City Council v National Asylum Support Service* Lord Steyn remarked as follows on the status of explanatory notes:¹⁶⁷

¹⁶⁷ [2002] UKHL 38 available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd021017/westmi-1.htm> (accessed on 7 September 2006). See also *Regina v Chief Constable of South Yorkshire* [2004] UKHL 39 which dealt with the retention of fingerprints and samples in cases when a suspect is subsequently acquitted or the charge is discontinued. Lord Steyn explained that the light cast on the interpretation of section 64(1A) of the Police and Criminal Evidence Act of 1984 by the explanatory notes was limited but it did show exactly what problem Parliament was addressing, and that the reference in the explanatory notes to fingerprints was

2. . . . The Explanatory Notes to the Immigration and Asylum Act 1999 were placed before the House and relied on as arguably assisting in the interpretation of sections of the Act. Lord Hoffmann has not relied on this material. I would also not do so in this case. On the other hand, since Explanatory Notes are now sometimes placed before the House, it would be sensible to clarify their status.

3. The background is as follows. Brief explanatory memoranda used to be printed at the front of a Bill. Such a document was a précis and did not provide background. In addition ministers were provided with Notes on Clauses, which did by and large explain what a clause in a Bill was meant to do. Later, in an era of greater transparency, Notes on Clauses were made available to backbenchers.

4. In 1999 a new system was introduced. It involves publishing Explanatory Notes alongside the majority of public bills introduced in either Houses of Parliament by a Government minister: see Christopher Jenkins QC, First Parliamentary Counsel, "Helping the Reader of Bills and Acts" (1999) 149 NLJ 798. The texts of such notes are prepared by the Government department responsible for the legislation. The Explanatory Notes do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. The notes are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and to ease the task of assimilating the law. This new procedure has the imprimatur of the House of Commons Select Committee on Modernization and the House of Lords Procedure Committee. The Explanatory Notes accompany the Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. Explanatory Notes are usually published by the time the legislation comes into force. Unlike *Hansard* material there are no costly researches involved. Explanatory Notes for both Bills and Acts are published by Her Majesty's Stationery Office. The notes are also available on the internet at: <http://www.parliament.uk> for Bills and <http://www.legislation.hmso.gov.uk> for Acts.

5. The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1386, and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-996. Moreover, in his important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763, Lord Blackburn explained the position as follows:

"I shall . . . state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross, *Statutory Interpretation*, 3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 407; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, The Times, 26 July 2002, in particular per Lord Hoffmann, at paragraph 40. On this basis the constitutional arguments which I put forward extra-judicially are also not engaged: "Pepper v Hart: A Re-examination" (2001) 21 Oxford Journal of Legal Studies 59.

6. If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.

2.153 The Law Reform Commission of Ireland (Irish Commission) considered the advantages and disadvantages of allowing the use of extrinsic aids in the interpretation of legislation in 2000.¹⁶⁸ The Irish Commission noted that English case-law (before *Pepper v Hart*) exhibited a strict adherence to the historical rule that reference should not be made in the course of judicial proceedings to *Hansard*¹⁵⁹ that this traditional bar dated from a resolution of the English Parliament in 1818, which permitted such reference to be made only where appropriate leave was granted and that it would appear that this, in fact, never occurred. The Irish Commission explained that the primary concern to the passage of the resolution was the protection of the staff of Parliament from being obliged to give evidence in court and that it was introduced at a time when parliamentary debates were not fully recorded. The Irish Commission considered that the historical context of the exclusionary bar has shifted considerably. The Irish Commission also noted the concern that one organ of state should not question the workings of another and that a court may not investigate the internal workings of Parliament. The Irish Commission considered that neither of

¹⁶⁸ Law Reform Commission Ireland *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61–2000) available at http://www.lawreform.ie/publications/data/lrc110/lrc_110.html (accessed on 7 September 2006).

these principles is particularly influential in Irish jurisprudence today.¹⁶⁰ The Irish Commission explained that at the core of the theoretical argument against allowing reference to Oireachtas debates is a fear of undermining the statute book by setting up an alternative locus of legislative authority and that it has been pointed out that there is a danger that frequent reference to parliamentary records might draw the attention of those interpreting legislation away from the Acts, which should constitute their primary source of law.¹⁶¹

2.154 In the Irish Commission's view the short answer to this argument is that the use of parliamentary debates would only undermine the statute book if the judiciary allowed it to do so. The approach the Irish Commission advocated was that judges should enjoy a discretion to use such parliamentary materials if clarification of a provision is required and if these materials would be of use in the instant case – in other words, a court would have a wide discretion to use the records in interpreting a statute, but would only be likely to do so when they provided clear evidence of legislative intention. The reason that preparatory materials would be more likely to be useful to a court in such a situation was that they would be more likely to give clear evidence of the purpose of the statute, and although Oireachtas debates would be unlikely to give such clear evidence in many cases, but certainly would do so in some. The Irish Commission regarded it odd if judges were allowed to look at what might have influenced the legislature in forming its opinion, while being prohibited from reading what the legislature itself considered to be its objective.

2.155 The Irish Commission noted that perhaps the most commonly voiced concerns relate to the quality of the material which would be disclosed by Oireachtas reports: it had been suggested that the concept of the 'intention of the legislature' is itself a fiction and that the speeches (even of the Minister at second stage) in the Oireachtas may reflect the purposes of the Government or pressure groups, rather than those of the 'legislature'; the time constraints in Ireland on debates such as taxation legislation make reliance on Oireachtas debates in this area particularly unsatisfactory; and the weight to be attached to particular parliamentary answers hurriedly prepared by Civil Servants for Ministers must be questionable.”

2.156 The Irish Commission remarked that it is sometimes suggested that a Minister, for political reasons or in order to capture favourable media attention, may either misstate the true purpose of legislation or, at least, seek to divert attention away from the less popular elements of it. The Irish Commission noted the following hypothetical example: a measure may give a moderate degree of protection to

tenants vis-à-vis landlords, and assuming that landlords are politically unpopular, it might suit the Minister in such a situation to exaggerate the element of protection for the tenant and the incursion into the landlord's position – alternatively, he might be goaded by the opposition into making an extreme anti-landlord statement as to what the Bill contained. The statements of a Minister may therefore not always provide an accurate insight into what the legislature sought to achieve, although, a clear distinction of course, requires to be drawn here between, on the one hand, using the Minister's speech to gain a better understanding of the intention of the legislators, and on the other hand, elevating the government's statement of intent to such a degree that it acquires the status of authoritative law. The Irish Commission pointed out that observations made to them reflected an underlying concern about escalating legal costs. Amongst others it was sometimes argued that the process of trawling through a collection of Oireachtas debates would inevitably lengthen court proceedings. Concern about the practical repercussions of any proposed change in the law in this area was voiced at their Colloquia by individuals working in various quarters of the legal world. The argument was made that a thorough search of multiple extrinsic materials might reveal several possible interpretations of a provision, and that these meanings would often conflict with each other which would require counsel to raise complex evidence from parliamentary records on behalf of their clients, which would cause great delay in proceedings and undermine legal certainty. Indeed, if reference to Oireachtas debates was permissible in formulating a possible line of argument in a case, it might follow that counsel was in fact bound to investigate this possibility.

2.157 The Irish Commission explained that in response to this prediction that proceedings would be lengthened some commentators have expressed an alternative view, arguing that a decision to grant to the courts a greater degree of freedom to look at parliamentary records, in order to resolve difficulties of construction, would in fact have the opposite effect, shortening proceedings and encouraging more settlements. Among those who subscribed to this opinion was Lord Bridge of Harwich, who was one of the majority in *Pepper v. Hart*. The basis for his view was that sometimes, reference to the parliamentary record may provide a quick and clear solution to a problem created by statutory ambiguity.¹⁶⁹ In answer to

¹⁶⁹ As expressed in the later case of *Chief Adjudication Officer v. Foster* [1993] 2 WLR 292. Bridge L was of the opinion in this case that if it had been possible to take account of parliamentary material at the outset, it would have been clear that the material refuted the appellant's contentions, so that she might well have been disinclined to bring her appeal in the first place.

the concern that there could be over-reliance on parliamentary records, the Irish Commission pointed out that it should be recalled that a court has various 'tools of discipline', most notably relating to the award of costs, against parties who waste the Court's time. The Irish Commission explained that empirical evidence from other jurisdictions, as to their experiences on this point, speaks with two voices: in the United Kingdom, most commentators are of the view that, since *Pepper v. Hart*, there has been an increase in the number of arguments led, concerning legislative intention, although in Australia it seems that the courts have been able to regulate such arguments quite effectively. The Irish Commission said that it was nonetheless conscious that while in principle, the situations in which debates may be invoked may be strictly defined, and adherence to these limits could be expected initially, slippage was likely to occur as the years go by, resulting in a progressive relaxation of the rules.

2.158 The Irish Commission noted the widespread practice among the judiciary in England of referring informally to *Hansard*, or taking "a surreptitious peek" at the debates without informing the parties,¹⁷⁰ similarly, another judge remarked to them that he often looked at the debates himself, yet counsel was forbidden to raise them. The view of the Irish Commission was that this was objectionable on the basis of the fundamental precept that judges should not utilise any arguments other than those which stated in open court, so that both sides have an opportunity to controvert them and make submissions as to their relevance to the case. The Irish Commission noted that the importance of this principle was recognised by the House of Lords in the rather notorious case of *Hadmor Productions v. Hamilton*,¹⁷¹ where Lord Denning was censured by the Law Lords, having admitted in a judgment that he had read *Hansard* in private after both parties had concluded their arguments when they made no reference to the parliamentary record. Lord Diplock, delivering judgment for the House of Lords, laid strong emphasis on the principle that counsel had a right to know what material would be considered by the Court, explaining the reason why he took exception to this type of judicial practice: "Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied on by the judge and to be given an

¹⁷⁰ Lord Lester, (1994) 15 *Statute Law Review* 10, 17.

¹⁷¹ [1982] 1 All ER 1042 (House of Lords), overturning the Court of Appeal decision, at [1981] 2 All ER 724.

opportunity of stating what his answer to it is. In the instant case counsel . . . complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill . . . and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise [that speech] but he would also have wished to rely on other speeches disagreeing [with it].”

2.159 The Irish Commission believed that extrinsic aids should, in principle, be available to a judge who is faced with a provision which is unclear, even when it is read in the light of the Act as a whole, or which, when given a literal interpretation, fails to reflect the plain intention of the legislature. They noted that it may be argued, in response, that once a judge is permitted to look at sources outside the Act, they will have a bearing on his decision as to whether they should influence his interpretation of the text of the statute. The Irish Commission recognised the dangers of this and therefore aimed to limit the cases in which recourse should be taken to material outside an Act. They acknowledged that such recourse should be the exception rather than the rule, notwithstanding the desirability of what Budd J has described as “informed interpretation”. It was the view of the Irish Commission that any material which influences the decision of a court should be available to litigants and, thus, their position was intended to place what was widespread judicial practice on a more solid and transparent footing. They considered that the countervailing dangers, relating to legal uncertainty, were probably overstated when one considers that the judiciary would retain a wide discretion to allow or disallow reference to extrinsic aids in a particular case, and that the value of such a discretion would be that a judge would at least have the option of looking at material which could resolve a difficulty.

2.160 As regards Oireachtas¹⁷² debates, the Irish Commission took the view that decisions regarding the aids to which reference may be made should always be left to the discretion of the Court. In seeking to strike the correct balance, thus allowing sufficient discretion, while also limiting it in the interests of certainty, they did not see why any particular category of extrinsic aid should be singled out for different treatment. The most important yardstick to them was relevance – some types of material (eg the history of Irish legislation governing the particular area of law) would naturally be more likely to be useful than others (eg Law Commission Reports from England), which would be of use far less often, although each type of material is

¹⁷² Parliament of Ireland.

related in a slightly different way to the drafting of legislation, so it is pertinent to consider how each could potentially contain evidence of the intention of the legislature.

2.161 The Irish Commission noted that there are two situations in which extrinsic aids may be relevant. The first of these was where the meaning of a statute is ambiguous, and the other was where the meaning is, on its face, clear; yet it contradicts the purpose of the legislature. The Irish Commission considered that there was obviously a case for confining the use of extrinsic aids to the first category, since the second involves a departure from the literal meaning of the provision but in practice there was likely to be substantial overlap between the two categories; the sort of case in which a provision has only one plain meaning on its face, which contradicts the plain purpose of the legislation, was likely to be rare. The Irish Commission noted that where such a situation, or something close to it, occurs, one would expect the Court to clarify matters expressly, so as to ensure that no-one would be misled by relying on the plain words of the provision. Accordingly, they did not recommend the adoption of this distinction, and it was not utilised in the draft proposed. While the arguments for and against the use of Oireachtas debates were finely balanced, the Irish Commission did not think that this category of extrinsic materials should be excluded from the approach which they recommended, provided that they were only used where there is a clear case for their utility, and subject to the safeguards recommended in this chapter.

2.162 Taking account of these factors, the Irish Commission said it would adopt a moderate position. They recommended the creation of a legislative framework to regulate this area, rather than a decision to leave the matter entirely to the common law. However, they recommended building into this framework a large measure of judicial discretion and favoured a provision allowing for the use of extrinsic aids in certain situations (section 2(1) below) but would then go on to restrict it in two ways; first, (in section 2(2)) by an exhaustive list of the categories of aids to which reference may be made, and second, (in section 2(3)), by reference to matters which a court must take into account before admitting extrinsic aids. Section 1 was qualified by the phrase, "provided that this can be gathered ...". Accordingly, they included the phrase, "Notwithstanding anything in section 1 ..." at the start of the proposed section 2(1), so as to authorise a court to make use of extrinsic aids.

2.163 The Irish Commission proposed the following provision:

1. In construing a provision of an Act
 - (a) which is ambiguous or obscure; or
 - (b) a literal interpretation of which would be absurd or would fail to reflect the plain intention of the Oireachtas,

a court may depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas; provided that this can be gathered from the Act as a whole.

2(1) Notwithstanding anything in section 1, in determining the intention of the Oireachtas, for the purposes of that section, a court may also, at its discretion, make use of extrinsic aids to construction.

(2) The only extrinsic aids that may be considered in determining the intention of the Oireachtas are:

- (a) any document that is declared by the Act to be a relevant document for the purposes of this section;
- (b) any relevant report of an Oireachtas committee;
- (c) any treaty or other international agreement referred to in the Act;
- (d) any official explanatory memorandum relating to the Bill containing the provision;
- (e) the speech made by a Minister on the second reading of a Bill;
- (f) any other material from the official record of debates on the Bill in the Dáil or Seanad;
- (g) any publication of the Law Reform Commission or other official body that was published before the time when the provision was enacted;
- (h) legislation dealing with the same subject area as the provision being construed;
- (j) such other document as the court, for a particular reason, considers essential.

(3) In determining whether consideration should be given to any extrinsic aid in accordance with subsection (1), or in considering the weight to be given to any such aid, a court shall have regard, 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
- (b) the need to avoid prolonging any legal or other proceedings without compensating advantage.

2.164 The Irish Commission said that the following points, in particular, may be worth noting:

1. The exhaustiveness of the list in sub-section (2) is designed to promote certainty and to keep the courts' search for enlightenment within some reasonable

bounds. On the other hand, paragraph (h) is intended to be a narrow concession to recourse to United Kingdom Parliamentary records as in the case of *DPP v. McDonagh*.¹⁷³ The phrase “for a particular reason” is included to emphasise that reference to materials, other than those listed at (a) to (g), should be made only in exceptional cases.

2. A good deal of judicial discretion is deliberately built into this model, especially in section 2(3). They believed that, for instance, the wording of section 2(3)(a) (“the desirability ...”), would allow a court to take a pro-accused or pro-tax payer approach, in the case of penal or taxation cases.

3. Section 2(3)(b) reflects the general feeling that 'case management' is a necessary and legitimate factor to be taken into account. In answer to the criticism that reference to extrinsic aids will prolong litigation, it was submitted that this is not inevitable – the contrary may also be true. Case-law suggested that there will be instances where reference to extrinsic aids would yield a 'knockdown' argument, which will clarify a complex point of law and might even render litigation predictably futile.

2.165 The Canadian Supreme Court noted the following in *Rizzo & Rizzo Shoes Ltd. (Re)* about the role of *Hansard* in the interpretation of legislation:¹⁷⁴

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. . . .

35 Although the frailties of *Hansard* evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of *Hansard* evidence, it should be admitted as relevant to both the background and the purpose of legislation.

2.166 In *M v H* in 1999 the Canadian Supreme Court considered legislative history in the search for legislative intent.¹⁷⁵

¹⁷³ [1996] 2 ILRM 468.

¹⁷⁴ [1998] 1 SCR 27.

¹⁷⁵ [1999] 2 SCR 3.

. . . until the landmark decision by the House of Lords in 1993, English courts were strictly prohibited from examining legislative debates as material aids to construction (*Pepper v. Hart*, [1993] A.C. 593). However, Canadian courts may consider a wide range of intrinsic and extrinsic sources when searching for legislative purpose (R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at pp. 51-59). Although legislative history will often be helpful in determining the precise harm sought to be remedied by law-makers, the ultimate standard for determining the category of harm is the provisions of the legislation itself and the social facts to which it is addressed. There is, thus, an objective and subjective component to the search for legislative intent and their relative importance will often depend upon the evidence before the court.

324 Usually, the objective and subjective aspects of the search for legislative purpose work hand in hand. On the one hand, the court must examine the social context of the terms of the legislation, and on the other, it should heed unambiguous indications in the legislative history of what the legislature believed it was addressing. Only where the two are manifestly inconsistent should legislative history be given little weight. Such an approach not only accords with general principles of statutory interpretation, but more precisely accords with the role of s. 1, which is to demand of the government a justification for its interference with a *Charter* guarantee. Since that onus of justification is placed on the government by virtue of s. 1, it is appropriate that the legislature's own views and characterization of a social problem be taken seriously.

325 This is particularly true in evaluating challenges based on s. 15. Although a social problem could change so drastically as to render a subjective Parliamentary purpose anachronistic, there will be many cases where the evaluation of social relationships is more subtle and open to disagreement by reasonable people, not only because the interpretation of facts may be debatable, but also because normative judgments often play a significant role in setting policy. In those cases, legislative determinations must be given some scope. The Court should not simply substitute its own opinion for that of the legislature where the nature of the legislative classification involves disputable social phenomena.

326 There are various theoretical justifications for giving careful consideration to legislative history when considering the legislative purpose of an equality claim. The legislative history may reveal that the legislature has misapprehended in some fundamental way, whether through prejudice or ignorance, the circumstances of a particular group that is affected by a classification. Rooting out this kind of unequal treatment based on a serious misunderstanding of the characteristics of a group, or based on sheer antipathy, emphasizes the importance of subjective legislative purpose, however obscure it may be. It is simply impossible to analyse whether the legislature has failed to take into account, on an equal footing, the concerns and characteristics of a particular group without, to some degree, examining the terms of their deliberations.

327 Also, an examination of the legislative history may demonstrate that the legislature failed to accord equal concern to the welfare of some disadvantaged groups. Again, only a review of the processes of evaluation by a legislature can unveil whether this is what has taken place. It is, however, necessary to consider whether the inclusiveness requirement is offended at the time of the claim, and not only at the time of the adoption of the legislation under review. Many statutes adopted before the *Charter* were unassailable when first enacted, but were held to offend the *Charter* at a later date. Examples of this phenomenon include *Oakes, supra*, which struck down s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, which struck down the federal *Lord's Day Act*, R.S.C. 1970, c. L-13; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, which struck down s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34; and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, which struck down s. 42 of the *Barristers and Solicitors Act*, R.S.B.C.

1979, c. 26. It is also important to note here, as in *Vriend, supra*, the deliberate decision of the legislature to exclude same-sex couples from the regime.

328 From a theoretical standpoint, it makes sense that legislative history should play a particularly important role in the s. 1 analysis. Within the broad guarantees of the *Charter*, there can be no doubt that judges share with the legislature the task of making the law in many areas. For some, this is a regrettable situation involving an irreducible struggle between the legislative and judicial branches of government. Others have conceived of the relationship differently. . . .

2.167 In *Delisle v Canada (Deputy Attorney General)*¹⁷⁶ L'Heureux-Dubé J remarked that the contextual approach to Charter analysis must also take into account the history of the need for government intervention to make effective the rights of workers to associate together. She agreed with her colleagues that both intrinsic and extrinsic sources are admissible and significant in determining legislative purpose and effects, and with their comments on the fact that an invalid purpose is sufficient to find a violation of a Charter right. Baudouin JA said in the same case that in determining the purpose of an impugned legislative provision, a court should look to intrinsic and admissible extrinsic sources regarding the provision's legislative history and the context of its enactment:¹⁷⁷

In some cases, it is possible for a court to determine the purpose of a particular provision by looking solely to sources intrinsic to the legislation itself, for example by considering the provision in light of the surrounding provisions, including definitions, analogous provisions, and the organization of the Act as a whole. Looking to intrinsic sources may be particularly important where there is little admissible extrinsic evidence of legislative purpose. However, in all cases a court is entitled to consider admissible extrinsic sources if they exist, and indeed is duty-bound to consider such evidence where it is presented by the parties. This accords with the modern contextual approach to statutory interpretation that has been endorsed by this Court. It accords, too, with the contextual manner in which this Court has interpreted and applied the *Charter*. Indeed, in *Charter* cases where a claimant asserts that a law has an invalid purpose, it is to be expected that most if not all of the relevant evidence of legislative purpose will be extrinsic to the statute *per se*.

2.168 It was explained in the *Australian Review of the Commonwealth Acts Interpretation Act 1901* that subsection 15AB(1) of the Acts Interpretation Act provides that any extrinsic materials capable of assisting in the interpretation of legislation may, in certain circumstances, be used to ascertain the meaning of legislation.¹⁷⁸ Subsection 15AB(2) sets out a non-exhaustive list of particular extrinsic materials that may be used in accordance with subsection 15AB(1). Paragraph 15AB(2)(e) refers to documents, relating to Bills, introduced into Parliament by a Minister. Subsection 15AB(2) does not purport to set out an exhaustive list of the

¹⁷⁶ [1999] 2 SCR 989.

¹⁷⁷ [R. v. Gladue, \[1999\] 1 S.C.R. 688.](#)

material which may be used to aid interpretation. Nevertheless, it had been suggested that the subsection could be amended to include specific references to additional forms of extrinsic material: for example, documents relating to Bills that are introduced into Parliament by a Member other than a Minister. The Australian Commonwealth Acts Interpretation Act provides presently as follows:

15AB Use of extrinsic material in the interpretation of an Act

(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.

(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.

2.169 The Australian Capital Territory Legislation Act of 2001 provides as follows:

141 Non-legislative context generally

(1) In working out the meaning of an Act, material not forming part of the Act may be considered.

(2) In deciding whether material not forming part of an Act should be considered in working out the meaning of [the Act](#), and the weight to be given to the material, the following matters must be taken into account:

- (a) the desirability of being able to rely on the ordinary meaning of the Act, having regard to the purpose of [the Act](#) and the provisions of [the Act](#) read in the context of [the Act](#) as a whole;
- (b) the undesirability of prolonging proceedings without compensating advantage;
- (c) the accessibility of the material to the public.

(3) Subsection (2) does not limit the matters that may be taken into account.

(4) For subsection (2) (c), material in the register is taken to be accessible to the public.

142 Non-legislative context—material that may be considered

(1) In working out the meaning of an Act, material mentioned in table 142, column 2 may be considered.

(2) In working out the meaning of a statutory instrument, material mentioned in table 142, column 3 may be considered.

(3) This section does not limit the material that may be considered in working out the meaning of an Act or statutory instrument.

Table 142

Column 1 Item	column 2 Act	column 3 statutory instrument
1	material not forming part of the Act	material not forming part of the

	<p>contained in an authorised version of the Act</p> <p><i>Note</i> See ch 3 (Authorised versions and evidence of laws and legislative material).</p>	<p>statutory instrument contained in an authorised version of the instrument</p> <p><i>Note</i> See ch 3 (Authorised versions and evidence of laws and legislative material).</p>
2	<p>any relevant report of a royal commission, law reform commission, committee of inquiry or other similar entity that was presented to the Legislative Assembly before the Act was passed</p>	<p>any relevant report of a royal commission, law reform commission, committee of inquiry or other similar entity that was presented to the Legislative Assembly—</p> <p>(a) if the statutory instrument was presented to the Assembly—before the end of 6 sitting days after the day the instrument was presented to the Assembly; or</p> <p>(b) in any other case—before the instrument was made</p>
3	<p>any relevant report of a committee of the Legislative Assembly that was made to the Assembly before the Act was passed</p>	<p>any relevant report of a committee of the Legislative Assembly that was made to the Assembly—</p> <p>(a) if the statutory instrument was presented to the Assembly—before the end of 6 sitting days after the day the instrument was presented to the Assembly; or</p> <p>(b) in any other case—before the instrument was made</p>
4	<p>any explanatory statement (however described) for the bill that became the Act, or any other relevant document, that was presented to the Legislative Assembly before the Act was passed</p>	<p>if the statutory instrument was presented to the Legislative Assembly—any explanatory statement (however described) for the instrument, or any other relevant document, that was presented to the Legislative Assembly before the end of 6 sitting days after the instrument was presented to the Assembly</p>
5	<p>the presentation speech made to the Legislative Assembly during the passage of the bill that became the Act</p>	<p>if the statutory instrument was presented to the Legislative Assembly by a member of the Assembly—any presentation speech made to the Assembly</p>
6	<p>official reports of proceedings in the Legislative Assembly in relation to the bill that became the Act</p>	<p>if the statutory instrument was presented to the Legislative Assembly—official reports of proceedings in the Legislative Assembly in relation to the statutory instrument</p>

7	any relevant treaty or other international agreement to which Australia is a party	any relevant treaty or other international agreement to which Australia is a party
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SECT 143 Law stating material for consideration in working out meaning

(1) If a [relevant law](#) provides that stated material may or [must](#) be considered in working out the meaning of an Act or statutory instrument, that does not by implication prevent other material of the same or similar kind being considered in working out the meaning of [the Act](#) or instrument.

Example

The *Computer Crime Act 2000* (hypothetical) contains the following provision:

4 Report may be used as an aid to interpretation

The *Community Law Reform Report on Computer Crime* (CLRC No X) may be considered in working out the meaning of this Act.

This does not limit access to other non-legislative material of the same or a similar kind for working out the meaning of the *Computer Crime Act 2000*.

(2) In this section:

"relevant law" means—

- (a) in working out the meaning of an Act—the Act or another Act; or
- (b) in working out the meaning of a statutory instrument made under an Act—the Act, another Act or the instrument; or
- (c) in working out the meaning of a statutory instrument made under another statutory instrument—an Act or either instrument.

2.170 The Tasmanian Acts Interpretation Act provides as follows:

8B. Use of extrinsic material in interpretation

(1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation –

- (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or
- (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.

(2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be given to –

- (a) the desirability of a provision being interpreted as having its ordinary meaning; and

- (b) the undesirability of prolonging legal or other proceedings without compensating advantage; and
- (c) other relevant matters.
- (3) In this section –

"extrinsic material" in relation to a provision of an Act, means material not forming part of [the Act](#), including –

- (a) material that is set out in the document containing the text of [the Act](#) as printed by the Government Printer; and
- (b) a relevant report of a Royal Commission, Law Reform Commission or Commissioner, board or committee of inquiry, or a similar body, that was laid before either House of Parliament before the provision concerned was enacted; and
- (c) a relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the provision was enacted; and
- (d) a treaty or other international agreement that is mentioned in [the Act](#); and
- (e) any explanatory note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given to the members of, either House of Parliament by the member bringing in the Bill before the provision was enacted; and
- (f) the speech made to a House of Parliament by a member of the House in moving a motion that the Bill be read a second time; and
- (g) relevant material in the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament; and
- (h) a document that is declared by an Act to be a relevant document for the purposes of this section;

"ordinary meaning" means the ordinary meaning conveyed by a provision having regard to its context in [the Act](#) and to the purpose or object of [the Act](#).

2.171 The mischief rule, which has been superseded by the term “purposive construction”, is incorporated in Hong Kong legislation.¹⁷⁹ Section 19 of the Interpretation and General Clauses Ordinance states:

An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.

¹⁷⁹ Hong Kong Law Reform Commission Report on *Extrinsic Materials as an Aid to Statutory Interpretation* available at <http://www.hkreform.gov.hk/en/docs/rstatutory-e.doc> (accessed on 7 September 2006).

2.172 The Hong Kong Law Reform Commission noted that as far back as 1861 the court referred to a speech introducing a Bill in the House of Commons,¹⁸⁰ and in *R v Bishop of Oxford*¹⁸¹ it was said that *Hansard* may be consulted. However, the courts subsequently retreated and objected to the use of *Hansard*. In *Escoigne Properties v Inland Revenue Commissioners*¹⁸² Lord Denning said:

In this country we do not refer to the legislative history of an enactment as they do in the United States. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of *Hansard*. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people.

2.173 The Hong Kong Commission explained that in *Davis v Johnson*¹⁸³ the House of Lords affirmed its “well established and salutary rule that *Hansard* can never be referred to by counsel in court and therefore can never be relied on by the court in construing a statute or for any other purpose” and that “[s]o long as this rule is maintained by Parliament it must be wrong for a judge to make any judicial use of proceedings in Parliament for the purpose of interpreting statutes.” The Hong Kong Court of Appeal rejected in *R v Cheng Chung-wai*¹⁸⁴ an attempt by counsel to have the court look at the statement made by the Attorney General, when first moving an Amendment Bill to the Societies Ordinance. Even though it allowed recourse to the Objects and Reasons¹⁸⁵ attached to the Bill, but only for ascertaining the mischief sought to be remedied, it did not assist the court much, as it “seems perfectly plain to me that the amendment was directed to strike at those who hold themselves out as belonging to triad societies”. The court later took judicial notice that, in Hong Kong, some members of triad societies see a way of purifying themselves by confessing their membership to a person in authority, thereby breaking their oath of secrecy. The court seemed to rely on this knowledge to avoid a strict literal approach, thus

¹⁸⁰ *In re Mew and Thorne* [1861] 31 LJ BK 87.

¹⁸¹ [1879] 4 QBD 525, 550.

¹⁸² [1958] AC 549 at 566.

¹⁸³ [1979] AC 264.

¹⁸⁴ [1980] HKLR 593, 598. In *R v Tseng Ping-yee* [1969] HKLR 304, 320-1, the Court of Appeal had looked at the speech of the Attorney General when he moved the second reading of the Bill to amend the Law of Criminal Evidence in 1906. Having quoted from the speech, Blair-Kerr J. expressed the hope that he had not been influenced by the speech.

¹⁸⁵ In *Elson-Vernon Knitters Ltd v Sino-Indo-American Spinners Ltd* [1972] HKLR 468 the Court of Appeal held that a court may properly look at the Objects and Reasons for a Bill for the purpose of ascertaining the mischief which it was intended to remedy but not for the purpose of interpreting language used in the enactment which is clear and

quashing the conviction. The Hong Kong Commission stated that the court relied on *Davis v Johnson*¹⁸⁶ in stating that a judge is forbidden from referring to speeches made in the Hong Kong Legislative Council, as an aid to construction. The judge in the court below had said that he was not using the Financial Secretary's speech as an aid to construction, but to demonstrate the purpose behind the legislation. This was not accepted by the court who stated: "I am aware that distinguished judges have confessed to taking an occasional, surreptitious look at *Hansard*, but in my view the better practice (having obeyed the rule clearly laid down and maintained by the House of Lords) is for judges not to make reference to speeches in the Legislative Council in their judgments for any purpose so that no misunderstanding can occur and no ground for complaint can arise".

2.174 The Hong Kong Commission noted that the Hong Kong courts have applied the criteria of *Pepper v Hart*, though only a small number of cases have been reported. That is not to say that counsel are not referring the court to it when they produce *Hansard*. One difficulty is that many judges do not refer to *Pepper v Hart* when they are relying on or referring to *Hansard* so it can be difficult to trace the cases in some of the reported casebooks. Despite the differences between the legislative process in Hong Kong and in the United Kingdom, only in *Ngan Chor Ying v Year Trend Development Ltd*¹⁸⁷ was a reservation expressed as to this fact by Findlay J. In *Matheson PFC Limited v Jansen*¹⁸⁸ Penlington J regarded a statement in the explanatory memorandum by the Attorney General as "a clear statement from the equivalent of a Minister . . .". The courts sometimes refer to the relevant extract from the legislative debates even where they have decided that the legislation is not ambiguous, obscure or absurd. In *Hong Kong Racing Pigeon Association Limited v Attorney General*¹⁸⁹, Nazareth J noted the purpose of the Bill as stated by the Secretary for Health and Welfare in moving the second reading and he emphasized the constraints on the relaxation of the exclusionary rule, as set out in *Pepper v Hart*.

2.175 The Hong Kong Commission noted that the New Zealand Law Commission did not recommend incorporating the rules on the use of extrinsic materials into legislation even though it could define the conditions on which resort might be had to

unambiguous. This case was also followed in a criminal case, *Attorney General v Chan Kei-lung* [1977] HKLR 312.

¹⁸⁶ [1979] AC 264.

¹⁸⁷ 1995] 1 HKC 605, 610.

¹⁸⁸ (1994) Civil Appeal No. 72 of 1994, (CA) 26 July 1994.

¹⁸⁹ [1995] 2 HKC 201(CA).

Hansard, and the guidelines for its use. The New Zealand Commission thought it preferable to leave this to judicial development.¹⁹⁰ This recommendation reflects the fact that the New Zealand Court of Appeal has maintained control over the development of the use of extrinsic aids. The New Zealand judiciary has been encouraged to develop the use of such materials by adopting a purposive interpretation called for by section 5(j) of the Acts Interpretation Act 1924, which is similar to section 19 of the Hong Kong General Clauses and Interpretation Ordinance (Cap 1). They also pointed out that the Canadian courts have developed their own rules about the admissibility of extrinsic aids without recourse to legislation and that Lord Browne-Wilkinson, in *Pepper v Hart*, noted the dangers of the system in the United States where there has been abuse of the rules and pointed out the importance of strictly controlling admissibility. The Hong Kong Commission was of the view that the situation in the United States is unlikely to arise in our more controlled legislative process.

2.176 Despite section 15AB, and similar provisions in other Australian States allowing reference to reports of official bodies, most of the judgements on extrinsic aids focus on *Hansard* rather than on official reports.¹⁹¹ The judiciary have relied more on the second reading speech of the Minister as an extrinsic aid than the speeches of members of Parliament. The judiciary have resisted attempts to persuade them to refer to extrinsic aids when the text appears to them to be clear. The Australian judiciary have responded in a balanced and controlled way to the new legislation providing for the admissibility of extrinsic aids. Even in Victoria, where the legislation provides a broad discretion, the judiciary have responded in a similar way to the judiciary in those other States where stricter criteria must be applied. The Australian case law on Section 15AB(1)(a), which allows extrinsic materials to be used to confirm the ordinary meaning, has decided that they can be used even if the provision is otherwise clear on its face, although such materials cannot be used to alter its meaning. Such alteration can only be effected if the conditions in subsection (1)(b) are satisfied. Some of the fears expressed by commentators in the United Kingdom after the judgement in *Pepper v Hart* have not been realized in Australia.

¹⁹⁰ Bennion *Statutory Interpretation* at 577 comments as follows on the New Zealand position: "This shows sensitivity to the fact that since the middle ages common law jurisdictions have regarded the interpretative function as belonging to the courts rather than the legislature. On the other hand an Interpretation Act, in order to achieve maximum utility, ought to codify all clearly worked out judicial rules regarding the construction of enactments."

¹⁹¹ Hong Kong Law Reform Commission Report on *Extrinsic Materials as an Aid to Statutory Interpretation* par 8.20.

Indeed, Lord Browne – Wilkinson noted in *Pepper v Hart* that Australia (and New Zealand) had relaxed the rule to the extent that he favoured. He also said that there was no evidence of any complaints coming from those countries. As a result of the decision in *Pepper v Hart*, Singapore amended its Interpretation Act to allow the use of ministerial statements as extrinsic aids. The Interpretation (Amendment) Act has a provision which is similar to section 15AB of the Australian Acts Interpretation Act 1901 (Cth).

2.177 The Hong Kong Commission explained that *Pepper v Hart*¹⁹² has changed the criteria for the admissibility of extrinsic aids for the interpretation of legislation, not only for *Hansard* but for other extrinsic aids such as official reports. They said that there are, however, unresolved areas that are not covered by the criteria in *Pepper v Hart*, there are some uncertainties even for those areas covered by the criteria and that this may lead to more uncertainty and hinder the interpretation of legislation. The first limb of *Pepper v Hart* provides that parliamentary materials may be used where legislation was ambiguous or obscure or led to absurdity. The United Kingdom Law Commissions' report¹⁹³ focused on the relevance, reliability and availability of the extrinsic aids, rather than in what circumstances they could be used. In that sense, the Hong Kong Commission said, the English and Scottish Commissions' report did not help them in formulating any addition to the first limb. The Commissions recommended in their draft clause 1(1) that, in order to ascertain the meaning, the matters which may be considered should include the materials that they listed in clause 1(1)(a)-(e).¹⁹⁴ The only proviso was the weight, and the continuing exclusion of *Hansard*. There have been developments of the criteria under the first limb, as some judges have allowed extrinsic materials to confirm the meaning, a pattern which has also been made manifest in New Zealand. Section 15AB(1)(a) of the Australian Acts Interpretation Act 1901 (Cth) allows extrinsic materials to be used to confirm the meaning, and Singapore has made similar provision.

2.178 The Hong Kong Commission pointed out that the second limb of *Pepper v Hart* provided that the material which could be referred to consisted of a statement by a minister, or promoter of a bill, "together if necessary with such other parliamentary material as was necessary to understand such statements and their effect". It is clear

¹⁹² [1992] 3 WLR 1032, at 1033.

¹⁹³ "The Interpretation of Statutes", (Law Com No 21) (Scot Law Com No 11) 1969.

that the judgments since *Pepper v Hart* have focused on speeches by the minister or promoter of the Bill. In *Chief Adjudication Officer v Foster*¹⁹⁵ and in *Botross v London Borough of Fulham*¹⁹⁶ references were made to the movers of successful amendments in the House of Lords. Lord Browne-Wilkinson, in *Melluish v BMI (No. 3) Ltd*,¹⁹⁷ emphasised that “the only materials which can properly be introduced are clear statements made by a minister or other promoter ... directed to the very point in question in the litigation”. He warned that if there was misuse of the criteria there should be appropriate orders of wasted costs.

2.179 The Hong Kong Commission noted that it could be said that the criteria for the use of the other parliamentary material (ie “to understand ministerial statements and their effect”) is more restrictive than the United Kingdom Law Commissions’ tests of relevance, reliability and availability. In Australia, second reading speeches are regarded as authoritative.¹⁹⁸ This is assisted by a specific provision for such authority, though there is a separate provision for other relevant material.¹⁹⁹ This, in itself, ensures that the text from *Hansard* that is relied on will be relevant, reliable and available. It is “relevant”, as the Minister outlines the purpose of the legislation in the second reading speech or will explain amendments at the committee stage. It is “reliable”, as one would expect a minister to have obtained legal advice before speaking. In this context, the courts did not rely on an *extempore* comment by a Minister in *Doncaster Borough Council v Secretary of State for the Environment*.

2.180 The Hong Kong Commission considered that the limits of the material falling within the criteria were not entirely clear. Explanatory memoranda, for instance, are strictly speaking parliamentary materials, but have not been raised in the English cases since *Pepper v Hart*. In Hong Kong there have been judgments pre-dating *Pepper v Hart* which used explanatory memoranda to assist a purposive interpretation. An explanatory memorandum has also been referred to since that judgment.²⁰⁰ It was not clear whether speeches made outside the legislature by

¹⁹⁴ These included official reports, treaties, other documents bearing upon the subject matter, which had been presented to Parliament (special explanatory memoranda), and documents listed in an Act as being relevant.

¹⁹⁵ [1993] 2 WLR 1.

¹⁹⁶ (1995) 16 Cr App R (S) 622.

¹⁹⁷ [1995] 3 WLR 631, at 645.

¹⁹⁸ See *Re Bolton: Ex p Beane* [1987] 162 CLR 514.

¹⁹⁹ Section 15AB(2)(f) and (h) of the Acts Interpretation Act.

²⁰⁰ *Matheson PFC Limited v Jansen* [1994] HKLD G56.

politicians or ministers could be relied on in Hong Kong. The only authority was *Churchill Falls (Labrador) Corp v Newfoundland (Attorney General)*.²⁰¹ In that case, the court held that it could consider a government pamphlet to show the true purpose of the legislation. There has been little analysis in the various reports from the United Kingdom as to whether the criteria in *Pepper v Hart* should be used to include reports from, or speeches in, Standing Committees. There have been few judgments in the United Kingdom since *Pepper v Hart* that have covered speeches made in Standing Committees. It would seem in principle that statements made in such committees or their reports would be admissible if they meet the criteria. The Hong Kong Commission stated that it seemed consistent with the practice of other jurisdictions such as New Zealand and Canada.²⁰²

2.181 The Hong Kong Commission noted that the call for greater availability of parliamentary material such as Standing Committee debates has been left to commentators since the judgment in *Pepper v Hart*.²⁰³ The criticism of lack of availability would also apply in Hong Kong to Bills Committee deliberations. Their minutes are not recorded in *Hansard*. A question arises whether statements by promoters, or their representatives, made in a Bills Committee come within the criteria of *Pepper v Hart*. If the statement was clear, and complied with the other two limbs of the criteria, then, in principle, a court could exercise its discretion to rely on the statement. However, it is unlikely that spontaneous responses made by a promoter or his representatives to questions put to them in a Bills Committee, would be seen as sufficiently clear, or of sufficient weight, to fall within the criteria. However, it would seem that speeches made at the resumed second stage of a Bill, when members of a Bills Committee have indicated the results of their deliberations, have been allowed to be referred to in some cases. In *Re Chung Tu Quan & Ors*²⁰⁴, Keith J referred to the speech of the Chairman of the Ad Hoc Committee and in the unreported case *L v C Barnett J* referred *inter alia* to a member's report of the meetings of the Legislative Council's Ad Hoc Group on the reasons for proposed amendments to the particular Bill before him. Reference was made in *Real Estate*

²⁰¹ (1984) 8 DLR (4th) 1, at 18-20.

²⁰² This is also in accordance with section 15AB(2)(h) of the Acts Interpretation Act 1901 where material "in any official record of debates" is included.

²⁰³ Tunkel, "Research after *Pepper v Hart*", *Gazette*, 90/18, 12 May 1993, and "*Pepper v Hart* and Parliamentary Standing Committee Debates" *The Law Librarian*, vol. 24, no. 3, September 1993, 141.

²⁰⁴ [1995] 1 HKC 566, at 574.

Developers Association v Town Planning Board ²⁰⁵ to a statement made in the Legislative Council by the policy Secretary which seemed to have been on the resumption of the second stage as he referred to an agreement with the Ad Hoc Group.

2.182 Having considered all the arguments, the Hong Kong Commission concluded that it would be desirable to codify and modify the existing common law principles and in the process extend and clarify the position by way of legislation. The Commission recommended that it would be more useful to incorporate the criteria for the use of extrinsic aids in legislation by appropriate amendments to the Interpretation and General Clauses Ordinance. The Commission did not favour using the legislation from the State of Victoria as a model. The Commission recommended that the model of section 15AB of the Commonwealth of Australia Acts Interpretation Act with modifications for the Hong Kong context, should be adopted as the basis for legislative reform:

Draft proposed section 19A to be inserted into the Interpretation and General Clauses Ordinance (Cap. 1)

19A. “(1) Subject to subsection (3), (4), (5) and (6), in the interpretation of a provision of an Ordinance, if any material not forming part of the Ordinance is capable of assisting in the ascertainment of the meaning of the provision consideration may be given to that material:

- (a) 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 Ordinance and the purpose or object underlying the Ordinance leads to a result that is absurd or is unreasonable.

(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 Ordinance includes :

- (a) all matters not forming part of the Ordinance that are set out in the document containing the text of the Ordinance as printed by the Government Printer;
- (b) any relevant report of a commission, the Law Reform Commission, committee of inquiry or other similar body that was published before enactment of the provision ;
- (c) any relevant report of a body similar to the Law Reform Commission in any jurisdiction other than Hong Kong where the provision was modelled on legislation from such jurisdiction implementing any recommendations of the report ;

²⁰⁵

(1996) 6 HKPLR 179.

- (d) any relevant treaty or other international agreement that is referred to in the Ordinance or in any of the materials that are referred to in this subsection;
 - (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 the Legislative Council by the policy Secretary or other promoter before the time when the provision was enacted;
 - (f) the speech made to the Legislative Council by a policy Secretary or other promoter on the occasion of the moving by that policy Secretary or other promoter of a motion that the Bill containing the provision be read a second time in the Council;
 - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Ordinance to be a relevant document for the purposes of this section;
 - (h) any relevant report of a committee of the Legislative Council before the time when the provision was enacted.
 - (i) any relevant material in the official record of debates in the Legislative Council.”
- (3) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) or (2) shall be no more than is appropriate in the circumstances.
- (4) For the avoidance of doubt, the amendments made by this Ordinance shall apply in relation to all Ordinances in force whether such an Ordinance came or comes into operation before or after the commencement of this Ordinance.
- (5) Nothing in this section shall prejudice any right to rely on extrinsic materials as provided for under common law.
- (6) “Nothing in this section shall prejudice the common law rule that ambiguous legislation cannot be construed to derogate from the rights of individuals.

2.183 The following clauses were proposed in the Hong Kong Interpretation and General Clauses (Amendment) Bill of 1999:

19A. Use of extrinsic material in the interpretation of Ordinances

- (1) Subject to subsections (5), (6) and (7), in the interpretation of a provision of an Ordinance, if any material not forming part of the Ordinance is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material to determine the meaning of the provision where –
- (a) the provision is ambiguous or obscure; or
 - (b) the ordinary meaning conveyed by the text of the provision taking into account its context in the Ordinance and the object of the Ordinance leads to a result that is absurd or unreasonable.
- (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 Ordinance includes –

- (a) all matters not forming part of the Ordinance that are set out in any document –
 - (i) containing the text of the Ordinance; and
 - (ii) printed by the Government Printer;
- (b) any relevant report of a commission, the Law Reform Commission of Hong Kong, committee of inquiry or other similar body that was published before the enactment of the provision;
- (c) any relevant report of a body –
 - (i) established, by whatever means, outside Hong Kong; and
 - (ii) similar to any body referred to in paragraph (b),

where the provision was modelled on legislation from that place implementing any recommendations of the report;

- (d) any relevant treaty or other international agreement that is referred to in the Ordinance or in any material referred to in this subsection;
- (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 the Legislative Council by or on behalf of the presenter of the Bill before the enactment of the provision; (f) the speech made to the Legislative Council by the presenter of the Bill containing the provision on the occasion of the moving by the presenter of a motion that the Bill be read a second time;
- (g) any relevant report of a committee of the Legislative Council made before the enactment of the provision;
- (h) any document (whether or not a document to which paragraph (a), (b), (c), (d), (e), (f) or (g) applies) that is declared by the Ordinance to be a relevant document for the purposes of this section;
- (i) any relevant material in the Official Record of all proceedings in the Legislative Council and in the committee of the whole of the Legislative Council.

(3) Without prejudice to the generality of section 98, a document purporting to be –

- (a) a copy of –
 - (i) any proceedings of the Legislative Council; or
 - (ii) the votes of the Legislative Council; and
- (b) printed by the Government Printer, shall on its production be admitted as prima facie evidence thereof in all courts for the purposes of this section without any further proof.

(4) There may be added as a note to the provision of an Ordinance a reference to the date on which the Bill containing the provision was read the second time.

(5) The weight, if any, to be given for the purposes of this section to any material referred to in subsection (1) or (2) shall be not more than is appropriate in the circumstances.

(6) The provisions of this section shall apply to an Ordinance whether the Ordinance came or comes into operation before, on or after the commencement of this section.

(7) The provisions of this section shall be in addition to and not in derogation from the common law applicable to the interpretation of a provision of an Ordinance and, without prejudice to the generality of the foregoing, in particular –

- (a) any rule of law relating to the use of any material not forming part of an Ordinance in the interpretation of a provision of the Ordinance;
- (b) any rule of law that a provision of an Ordinance which is ambiguous or obscure shall not be interpreted to derogate from the rights or privileges of individuals.

2.184 In *Christian Lawyers Association of SA and Others v Minister of Health and Others*²⁰⁶ the court explained that the general rule is that evidence of surrounding circumstances in order to interpret a statute is not permissible.

In this respect Steyn JA said the following in *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA and Another* 1958 (4) SA 572 (A) at 657H--658A:

'To the extent to which the interpretation of a statute should be based upon surrounding circumstances requiring evidential proof, it would be an interpretation which could operate inter partes only. If the leading of evidence were to be admissible, no other person, when affected by the statute, could be denied the right to bring other evidence proving other surrounding circumstances or disproving those accepted in a previous case; and in every case the evidence, unless the parties are in agreement as to its effect, would have to be led anew. The result would be that the interpretation of the same provision in an enactment may for good reason differ from case to case. The uncertainty and confusion which would arise from that, needs no elaboration. I consider, therefore, that generally speaking such evidential proof would not be admissible.'

An exception to this general rule is where reference is made to the report of a judicial commission of enquiry whose investigations shortly preceded the passing of the statute, but only in order to ascertain the mischief aimed at by the statutory enactment in question . . .

Counsel for the plaintiffs relied on the remarks of Chaskalson P in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 405H where the following is said:

'[16] In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process.'

The learned President of the Constitutional Court goes on, however, to state the following at 407E:

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1998 (4) SA 1113 (T).

'[19] Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case.'

Counsel for the plaintiffs also referred to *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) in which it was held (at 457B--C) that in order to understand the reasons for passing a constitutional Act like the Statute of Westminster it is permissible to refer to the events which led up to such Act being passed, and that these events might throw light on the meaning of the statute.

It is not apparent what the exact nature of the evidence is which the plaintiffs wish to lead to substantiate their cause of action. The pleadings are silent thereon. No obvious facts exist from which the Court can deduce that there is evidence of circumstances surrounding the enactment of the Constitution which may cast a light on the meaning to be attached to the term 'anyone' or 'every person' therein, and more particularly in s 11. Nor do I consider that there is an ambiguity in s 11 of such a nature that extraneous facts may be relevant in the interpretation thereof. Nothing is pleaded in the particulars of claim to indicate that resort should be had to extrinsic evidence to elucidate the content of the section. In these circumstances the remarks of Miller J in *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) are, in my view, particularly apposite and bear quoting in full. At 715G--716E the learned Judge says the following:

'It is clear from these decisions and from many others which it is not necessary to quote in this judgment that, where the whole contract is not before it, the Court will not assign a meaning to particular words or clauses thereof at the exception stage if there is room for a contention, ex facie the pleadings, that the omitted terms of the contract, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issue before the Court. The Court's reluctance to decide issues of interpretation in such circumstances has undoubtedly placed an effective weapon in the hands of respondents in exception proceedings. This weapon in the litigant's armoury is frequently used as a shield rather than a sword, if I may borrow from the lore of estoppel cases. When it is properly used as a sword, it is usually fatal to the exception, for it cuts through the tissue of which the exception is compounded and exposes its vulnerability. This is clearly illustrated in cases where the contract is ambiguous, thus enabling the respondent to attack the soundness of the exception by showing that on the contract as pleaded an interpretation adverse to the excipient is reasonably possible, and that extrinsic evidence could resolve the ambiguity in favour of the respondent. The case of *Sacks v Venter* 1954 (2) SA 427 (W), is an example thereof. But where the argument is used as a shield to protect the frail body of the pleading which is being attacked on exception, it is necessary to examine with some care a contention that the whole contract might "possibly" or "conceivably" reveal a situation favourable to the respondent, or that evidence of surrounding circumstances might "possibly" be admissible, and if admissible, might "conceivably" confound the excipient. It is clearly not correct to say that the Court will never interpret a clause in an agreement on exception, or decide an issue as to the rights of the parties under an agreement, merely because the whole agreement is not before it. The Rules of Court expressly permit of extracts from a written agreement being set out in a pleading. Nor do I think that the mere notional possibility that evidence of surrounding circumstances

may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts.'

Although Miller J was dealing with the interpretation of a contract, I see no reason why a similar approach should not be adopted in the interpretation of statutory provisions, including the Constitution, where relief is sought to strike down an Act of Parliament. The defendants are surely entitled to be apprised of the background material on which the plaintiffs will seek to rely, when that material is fundamental to the plaintiffs' cause of action.

2.185 In *Ngcobo and Another v Van Rensburg and Others*²⁰⁷ the court remarked as follows on the legislative history of the legislation at issue:

[27] Mr Van der Merwe referred in argument to two documents which he suggested supported his view that the conjunctive interpretation should prevail. The first was a media release dated 1 June 1995 by the Minister of Land Affairs which accompanied the publication of the Land Reform (Labour Tenants) Bill 1995 and the second was the Bill itself (to which was annexed an explanatory memorandum in accordance with Parliamentary practice). Both the media release and the explanatory memorandum Bill referred under the heading 'Limited Scope' to the requirement in the definition of a 'labour tenant' that the person be a second generation labour tenant. The definition in the Bill itself was at that time worded differently, but, it was contended, also pointed to a conjunctive interpretation. The weight of authority is very much against allowing such documents to be called in aid in the interpretation of a statute. This authority has received considerable academic criticism. There are also a few authorities which seem to suggest a softening of attitudes by South African Courts to certain of the documents which precede the passing of an Act. For the purpose of deciding this matter it has not been necessary for me to rely on the documents referred to by the first respondent. It is therefore unnecessary for me to decide on their admissibility. (Footnotes omitted)

2.186 In *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue*²⁰⁸ the court remarked as follows about the taking into account of the legislative history of the provisions in question:

However, it remains of course a question whether in any given case there is indeed adequate justification for concluding that the 'real intention' of the Legislature is properly evidenced. In answering the question the dividing line between impermissible speculation as to the purpose of legislation and permissible reliance upon factors *dehors* the language under consideration to discover it, is admittedly sometimes fine but it is a conceptually clear line which must be respected.

²⁰⁷ 1999 (2) SA 525 (LCC).

²⁰⁸ 1998 (4) SA 860 (SCA) at 871B.

Some of the factors upon which appellant seeks to rely are not factors which can legitimately be taken into account. The reports of the Board of Trade and Industry fall into this category. They are investigative reports containing various findings and recommendations, but they can throw no light upon which of them was accepted and translated into legislation.

Also falling within that category is the manner in which the 1991 provision was for a relatively short period of time interpreted by the Commissioner or members of his staff. That relatively quickly jettisoned interpretation of the 1991 provision is not what is comprehended by the doctrines of *subsecuta observatio* and *contemporeana expositio*. Those doctrines rest upon two foundations. One is that there must at least be room for the interpretation in the language of the provision. The other is that the interpretation must have been accorded it for sufficiently long without it being gainsaid that it provides good reason for concluding that that is what it was intended to mean. See *R v Detody* 1926 AD 198 at 202--3. It is true that it was said in *Secretary for Customs and Excise v Millman NO 1975 (3) SA 544 (A)* at 551F that 'it may well be' that a departmental interpretation of an ambiguous provision is a factor which cannot be overlooked and that 'it may . . . well be invoked to tip the balance where the language . . . may fairly be construed in either of two ways', despite the absence of any indication as to how long that interpretation had been accorded to it, but the observation was tentative and guarded and did not purport to be a considered and definite expression of opinion.

I turn to the provision itself. Whatever the permissible scope for, and the limitations upon, the use of the legislative history of a particular provision as an aid to interpretation may be, I think it is obvious that where a provision had been amended and the amendment is deemed to have taken effect while the provision in its unamended state was operative, one is entitled to examine the implications of that in order to see whether they throw any light upon the interpretation which should be accorded to the amendment. If on one interpretation of the amended provision it would retroactively destroy vested rights acquired (and even vested rights acquired for value given) in terms of the provision before its amendment, but on another interpretation it would not, that would provide, I think, a strong reason for preferring the latter interpretation unless the language used cannot possibly accommodate it. To my mind, such an indication can be found if the 1990 and 1991 versions of the provision are compared and the implications of their respective commencement dates are appreciated.

2.187 In *Thoroughbred Breeders' Association V Price Waterhouse* the Supreme Court of Appeal remarked as follows about reference to *Hansard* and reference to *Pepper v Hart*:²⁰⁹

[25] During the course of the argument counsel for the respondents referred us to the texts of draft bills which were published in the Government Gazette before the Act was passed by Parliament. These texts showed, so it was submitted, that although it was originally proposed to limit the operation of the Act to delictual claims this intention was departed from in the text which was eventually passed by the Legislature. Counsel for the appellant responded to this material by placing before us the text of the Hansard report of the proceedings in the House of Assembly which clearly showed, particularly from the speech of the Minister of Justice, who introduced the Second Reading of the Bill, that the discussions related solely to delictual claims. In view of the fact that we have without reference to this material come to the conclusion that the Act only applies to delictual claims it is unnecessary for us to decide whether material of this kind can be looked at by a court when legislation falls

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2001 (4) SA 551 (SCA).

to be interpreted and, in particular, whether the decision of the House of Lords in *Pepper v Hart* [1993] AC 593 (HL) is in accordance with our law.

2.188 Du Plessis²¹⁰ suggests that historical material cannot be relied on as a primary method of interpretation, but it should rather be used to confirm results arrived at through other methods. The publication of a Bill is often accompanied by the publication of an explanatory memorandum from its drafters. Such a memorandum, it would seem, may readily be relied on to help determine the purpose of statutory provisions eventually resulting from the Bill. This view is supported by recent case law. In *National Union of Mineworkers of SA v Driveline Technologies*²¹¹ the Labour Appeal Court was prepared to use the explanatory memorandum to interpret the Labour Relations Act 66 of 1995. See also *Shoprite Checkers (Pty) Ltd v Ramdaw*,²¹² in which the Labour Court also scrutinised the explanatory memorandum in interpreting the Labour Relations Act.

2.189 The following is a practical example of the crucial importance of extrinsic material during statutory interpretation. In 1999 the KwaZulu-Natal provincial legislature adopted the KwaZulu-Natal Adjustments Appropriation Act 1 of 1999 to provide for the shortfall in the original Estimates of Revenue and Expenditure for the 1998-1999 financial year for the Province of KwaZulu-Natal. The Act was duly passed in terms of the Constitution, after which it was assented to and signed by the Premier of the province. In Schedule 1 to the Act the total appropriated amount was further divided amongst the various provincial government departments. The detailed allotments of money to various projects within each department were set out in the Adjustment Estimates of Expenditure for the Financial Year ending 31 March 1999 (including the explanatory memorandum of the MEC for Finance and Auxiliary Services attached to the Estimates), tabled in the KwaZulu-Natal provincial legislature. However, the Estimates were not published as part of the Act, although it embodied the detailed explanation of the specific budgetary allocations the provincial legislature had to authorize. Without the specific financial statements included in the Estimates, the provincial legislature would not have been able to exercise its constitutional and legislative duties. As a result the Estimates not only played a central and crucial role during the adoption of this particular money Bill, but the ensuing Act (including Schedule 1) cannot be interpreted or applied without recourse to the Estimates.

²¹⁰ Du Plessis *Re-Interpretation of Statutes* (2002) 269.

²¹¹ 2002 (4) SA 645 (LAC) para 79-80.

2.190 There are a number of reasons why the courts traditionally do not admit extrinsic material during interpretation of legislation material. Some of these are the following: not all debates and deliberations in the legislature necessarily apply to the purpose of the legislation; there might have been differences of opinion amongst the members; some of the members did not take part in the debates; the sources of the material might be unreliable; and the separation of powers principle might be infringed since there is a measure of respect and courtesy between legislature and the judiciary that should be observed.²¹³ However, as Hahlo & Kahn²¹⁴ point out, the criticisms against the use of extrinsic material “go rather to the weight to be given to this material than the legitimacy of using it”.

2.191 The traditional view as to the use of extrinsic material during statutory interpretation is changing. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*²¹⁵ the court referred to parliamentary debates, reports of task teams and opinions of academics in interpreting the Films and Publications Act 65 of 1996. In *Western Cape Provincial Government: in re DVB Behuising (Pty) Ltd*²¹⁶ the Constitutional Court used parliamentary debates, as reported in *Hansard* during statutory interpretation. In *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* Mokgoro J noted that during the second reading of the Indecent or Obscene Photographic Matter Bill, the Minister of Justice made clear that the mischief at which the Bill was aimed was specifically the apprehended moral subversion of 'a Christian, civilised country such as the one in which we are living'.²¹⁷ She explained that she did not wish to be understood as holding that parliamentary statements are admissible for the purpose of interpreting the 1967 Act, and that she referred to such material purely for the purpose of sketching the background to the legislation.²¹⁸ She explained that the law in South Africa has traditionally been that legislative history is not admissible in the interpretation of a statute²¹⁹ although that rule is no longer as firmly entrenched as it once was. She pointed out that in *S v*

²¹² 2001 (3) SA 68 (LC) at paras 59-60.

²¹³ See Devenish 123.

²¹⁴ Hahlo & Kahn *The Union of South Africa: the development of its law and constitution* (1960) 184-5.

²¹⁵ 2003 (3) SA 389 (W) paras 14 – 23.

²¹⁶ 2001 (1) SA 500 (CC) para 45 note 74.

²¹⁷ 1996 (1) SACR 587 (CC) at par 12.

²¹⁸ In the footnote to par 12.

²¹⁹ *E.g.*, *Mathiba v Moschke* 1920 AD 354, 362.

*Makwanyane*²²⁰ the Court noted that the exclusionary rule was being relaxed in other jurisdictions, but held that “whether our courts should follow these examples and extend the scope of what is admissible as background material for the purpose of interpreting statutes does not arise in the present case”:

In *Westinghouse Brake & Equip. Pty Ltd. v Bilger Engineering* 1986 (2) SA 555 (A) 562-63, the Court held that, where the words of a statute are not clear and unambiguous, the court may have regard to the report of a Commission of Inquiry in order to ascertain the mischief aimed at and the state of the law as it was then understood to be. See also *S v Mpetha* 1985 (3) SA 702 (A) 713; *Ex Parte Slater, Walker Securities (SA) Ltd.* 1974 (4) SA 657 (W); Cockram, *Interpretation of Statutes* (1987) 55 (“The present trend would appear to permit limited use to be made of the history of legislation as an aid to its interpretation.”). The case for relaxing the exclusionary rule in South Africa is strengthened by the fact that the rule has been considerably relaxed in England, see, e.g., *Pepper v Hart*, [1993] AC 593 (HL) (where legislation is obscure or ambiguous the parliamentary statements of a minister or promoter of the bill could be taken into account). According to Professor Hogg, “[l]egislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the classification of the statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose.” *Constitutional Law of Canada* (3d ed.) (1992) 1285.

2.192 In *S v Dzukuda; S v Tilly; S v Tshilo*²²¹ the court referred to a report of the South African Law Reform Commission and a ministerial speech in Parliament (reported in *Hansard*) during the interpretation of the Criminal Law Amendment Act 105 of 1997. In *S v Makwanyane*²²² the Constitutional Court decided, after considering the position in foreign law, that it was acceptable to have regard to the drafting history of the Constitution as an aid to its interpretation:

Such background material can provide a context for the interpretation of the Constitution and, where it serves this purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.

2.193 In *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang And Another NNO Pharmaceutical Society Of South Africa And Others v Tshabalala-Msimang and Another NNO*²²³ the court noted the historical background preceding the adoption of the regulations:

[66] It is quite evident from the record that the introduction of the transparent pricing system is not without background. I have, at the commencement of the judgment, set out some historical background preceding the amendment to the Act to make

²²⁰ 1995 (6) BCLR 665 (CC) 678.

²²¹ 2000 (3) SA 229 (W) 233.

²²² Para 17 (Chaskalson P, as he then was).

²²³ 2005 (2) SA 530 (C).

provision for the introduction of a transparent pricing system process. This background relates to various commissions and reports of committees over concerns about the price of medicine and related substances in South Africa; the first vestiges of the guarantee of a right to health care as a fundamental right; the entrenchment of a right to health care as a substantive fundamental right; the signature of a number of international instruments relating to a right to health care and the subsequent substantial amendments to the Medicines Act. The amendment to the Act was a sequel to that background material. The legislative purpose of the amendment was to address the spiralling cost of medicine and to make medicine and related substances more affordable. Whether that process is construed as a form of statutory price control, or a need to make medicine more affordable or to introduce a transparent price system, is indeed of no significance. Such background material is relevant for purposes of determining the legislative purpose of the empowering provision, the mischief it had intended to suppress and the introduction of a system to remedy such mischief. (Footnotes omitted)

2.194 In *Minister of Health v New Clicks South Africa (Pty) Ltd*²²⁴ Chaskalson CJ noted that he had occasion in *S v Makwanyane* to consider whether background material was admissible for the purpose of interpreting the Constitution, and although it was not entirely clear whether the majority of the Court concurred in this finding, none dissented from it. He pointed out that he had no reason to depart from that finding and in his view was applicable to ascertaining “the mischief” that a statute is aimed at where that would be relevant to its interpretation:

This would be consistent with the decisions of the Appellate Division in *Attorney-General, Eastern Cape v Blom and Others*, and *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* and the cases from other jurisdictions referred to in *Makwanyane’s* case.

[202] The National Drug Policy is set out in a comprehensive document which addresses health objectives, economic objectives and national development objectives. The economic objectives are as follows:

- “(a) to lower the cost of drugs in both the private and public sectors
- (b) to promote the cost-effective and rational use of drugs
- (c) to establish a complementary partnership between Government bodies and private providers in the pharmaceutical sector
- (d) to optimize the use of scarce resources through cooperation with international and regional agencies.”

[203] The drug pricing policy is dealt with in a separate chapter. Its aim is said to be: “To promote the availability of safe and effective drugs at the lowest possible cost”. The mischief, therefore, to which section 22G is directed is the lowering of the high cost of drugs. The price control provisions of the regulations are a means, though not the only means, of addressing this mischief.

[204] The document goes on to describe how the stated aim of this policy is to be achieved. It is not necessary to decide whether it is permissible to have regard to this for the purpose of interpreting section 22G. Even if I were to assume in favour of the

²²⁴ 2006 (2) SA 311 (CC) par 200. Also available at http://concourt.law.wits.ac.za/judgment.php?case_id=13122 (accessed on 7 September 2006).

Pharmacies that it is a relevant consideration, the methods described include establishing a “Pricing Committee with clearly defined functions to monitor and regulate drug prices”, the development of a “data base . . . to monitor the cost of drugs in the country in comparison with prices in developing and developed countries” and that “[p]rice increases will be regulated.” The policy for implementation also refers to “total transparency in the pricing structure of pharmaceutical manufacturers, wholesalers, providers of services, such as dispensers of drugs, as well as private clinics and hospitals”, the introduction of a “non-discriminatory pricing system” which will if necessary be enforced, and the replacement of the “wholesale and retail percentage mark-up system” with “a pricing system based on a fixed professional fee.” The regulations seem to me to be broadly in line with these policies. The question, however, is not whether the regulations are consistent with policy statements, but whether they are sanctioned by the empowering legislation.

[205] PSSA rely on evidence given by the former Director-General of Health as to the meaning of section 22G and on his opinion that the SEP was to be set by manufacturers. The opinion of the former Director-General as to the meaning of section 22G is not admissible for this purpose. It is the Court’s duty, and not that of the former or present Director-General, to interpret the statute.

2.195 In *Hleka v Johannesburg City Council*²²⁵ the court left open the question whether reference to commission reports is permissible. The Appellate Division in *Harris v Minister of the Interior*²²⁶ was prepared to use the reports of the Imperial Conferences to interpret the Statute of Westminster.²²⁷ In *Hopkinson v Bloemfontein District Creamery*²²⁸ the court held that the prevailing law prevented the use of a commission report about the Companies Act 46 of 1926. In *Rand Bank Ltd v De Jager*²²⁹ the court decided that the report of the commission of enquiry is an admissible aid in construing the Act. In *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*²³⁰ the Appellate Division held that the report of a commission of enquiry which preceded the passing of an Act could be used to establish the purpose of the Act provided a clear link existed between the recommendations of the report and the provisions of the particular legislation. In *National Home Products (Pty) Ltd v Vynide Ltd*²³¹ it was held that the official report of a statutory body to a Minister regarding particular legislation could be used where the Act contained ambiguities. It would appear that the courts were amenable to

²²⁵ 1949 (1) SA 842 (A).

²²⁶ 1952 (2) SA 428 (A)

²²⁷ *Harris* can hardly serve as authority for the courts in general to use preceding discussions, as it was not the Statute of Westminster that was in dispute. The judgment does, however, indicate a willingness to enquire into the historical context of legislation.

²²⁸ 1966 (1) SA 159 (O).

²²⁹ 1982 (3) SA 418 (C).

²³⁰ 1986 (2) SA 555 (A).

²³¹ 1988 (1) SA 660 (W).

consulting commission reports concerning particular legislation during the interpretation process, albeit only where the provisions of the legislation are ambiguous.

(iii) Proposed provision on extrinsic material

2.196 We noted above the view of Bennion against leaving the development of rules on relevance and significance on extrinsic information to the courts and that he remarks that “an Interpretation Act, in order to achieve maximum utility, ought to codify all clearly worked out judicial rules regarding the construction of enactments”. The Commission agrees with him and proposes that the Bill should address this issue.

2.197 The Commission acknowledges that caution must be exercised with regard to extrinsic information as aids to interpretation of legislation. It has noted the international debate which followed on the decision of *Pepper v Hart*. A total prohibition on the use of extrinsic information or material is not a suitable response, as there might well be relevant, accessible and reliable extrinsic material at the disposal of a particular interpreter to find the mischief of a legislative provision. While it is true that a blanket ban could indiscriminately exclude potentially valuable interpretive material, it is not immediately clear which extrinsic materials should be allowed and which safeguards must be included in a provision about such material. Traditionally courts do not like closed lists, and it may be argued that a new Interpretation Act should contain an open-ended provision allowing the use of extrinsic material during interpretation, with the relevance and weighting of such material left to the discretion of the courts to find a balance between text and context. Another possibility is to allow the use of all official extrinsic material printed along with the legislation (such as explanatory memoranda, commission reports, speeches and statements in *Hansard*, footnotes, endnotes, diagrams and explanations). Although this would limit the range of possible extrinsic material at the disposal of the courts, it would still leave the door open for other official material to be available in future (eg reliable minutes of portfolio committee meetings, etc.). However, it must be stressed that the use of extrinsic material must not be qualified in the new Act with traditional, orthodox terminology such as “ambiguities” and “unclear language”.

2.198 It was proposed above that “extrinsic information” should be defined in the Bill as meaning any reports, submissions, comments or any other information which sheds light on the background to, or the purpose or scope of, legislation. It is

considered that extrinsic information may be taken into account when interpreting legislation but only as an opinion on the information it conveys; and for the purpose of establishing the background to, or the purpose or scope of, the legislation or any of its provisions, if such background, purpose or scope cannot be established from the text of the legislation or provision; to resolve any ambiguity or obscurity in the legislation or provision, if the ambiguity or obscurity cannot be resolved from the text of the legislation or provision; or to confirm the meaning of the legislation or provision. It is proposed that the following provision be included in the Bill on taking into account extrinsic information when interpreting legislation:

Extrinsic information

8. When interpreting legislation extrinsic information may be taken into account but only –
- (a) as an opinion on the information it conveys; and
 - (b) for the purpose of –
 - (i) establishing the background to, or the purpose or scope of, the legislation or any of its provisions, if such background, purpose or scope cannot be established from the text of the legislation or provision;
 - (ii) to resolve any ambiguity or obscurity in the legislation or provision, if the ambiguity or obscurity cannot be resolved from the text of the legislation or provision; or
 - (iii) to confirm the meaning of the legislation or provision determined in accordance with section 5.

C. CODIFICATION OF RULES OF INTERPRETATION

2.199 The canons of statutory interpretation consist of rules and presumptions, some of which are of common-law origin, while others are laid down as interpretative precepts in the current Interpretation Act and the Constitution.²³²

2.200 The question which of the canons of statutory interpretation should be codified in the Interpretation Act is a problematic one. It has been stated that the

²³² Du Plessis *Butterworths Compendium* para 2C15.

rules of statutory interpretation should not be codified for a number of reasons, being that

- (a) they are only guidelines;
- (b) they are contradictory;
- (c) codifying the rules would restrict the interpreters' choice.

2.201 Wolfgang Friedmann states as follows:²³³

It is notorious that the canons of statutory interpretation, far from forming a symmetrical and harmonious body of rules, overlap and often contradict one another. It is not too much to say that they consist of a number of guides which largely cancel each other out, of learned formulas giving a deceptive appearance of logic which only serves to conceal the between opposing conclusions of equal logical validity, and of inarticulate ideological premises which depend on personal predilection and on changing trends of public and social policy.

2.202 The English and Scottish Law Commissions conducted an investigation into the rules of statutory interpretation in 1969.²³⁴ The Law Commissions concluded as follows:²³⁵

We do not propose any comprehensive statutory enumeration of the factors to be taken into account by the courts in the interpretation of legislation. Even in countries with the most highly codified systems the principles of interpretation largely rest on a body of flexible doctrine developed by legal writers and by the practice of the courts.²³⁶

2.203 They also noted the danger that a comprehensive codification of the law of interpretation would introduce excessive rigidity into the law. However, they did recommend a limited degree of statutory intervention.

2.204 The Law Reform Commission of Hong Kong in its 1997 Report on *Extrinsic Material As An Aid To Statutory Interpretation* concluded in favour of a legislative approach, finding that it "would be desirable to codify and modify the existing common law principles and in the process extend and clarify the position by way of legislation".

2.205 The Irish Law Reform Commission in its consultation paper on statutory drafting and interpretation recommended that the basic rules of statutory

²³³ Friedmann Wolfgang *Law and social change in contemporary Britain* London: Stevens & Sons 1951 243.

²³⁴ English Law Commission Report No 21; Scottish Law Commission Report No 11.

²³⁵ English and Scottish Law Commission Reports para 81.

²³⁶ English and Scottish Law Commission Reports para 81.

interpretation should be set out in legislative form.²³⁷ It did not, however, recommend a comprehensive codification of all of the many rules of statutory interpretation. It recommended minimal intervention, to set out the general principle that the purpose of legislation should be borne in mind and that it should be permissible (though not required) for the courts to look at extrinsic aids in the interpretation of statutes in certain circumstances.

2.206 In the discussion paper on the Commonwealth Acts Interpretation Act 1901 prepared by officers of the Department of the Attorney-General and the Office of Parliamentary Counsel, the codification of the rules of statutory interpretation was considered.²³⁸ The view was expressed that to the extent that codification could be achieved, it would help to ensure that both drafters and users of legislation applied the same rules in dealing with legislation, and would make those rules more accessible to users as they would not have to be extracted from the case law by each individual user. On the other hand, however, it was noted that codification of any set of legal principles is a difficult task, and that mistakes are easily made. It was also argued that attempts to codify the common law would impose undesirable restrictions on the ability of the courts to develop the common law to cope with new issues.

2.207 The Commission considers that the existing common-law presumptions and maxims should not be codified, because a codification could lead to more unnecessary rigidity in statutory interpretation. The courts and other interpreters may still rely on these common-law maxims and presumptions, insofar as they are not in conflict with the values of the Constitution.

²³⁷ Irish Law Reform Commission Consultation Paper 14 -1999 Dublin para 1.186.

²³⁸ Para 2.14.

CHAPTER 3

OPERATION OF LEGISLATION

A. INTRODUCTION

3.1 Logically the reading, interpretation and application of statutory law should start with an inquiry into whether the legislation is in effect. As a result the operational provisions in the Interpretation Act could start with the commencement of legislation, and then be followed by the various ways in which legislation comes to an end (repeal, invalidation, unconstitutionality etc). This approach is followed in Parts II and III of the Australian Acts Interpretation Act 1901. The difference between the formal adoption process and the commencement of legislation seems to confuse people (or at least most law students).

B. COMMENCEMENT OF LEGISLATION

(a) MEANING AND DATE OF COMMENCEMENT

3.2 The Interpretation Act provides presently as follows:

13 Commencement of laws

(1) The expression 'commencement' when used in any law and with reference thereto, means the day on which that law comes or came into operation, and that day shall, subject to the provisions of subsection (2) and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the Gazette as a law.

(2) Where any law, or any order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under the authority of a law, is expressed to come into operation on a particular day, it shall be construed as coming into operation immediately on the expiration of the previous day.

(3) If any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a province by proclamation in the Gazette, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act.

3.3 The Constitution provides that a Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.¹ The fact that parliamentary and provincial Acts become law after they have been signed by either the President or the

¹ Section 81. The Constitution provides further in section 82 that the signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Premier of a province, but are not yet in force is somewhat confusing, at least conceptually. Although the formal legal requirements for the adoption² (including the signing of the legislation³) of national and provincial legislation are spelt out in the Constitution, they could in broad terms be included in a provision dealing with the meaning of commencement.

3.4 Legislation commences in four instances: on the date it is published; on a future date determined by the published legislation itself; on a date to be determined and proclaimed by the President or the Premier; and retrospective publication where the legislation is deemed to have commenced on a particular day, but is only published later (eg, when new tax regulations are announced in the Minister of Finance's budget speech, but the actual publication takes place on a later date).

3.5 The Constitution Fourteenth Amendment Bill, published for public comment during December 2005, seeks to prevent courts from suspending commencement of legislation. The proposed section 172(3) provides as follows: "Despite any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act".⁴

² The adoption of legislation is set out in sections 73 – 82 of the Constitution under the heading *National Legislative Process*.

³ 79 Assent to Bills

(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

⁴ There are views that the clause probably has its roots in the United Democratic Movement's 2002 challenge to the floor-crossing legislation. See "Constitutional amendment to be pressed ahead" available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1136820601553B252 (accessed on 9 January 2006). The Constitutional Court said in *President of the Republic v UDM* 2003 (1) SA 472 (CC) at 483:

[25] . . . One of the founding values in section 1 of the Constitution is a multi-party system of democratic government to ensure accountability, responsiveness and openness. The legislature has a very special role to play in such a democracy – it is the law-maker consisting of the duly elected representatives of all of the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. On the other hand, the Constitution as the supreme law is binding on all branches of government and no less on the legislature and the executive. The Constitution requires the courts to ensure that all branches of government act within the law. The three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law.

[26] The answers to the questions raised must be found in the terms of the Constitution

3.6 Section 3 of the Australian Commonwealth Acts Interpretation Act defines commencement as follows:

3 Meaning of commencement

(1) In every Act, **commencement**, in relation to an Act or a provision of an Act, means the time at which the Act or provision comes into operation.

(2) Where an Act, or any instrument (including any rules regulations or by-laws) made granted or issued under a power conferred by an Act, is expressed to come into operation on a particular day (whether the expression “come into operation” or “commence” is used), it shall come into operation immediately on the expiration of the last preceding day.

3.7 The New Zealand Interpretation Act of 1999 provides as follows on the date of commencement of Acts

8(1) An Act or an enactment in an Act comes into force on the date stated or provided in the Act for the commencement of the Act or for the commencement of the enactment.

(2) If an Act does not state or provide for a commencement date, the Act comes into force on the day after the date of assent.

itself. It contains clear and express provisions which preclude any court from considering the constitutionality of a bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution, respectively. . . .

Those sections of the Constitution make provision for the President, in the case of Parliament, and the premier of a province, in the case of a provincial legislature, to refer a bill to the Constitutional Court if the President or premier, as the case may be, has a reservation about its constitutionality. This power of abstract judicial review is exceptional and something quite distinct from the power, having found an enactment inconsistent with the Constitution, to strike it down and to grant appropriate consequential relief relating to its effect. It follows, in our opinion, that on a proper reading of the Constitution, no court may, save as provided in sections 79 and 121, consider the constitutionality of a bill before the National Assembly or a provincial legislature. If no court may decide the constitutionality of a bill, no court could grant interim relief. There would be no proceeding in respect to which it could apply.

[27] Once again it should be noted that there is a fundamental difference between abstract judicial review and a specific inquiry into an inconsistency between one or more provisions of a statute and some right or value protected by the Constitution. However, in the present case, the bills had been assented to and signed by the first appellant prior to the respondent’s approach to the High Court. Whether or not they had been published, in terms of section 81 of the Constitution, they had become Acts of Parliament. The only express provision of the Constitution which caters for this eventuality is contained in section 80 of the Constitution, which provides that the requisite number of members of the National Assembly may refer an Act to this Court for an order declaring that part or all of the Act is unconstitutional. In the case of abstract review in terms of section 80(3), this Court (and it alone) is empowered to suspend the operation of the impugned provisions pending determination of the challenge. Whether the High Court nevertheless has jurisdiction to suspend the operation of an Act of Parliament, whether before or after they have been published, is a question which it is not necessary in this case to decide. In what follows, we shall assume that there might be exceptional cases in which the High Court might grant such an order. (Footnotes omitted)

9(1) Regulations or enactments in regulations come into force on the date stated or provided in the regulations for the commencement of the regulations or for the commencement of the enactments.

(2) If regulations do not state or provide for the date on which the regulations or enactments in the regulations come into force, the regulations come into force on the day after the date of their notification in the *Gazette*.

3.8 Before the commencement of the New Zealand Interpretation Act of 1999, Acts that were silent as to the date of their commencement came into force on the day on which they received assent.⁵ In other words, they came into force at the beginning of the day of assent. This allowed for a slight degree of retrospectivity and would have conflicted with the principle against retrospectivity under section 7 of the Act. The Act now provides that an Act comes into force on the day *after* the date of assent. Under the Standing Orders Bills are required to have a distinct clause stating when the Bill comes into force. This means that New Zealand Acts will almost always specify a commencement date or make specific provision for their commencement. If an Act is silent as to when it comes into force, the default position under section 8 of the Act is that the Act comes into force on the day after the date of assent. If an Act is required to come into force on the commencement of the date of assent or on the expiry of the previous day, it will be necessary to provide for this in the same manner as for any other retrospective legislation. Similarly, regulations invariably contain commencement provisions. Under section 9 of the Act, the default position for regulations is that they will come into force on the day after the date of their notification in the *Gazette*.

3.9 The New Zealand Interpretation Act also contains a provision dealing with the time of commencement of legislation. This provision relates to the time, rather than the date, of commencement. It states that an enactment comes into force at the beginning of the day on which the enactment comes into force.

10(1) An enactment comes into force at the beginning of the day on which the enactment comes into force.

(2) If an enactment is expressed to take effect from a particular day, the enactment takes effect at the beginning of the next day.

(3) An Order in Council may appoint a day for an enactment to come into force that is the same day as the day on which the Order in Council is made, in which case the enactment comes into force at the beginning of that day.

⁵ Available at <http://www.justice.govt.nz/lac/index.html> (accessed on 7 September 2006).

3.10 Section 5(1A) of the Australian Acts Interpretation Act provided prior to its recent amendment that an Act receiving Royal Assent after 1 January 1938 comes into operation 28 days after the giving of Assent, unless the contrary intention appears.⁶ This provision was adopted to allow time for the printing and publication of an Act before it comes into operation. The default commencement for Acts under the AIA was thus 28 days after the giving of Assent.

3.11 The general position in Australia is that an Act or provision commences at the beginning of a given day, irrespective of when on that day the Act is actually assented to. This means that Acts or provisions that commence on the day of assent will usually have retrospective operation for some hours by operation of the default provisions in the AIA. This is so even though basic legal policy considerations dictate that legislation should not have retrospective operation unless that is required having regard to special circumstances in a particular case. It was noted in the Australian discussion paper *Review of the Commonwealth Acts Interpretation Act 1901* that in revising the commencement provisions, it will be important to develop an approach that does not routinely give rise to questions of retrospectivity, or create confusion as to when, on any given day, Acts and provisions commence. It was explained that the default provisions in the AIA should not of themselves give Commonwealth legislation retrospective operation, however limited. It was also considered that a Commonwealth Act having retrospective operation should make the fact of that operation clear on its face. Any default provision applying to commencements on assent should ensure that an Act cannot commence *before* assent is actually given. It was suggested that this may require an AIA provision specifying that Acts expressed to commence on assent actually commence at the beginning of the next day. It was said that a neater solution might be for the Office of Parliamentary Counsel to adopt as standard a commencement provision expressly providing for commencement on the day after Royal assent. This would avoid using the AIA to override the apparent meaning of specific commencement provisions.

3.12 Commencement 28 days after assent where no other provision is made is rarely relied on in modern Bills. It was suggested that this provision could be replaced by a default provision to apply where no specific provision is made, which would also provide for commencement on the day after assent. It was noted that the proposed provisions should not affect the general principle that an Act comes into operation from

⁶ *Review of the Commonwealth Acts Interpretation Act 1901* (available at http://www.ema.gov.au/agd/Department/Publications/part_3.htm#Section%203_5)

the first moment of the day of commencement. It was explained that problems have arisen in the past where the commencement of the general “commencement” provision in a particular Act is delayed beyond a date proclaimed for commencement of substantive provisions. The Interpretation Acts of Western Australia and the Northern Territory contain provisions of general application to the effect that, where any part of an Act is to commence on proclamation, the short title and commencement provisions themselves are to come into operation on the day on which the Act receives the Royal assent (see section 22 of the *Interpretation Act 1984* (WA) and subsection 6(3) of the *Interpretation Act* (NT)).

3.13 A slightly different approach is adopted in subsection 23(7) of the New South Wales *Interpretation Act 1987*. This provision applies where an Act is expressed to commence on proclamation, and no special provision is made to bring the commencement provision into operation. Under subsection 23(7) of the NSW Act, a proclamation may be made bringing all or part of the Act (including the commencement provision) into operation. In a similar vein, subsection 4(3) of the AIA provides a power to make a commencement proclamation where any part of an Act is expressed to commence on proclamation. Current Australian Commonwealth drafting practice is to provide for the citation and commencement provisions of an Act to commence on Royal assent. It was suggested that this practice may obviate the need for the AIA to address this issue at all.

3.14 See also section 6 of the Canadian Interpretation Act 1985 in this regard:

Operation when date fixed for commencement or repeal

6.(1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force on the expiration of the previous day, and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect on the commencement of the following day.

When no date fixed

(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

- (a) in the case of an Act, on the expiration of the day immediately before the day the Act was assented to in Her Majesty's name; and
- (b) in the case of a regulation, on the expiration of the day immediately before the day the regulation was registered pursuant to section 6 of the Statutory Instruments Act or, if the regulation is of a class that is exempted from the application of subsection 5(1) of that Act, on the expiration of the day

immediately before the day the regulation was made.

Judicial notice

(3) Judicial notice shall be taken of a day for the coming into force of an enactment that is fixed by a regulation that has been published in the Canada Gazette.

3.15 Until 1918, silence in an Ontario Act meant that the Act came into force upon assent, as is currently the case federally in Canada.⁷ In 1919, the rule was changed to provide that unless otherwise stated, an Act came into force on the 60th day after assent. The current rule of 60 days after prorogation was adopted in 1925.

3.16 Prof Julien Hofman commented that section 13(2) is useful but in its present form involves a degree of retrospective operation that is potentially unfair. He suggested that it might be better to fix a prospective time, eg one month after publication in the *Gazette*. Section 13 refers to the commencement of “a law”, which read with the current section 2, would include all categories of legislation, including subordinate legislation. Section 16 specifically deals with the commencement of subordinate legislation. If legislation is properly defined in the new Act, one single provision in the new Act could deal with the commencement of all categories of legislation.

3.17 It is considered that a general provision explaining the commencement or coming into force of legislation is needed. It is proposed that the Bill define the meaning of *commencement provision*. The Bill should also set out the position where commencement of legislation is subject to commencement provisions, where commencement of legislation is not subject to commencement provisions and where different commencement dates are set for different provisions. The following provisions are proposed:

Definition

14. (1) In this Part –

⁷ Philip Kaye *When Do Ontario Acts and Regulations Come Into Force? Research Paper B31* available at <http://www.ontla.on.ca/library/billsresources/b31.htm> (accessed on 9 January 2006). The *Statutes Act* provision reads as follows:

5(1) Unless otherwise provided therein, every Act comes into force and takes effect on the sixtieth day after the prorogation of the session of the Legislature at which it was passed or on the sixtieth day after the day of signification, whichever is the later date.

(2) Where a session of the Legislature is ended by the dissolution of the Legislature, the date of the dissolution shall for the purposes of this section be deemed to be the date of the prorogation.

“commencement provision” means a provision in legislation which regulates the commencement of that or any other specific legislation by –

- (a) specifying a date on which the legislation will take effect or must be regarded as having taken effect; or
 - (b) conferring a power on an executive organ of state to determine the date on which the legislation will take effect or must be regarded as having taken effect.
- (2) A commencement provision takes effect at the beginning of the day on which it is published in accordance with section 10.

Commencement of legislation not subject to commencement provisions

15. Legislation which is not subject to a commencement provision takes effect immediately after the end of the day on which the legislation is published in accordance with section 10.

Commencement of legislation subject to commencement provisions

16. Legislation which is subject to a commencement provision takes effect or must be regarded as having taken effect at the beginning of the day –

- (a) specified in that commencement provision; or
- (b) determined by an executive organ of state in terms of that commencement provision.

Different commencement dates for different provisions

17. If legislation is subject to a commencement provision which confers a power on an executive organ of state to determine the date on which that legislation will take effect or must be regarded as having taken effect, that executive organ of state may determine different dates on which different provisions of that legislation will take effect or must be regarded as having taken effect.

(b) EXERCISE OF POWERS BEFORE COMMENCEMENT

3.18 The Interpretation Act contains the following provision at present:

14 Exercise of conferred powers between passing and commencement of a law

Where a law confers a power-

- (a) to make any appointment; or
- (b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or
- (c) to give notices; or
- (d) to prescribe forms; or
- (e) to do any other act or thing for the purpose of the law,

that power may, unless the contrary intention appears,⁸ be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof: Provided that any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation.

3.19 The Interpretation Act of England and Wales provides as follows on anticipatory exercise of powers:

13. Where an Act which (or any provision of which) does not come into force immediately on its passing confers power to make subordinate legislation, or to make appointments, give notices, prescribe forms or do any other thing for the purpose of the Act, then unless the contrary intention appears, the power may be exercised, and any instrument made thereunder may be made so as to come into force, at any time after the passing of the Act so far as may be necessary or expedient for the purpose –

- (a) of bringing the Act or any provision of the Act into force; or
- (b) of giving full effect to the act or any such provision at or after the time when it comes into force.

3.20 The Australian Commonwealth Acts Interpretation Act deals as follows with this issue:

4 Exercise of certain powers between passing and commencing of Act

- (1) Where an Act (in this section referred to as the Act concerned), being:
 - (a) an Act enacted on or after the date of commencement of this section that is not to come into operation immediately upon its enactment; or
 - (b) an Act enacted before the date of commencement of this section that did not come into operation on or before that date;

is expressed to confer power, or to amend another Act in such a manner that the other Act, as amended, will confer power, to make an appointment or to make an instrument of a legislative or administrative character (including rules, regulations or by-laws), then, unless the contrary intention appears, the power may be exercised, and anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment or instrument into effect, before the Act concerned comes into operation as if it had come into operation.

3.21 Section 11 of the New Zealand Interpretation Act is very similar to the provisions contained in other jurisdictions.⁹ It deals with the anticipatory exercise of

⁸ Prof Hofman's suggestion that the Interpretation Act should be amended to remove all references to "unless the contrary intention appears therein" is noted in chapter 2.

⁹ 11(1) A power conferred by an enactment may be exercised before the enactment comes into force or takes effect to-

- (a) make a regulation or rule or other instrument; or
- (b) serve a notice or document; or

powers in legislation. It allows powers under an enactment to be exercised before the enactment comes into force if the exercise of those powers is necessary or desirable to bring the enactment into operation. A common example of the use of this provision is the making of regulations or rules that are required to ensure that the Act is ready to operate as soon as it comes into force. Section 11(3) of the Act contains the qualification that a power may not be exercised if anything that results from exercising the power comes into force or takes effect before the enactment comes into force, unless the exercise of the power is itself necessary or desirable to bring the enactment into operation.

3.22 The application of section 11 of the Act was considered by the Court of Appeal in *New Zealand Employers Federation Incorporated v National Union of Public Employees*.¹⁰ The issue in this case was whether the registration of a union by the Registrar of Unions under the Employment Relations Act 2000 before the commencement of that Act involved the exercise of a power "necessary or desirable to bring, or in connection with bringing" the enactment into operation within the exception provided by section 11. The majority of the court held that section 11 did not authorise the registration of unions before the commencement of the Employment Relations Act. The court considered that employee associations were not part of the governmental administrative institutions necessary or desirable for bringing that Act into force. Judge Tipping said:¹¹

The concept of bringing an enactment into operation involves a distinction between getting an enactment ready to operate, and actually operating its substantive provisions. The distinction is between putting in place the infrastructure necessary or desirable to make the enactment work on the one hand, and, on the other, the actual operation of its substantive provisions. In my view the power in issue in this case falls into the latter non-qualifying category...

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- (c) appoint a person to an office or position; or
 - (d) establish a body of persons; or
 - (e) do any other act or thing for the purposes of an enactment.
- (2) The power may be exercised only if the exercise of the power is necessary or desirable to bring, or in connection with bringing, an enactment into operation.
 - (3) The power may not be exercised if anything that results from exercising the power comes into force or takes effect before the enactment itself comes into force unless the exercise of the power is necessary or desirable to bring, or in connection with bringing, the enactment into operation.
 - (4) Subsection (1) applies as if the enactment under which the power is exercised and any other enactment that is not in force when the power is exercised were in force when the power is exercised.

¹⁰ [2002] 2 NZLR 54.

¹¹ Par 99.

3.23 The Canadian Interpretation Act 1985 deals as follows with this issue:

7. Where an enactment is not in force and it contains provisions conferring power to make regulations or do any other thing, that power may, for the purpose of making the enactment effective on its commencement, be exercised at any time before its commencement, but a regulation so made or a thing so done has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective on its commencement.¹²

3.24 Professor Hofman comments that sections 14 and 16A of the current Act could be retained in the new Act, subject to changes in terminology. Another aspect that should be mentioned is the duplication in sections 13 and 16 of the current Act. The application of section 14 of our Interpretation Act was considered in the case of *Cats Entertainment CC v Minister of Justice Van der Merwe v Minister of Justice Lucksters CC v Minister of Justice*.¹³ Acting in terms of the Lotteries and Gambling Board Act 210 of 1993 the Minister of Justice invited interested persons to nominate candidates for appointment to the Lotteries and Gambling Board which was to be established in terms of the Act. The Board was eventually appointed on 17 June 1994.

3.25 It was contended, inter alia, that the Lotteries and Gambling Board had not been validly appointed as the Minister had invited nominations for appointment to the Board before the relevant section had come into operation. The respondents, however, contended that by virtue of the provisions of section 14 of the Interpretation Act the actions of the Minister in inviting nominations for the Board were valid. The court held that there was no contrary intention in the Lotteries and Gambling Board Act prohibiting the Minister from inviting nominations for the positions on the Board. The only question was whether this was necessary for the purpose of bringing the Lotteries and Gambling Board Act into operation at the commencement thereof, as contemplated in section 14 of the Interpretation Act. The court held that, as the name of the Lotteries and Gambling Board Act implied, the primary purpose or object of the Act was to establish the Board which was to be responsible for the activities and/or executing the powers set out in the Act: it was apparent from the provisions of the Act that, without the Board, the Act could not come into operation. The court said it was clear that in terms of section 14 the powers could only be exercised between the passage of the Act and promulgation in so far as the exercise might be necessary

¹² Professor Crabbe's proposed provision in his Bill for an Interpretation Act reads as the Canadian provision does.

¹³ 1995 (1) SA 869 (T).

eventually to put the enactment into operation at the date of commencement thereof.¹⁴

3.26 It is proposed that the Bill provide on the application of legislation before its commencement that a power or duty contained in any legislation that has been published as described below, may be exercised or carried out before the commencement of that legislation but only insofar as the exercise of the power or the carrying out of the duty is necessary to bring that legislation into effect. In addition, nothing done should take effect before the commencement of the legislation in terms of which it was done. The following provision is proposed:

Application of legislation before its commencement

18. (1) A power or duty contained in any legislation that has been published in accordance with section 10 may be exercised or carried out before the commencement of that legislation but only insofar as the exercise of the power or the carrying out of the duty is necessary to bring that legislation into effect.

(2) Nothing done in terms of subsection (1) takes effect before the commencement of the legislation in terms of which it was done.

(c) PUBLICATION OF LEGISLATION

3.27 The Interpretation Act provides as follows on publication of legislation:

¹⁴ The court also noted in *Cats Entertainment* the case of *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier, SA Polisie, Noord-Transvaal 1972 (1) SA 376 (A) 391B-G*:

Die bedoeling skyn duidelik te wees dat Kennisgewings uitgereik kan word en ander handelinge verrig kan word ná aanneme van die Wet vir sover dit nodig is om die Wet by sy inwerkingtrede te laat funksioneer. Dit gebeur gereeld dat artikels van 'n Wet voorsiening maak vir die aanstelling van persone in sekere ampte, vir die uitvaardiging van regulasies en reëls en die doen van ander handelinge. Indien so 'n Wet in werking gestel sou word sonder voorafgaande aanstellings, uitvaardiging van regulasies of kennisgewings sou die Wet of sekere artikels daarvan wesenlik nie funksioneer nie totdat die nodige aanstellings gedoen is en die regulasies en kennisgewings uitgevaardig is. Klaarblyklik sou dit 'n ondoeltreffende proses wees om die Wet in werking te stel terwyl die geheel of dele daarvan nie funksioneer nie en daar gewag moet word op toekomstige administratiewe handelinge. Dit is dus te verstaan dat die Interpretasiewet voorsiening maak om 'n Wet behoorlik te laat funksioneer wanneer dit in werking tree."

In *Cats Entertainment R v Magana 1961 (2) SA 654 (T) 655H-656D* was also noted:

Some difficulty is perhaps created initially by the use of the phrase 'bringing the law into operation', because a statute usually comes into operation at the date of its commencement, and it is usually 'brought into operation' when it is officially declared to commence. . . . I do not think that 'bringing the law into operation' means only 'effecting its commencement'; it also includes 'rendering it operative' from and after the time it commences. In other words the whole object of s 14 is to enable the authorised official to take such of the enumerated steps before the enactment commences as are necessary to render it operative immediately it commences. Although the corresponding section of the English Interpretation Act, 1889 (s 37), is slightly differently worded (it omits for example the words 'at the commencement thereof') the decision of the English Court of Appeal in *R v The Minister of Town and Country*

16 Certain enactments to be published in Gazette

When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister or by the Premier of a province or a member of the Executive Council of a province or by any local authority, public body or person, with the approval of the President or a Minister, or of the Premier of a province or a member of the Executive Council of a province, such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the Gazette.

16A Promulgation and commencement of laws and publication of certain notices when publication of the Gazette impracticable

(1) If the President is satisfied that the publication of the Gazette cannot be effected or is likely to be seriously delayed as a result of circumstances beyond the control of the Government Printer, he may by proclamation published in the manner directed by him, make such rules as he may deem fit for the publication, during any period specified in the proclamation, of laws or notices required or authorized by law to be published in the Gazette.

(2) Any law or notice published in accordance with any rules so made, shall be deemed to have been published in the Gazette, and any law so published shall be deemed to have come into operation on the day on which it was first so published as a law, unless some other day is fixed by or under that law for the commencement thereof.

(3) The President of a province may at any time vary or withdraw any proclamation referred to in subsection (1) by like proclamation.

(4) Any law or notice published in accordance with any rule made under subsection (1) shall, if it is then still in force, be published in the Gazette for general information as soon as publication of the Gazette can be effected.

(5) The provisions of subsection (4) shall not affect the validity of anything done under any rules made under subsection (1).

(6) The Premier of a province may exercise the President's powers in terms of this section with reference to such province.

17 List of certain proclamations and notices to be submitted to Parliament and provincial legislatures

When the President, a Minister or the Premier or a member of the Executive Council of a province is by any law authorized to make rules or regulations for any purpose in such law stated, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices and provincial notices under which such rules or regulations were published in the Gazette during the period covered in the list, stating in each case the number, date and title of the proclamation, government notice or provincial notice and the number and date of the Gazette in which it was published, shall be submitted to Parliament or the provincial legislature concerned, as the case may be, within fourteen days after the publication of the rules or regulations in the Gazette.

3.28 It is considered that the publication requirement (in the *Official Gazette*) should remain, but the various possibilities in respect of when legislation actually commences should be made very clear in the provision. Since the new Interpretation Act is

intended to be a practical document, the four main options should be spelt out. In practical terms legislation commences in four instances: on the date it is published; on a future date determined by the published legislation itself; on a date to be determined and proclaimed by the President or the Premier; and retrospective publication where the legislation is deemed to have commenced on a particular day, but is only published later (eg according to tax lawyers, when new tax regulations are announced in the Minister of Finance's budget speech, but the actual publication takes place on a later date).

3.29 In the past there was a debate (mainly amongst academics) about the practicalities of commencement after publication in the *Official Gazette*. According to this argument there should be a *de facto* and *de iure* commencement date, since the *Official Gazette* only reaches outlying areas days and weeks after the actual commencement date.¹⁵ Although the arguments may have merits, it must be borne in mind that there will always be problems with cutoff dates, and it is submitted that the current legal position should be maintained, ie the legislation commences on the date of publication (or date otherwise specified), as held in *Q v Jizwa* 11 SC 387.

3.30 Section 81 of the Constitution provides that a Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act. Section 123 of the Constitution provides similarly in respect of provincial legislation that a Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act. Section 162(1) of the Constitution provides that a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province. The Constitution provides further in section 162(2) that a provincial official gazette must publish a municipal by-law upon request by the municipality, and in subsection (3) that municipal by-laws must be accessible to the public.

3.31 In *Weenen Transitional Local Council v Van Dyk*¹⁶ the court noted that under the common law an act which, as in the case, has legislative effect, though valid, is not binding upon those to whom it is intended to apply until such time that it has been published or promulgated:

¹⁵ See Steyn *Die Uitleg van Wette* (1981) 180-1 and Du Plessis *The Interpretation of Statutes* (1986) 18.

¹⁶ 2000 (3) SA 435 (N) at 450D.

In Huber Jurisprudence of My Time (Gane's translation) 1.2.37, the following appears:

'It should also be noticed that the resolutions of the State ought not strictly to be considered public laws until they have been published in placaten, and made known to the people at the place at which it is usual to promulgate them; from which time, but not before, they are binding on the subjects, unless in the law itself a certain time had been fixed after which the law should begin to take effect.'

Voet in his Commentary on the Pandects (Gane's translation) 1.3.9.10 expresses the rationale of the principle as follows:

'Otherwise it would happen that the law does not bind all equally, and that individuals among the people will each enjoy different rights according to his knowledge or ignorance of the law having been passed. It follows that we must lay down that a law or universal edict which has been published almost everywhere over a whole area, but the promulgation of which has been nevertheless neglected in one or other place, whether town or village, either through the neglect of the proper officers or through some other cause, will indeed bind the dwellers in those other places where promulgation has been made, but not those in whose town or village it is proved to have been neglected.'

In *Crow v Aronson* 1902 TS 247 at 259 Innes CJ refers to the principle as well settled in our law:

'But I go further; the Rent Proclamation seems to me invalid on another ground. It is a well-established principle of Roman-Dutch law that no statutory enactment has any legal force until it has been duly promulgated (Voet 1.3.10 and see *Queen v Jizwa* 11 SC 387). . . . Until, therefore, a Law has been not only passed by the legislature, but published in the Staatscourant, it is no Law at all, and is of no operative effect whatsoever.'

(See also *S v Manelis* 1965 (1) SA 748 (A) at 752G and *Benator NO v Worcester Court (Pty) Ltd* 1983 (4) SA 126 (C) at 133). In *S v Manelis* (supra) Steyn CJ, referring to the same principle in the Interpretation Act 33 of 1957, said:

'According to our common law a statute only comes into operation on promulgation. That rule is preserved by s 13(1) of the Interpretation Act 33 of 1957, with the qualification (which may be said to be self-evident) "unless some other day is fixed by or under the law for the coming into operation thereof ".'

3.32 In *Van Rooy v Law Society (OFS)*¹⁷ the Court held that it would seem that unless the authorising statute dispenses, expressly or by necessary implication, with the requirement of promulgation, or authorises a mode of notification other than that laid down in section 16 of the Interpretation Act of 1910, the common law requires, and sec. 16 enjoins, promulgation in order to vest the regulation, by-law, etc., with legal force and effect.

3.33 The Australian case of *Watson v Lee*¹⁸ illustrates the making, publication,

¹⁷ 1953 (3) SA 580 (O) at 585A.

¹⁸ [1979] HCA 53; (1979) 144 CLR 374 (23 October 1979) available at <http://www.austlii.edu.au/au/cases/cth/HCA/1979/53.html> (accessed on 11 August 2006).

commencement and validity of delegated legislation. Chief Justice Barwick held as follows in this case:

5. A question of the interpretation of s. 48 (1) (b) of the Acts Interpretation Act was agitated during the hearing. That subsection provides that the regulations shall take effect from the date of their notification "or where another date is specified in the regulations, from the date specified". It was argued that this date could be a date anterior to the notification of the regulation including, of course, its prescription of that date. In my opinion, this date, unless the Parliament has expressly and intractably directed otherwise, must necessarily be a date subsequent to the date of notification. To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny. Parliament, in s. 48 (1), has recognized that justice requires that it be notified publicly before it becomes operative. I am quite unable to construe s. 48 (1) as a Parliamentary mode of expression of intention that the law should operate before it is notified. That would be so fundamentally unjust that it is an intention I could not attribute to the Parliament unless compelled by intractable language to do so. In my opinion, no semantic quirks of the draftsman would lead me to that conclusion - a conclusion which would attribute to the Parliament an intention to act tyrannically. In my opinion, what the section means is that the regulation will operate on or from the day it is notified or from such other day, being a subsequent day, as the regulation may specify. Such a construction is both reasonable, textually available and just. (at p379)

6. The primary means of notifying the terms of a regulation which has been made is by its publication in full in the Gazette. What is required by s. 48 (1) is notification of the regulation, not of the fact of its making or of the date of its making. In my opinion, the notification of a regulation involves the bringing to notice of its actual terms. Thus, in my opinion, s. 48 (1) of the Acts Interpretation Act really requires the terms of the regulation to be published in the Gazette. It must be accepted that such publication places the citizen in the position of being able to inform himself of the terms of the law by which he is to be bound. (at p379)

7. But the legislature has adopted an alternative method of notification which is specified in s. 5 (3) of the Rules Publication Act. The regulation-making authority is to notify the place or places where copies of the regulation which has been made are available for purchase. In my opinion, this provision means that copies of the regulation must be available at the place nominated in the Gazette on the date of the publication of the notice in the Gazette. If a subsequent date for the operation of the regulation is specified, it may well be sufficient that copies are available at the nominated place on or before that date. But, however that may be, it seems to me a most unjust construction to say that s. 5 (3) means that the notification of the regulation will be complete and s. 48 (1) satisfied if the regulation-making authority notifies a place where, though copies of the regulation are said to be available, in fact they are not. (at p380) . . .

9. . . . it is apparent that there has been neglect on the part of government in providing adequate copies of regulations for purchase by the public. It should be borne in mind that not only should they be capable of purchase at the time they are notified or by the time they are said to operate but they ought to be available to the citizen subsequently if an occasion arises for him to know with precision what exactly they provide. Too often, one hears the statement that the regulations are "out of stock". This, in my opinion, is an unbearable and a completely unacceptable situation. There can be no impediment whatever to government ensuring that stocks are maintained of all regulations available to be procured by the citizen on demand. It may be a manifestation of the laxity that does enter into the making of law by regulation: it seems to me, therefore, that it is essential that officialdom ensure that copies of regulations are available at the place nominated in the Gazette, and that thereafter an appropriate stock of them is maintained. Of course, if available at the earlier time, subsequent failure to maintain stocks will not affect the operation of the regulation. (at p381)

10. There should be no difficulty, having regard to the resources of government, in having copies of the regulations available at the notified place or places at the time of notification in the Gazette or at any subsequent date on which they are to become operative. The date of notification can be withheld until it is known that copies will certainly be available at the places notified at the time the regulation is notified to come into effect. In a case of emergency the regulation can be notified in the Gazette itself even if a special issue of the Gazette has to be published. I regard the availability of the terms of the law to the citizen of paramount importance. No inconvenience in government administration can, in my opinion, be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing. Thus, in my opinion, if it is proved that copies of the regulations were not available for purchase at the place specified, the regulations would not have commenced to operate. It would be quite insufficient, in my opinion, if at some subsequent date they were so available. If that were acceptable as publication, it would mean that in the interim between the date the regulation was said to commence in operation and the date of subsequent availability of copies, a citizen would be a subject to a law the terms of which he did not have any means of knowing. As I have indicated, that situation, in my opinion, is defective in the sense of fairness and justice on which the common law is based. (at p381)

3.34 Justice Stephen held as follows in *Watson v Lee*:

19. In 1903, when the Rules Publication Act was first enacted, there was no general Commonwealth statutory provision such as s. 48 of the Acts Interpretation Act, which first appeared on the statute book in 1904; each Act which provided for delegated legislative power had to prescribe its own regulation-making formalities, the details of which varied from Act to Act. Thus, in the twelve Commonwealth Acts of 1901 and 1902 which called for the gazettal of regulations, four different formulae are used, with variations occurring even within particular formulae, a disorderly situation only rectified by the enactment in 1904 of what is now s. 48 of the Acts Interpretation Act. Of those twelve Acts, six refer to "publishing", the other six to "notifying": hence, no doubt, the reference to "published or notified" in s. 5 (3) of the Rules Publication Act. Those twelve Acts appear to use the one terms or the other more or less indiscriminately and s. 5 (3) itself drew no apparent distinction between the two, treating the burden which was involved in compliance with either as requiring mitigation by the form of notice which it offered as a substitute. Whatever may be the precise content of "notified" in s. 48 (1)(a), whether or not synonymous with "published", it must at least involve something more than the gazettal of the bare form of notice permitted by s. 5 (3). It is for that reason that I conclude that the notice which in fact appeared in the Gazette in respect of Statutory Rule No. 265 will not itself satisfy s. 48 (1) (a). (at p393)

20. The consequence of a failure to comply with this requirement of s. 48 (1)(a), that regulations, once made, should be notified in the Gazette, is, in my view, that those regulations do not take effect. The failure will not affect the making of the regulations, their making precedes and is quite distinct from notification, as the terms of s. 48 (1) demonstrate. But notification is a critical step in the statutory process of delegated law-making and without it that process is incomplete. (at p393)

21. Its great importance is apparent from the history of delegated legislation. That history reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed "requires an adequate measure of control if it is not to degenerate into arbitrary government": *English Law and its Background* (1932). (at p394) . . .

25. This all reflects the concern of the legislature for those safeguards with which s. 48 surrounds the exercise of delegated legislation. Parliament, when it has expressly adverted to the consequence of non-observance of those safeguards, has not hesitated to legislate for invalidity of offending regulations or offending provisions within particular regulations. (at p395)

26. Against this background the mandatory language of s. 48 (1) (a), "shall be notified in the Gazette", may readily be understood as requiring notification as a prerequisite of validity. Indeed the terms of sub-s. (2) of s. 48 appear to me to preclude any other view: they are emphatic in their emphasis upon the importance of notification, there is to be no affecting of rights or imposition of liabilities before notification and any provision to the contrary is to be void. It would be inconsistent with this view to nevertheless treat a failure to notify altogether as having no effect upon validity. (at p396)

27. It is in the light of all these considerations that I conclude that failure to notify in accordance with s. 48 (1) (a) results in the regulation in question being void. . . . I should however say something further about *Dignan v. Australian Steamships Pty. Ltd.*, an authority which was said to support the view that s. 48 (1) (a) was directory only. In my view that decision, to the extent that it is at all in point, is, rather, to the opposite effect. . . .

28. The view of the majority that par. (c) was directory only affords no ground for treating the requirement in par. (a) as also only directory. . . . (at p397)

3.35 It is considered that the Bill should deal with publication of legislation as a precondition for its enforcement, publication of legislation in the Gazette, and alternative manner of publication.¹⁹ The following provisions are proposed on publication of legislation:

Publication of legislation precondition for its enforcement

- 10.** (1) All legislation must be published –
- (a) in the Gazette in accordance with section **11**; or
 - (b) in an alternative manner provided for in section **12**, but only if that alternative manner of publication is permissible in the circumstances.
- (2) No legislation takes effect unless subsection (1) has been complied with.

Publication of legislation in Gazette

- 11.** (1) National legislation must be published in the national Government Gazette.
- (2) Provincial legislation must be published in the official Gazette of the province concerned.
- (3) Municipal by-laws must be published in the official Gazette of the province in which the municipality issuing the by-law is situated or, in the case of a cross-border municipality, in the official Gazettes of the provinces in which the municipality is situated.

¹⁹

Submission of subordinate legislation to Parliament and the provincial legislatures is dealt with under the next heading.

Alternative manner of publication

12. (1) The President may by proclamation in the Gazette, or if this is not possible, in a manner determined by the President, determine an alternative manner in which legislation may be published –

- (a) during any period when –
 - (i) the Gazette cannot be printed; or
 - (ii) the ordinary printing schedules of the Gazette is disrupted or delayed; or
- (b) when publication in the Gazette of any specific kind of legislation is impractical.

(2) A proclamation in terms of subsection (1) may –

- (a) be issued in relation to –
 - (i) the national Government Gazette only;
 - (ii) the provincial official Gazettes only;
 - (iii) a specific provincial official Gazette only; or
 - (iv) all Gazettes; or
- (b) differentiate between –
 - (i) the national Government Gazette and the provincial official Gazettes; or
 - (ii) different provincial official Gazettes.

(3) Legislation published in accordance with subsection (1) during a period referred to in paragraph (a) of that subsection must upon expiry of that period promptly be published for general information in the Gazette if that legislation is at that stage still in force.

C. PARLIAMENTARY SCRUTINY OF SUBORDINATE LEGISLATION

(a) Introduction

3.36 Parliamentary scrutiny of subordinate legislation is a collateral issue to this investigation. In July 2006 the Department of Justice and Constitutional Development requested that this issue in particular be considered as part of this investigation. Regulations are the most common form of subordinate legislation. Legislation may, however, also authorise the making of other instruments that have similar legislative effect, such as rules, orders, tariffs, or ordinances. These types of subordinate legislation are usually made in the same way as regulations and are subject to the

same policy and legal constraints.²⁰ Legislation that authorise the making of subordinate legislation are called enabling Acts. Subordinate legislation must stay within the scope of the authority granted by the enabling Act and must not conflict with the Act or restrict or extend its reach. An Act generally sets out the framework of a regulatory scheme and delegates the authority to develop and express the scheme's details in subordinate legislation. While Acts and regulations are separate and are distinct forms of legislation, they are closely linked. It is through Acts passed by Parliament that subordinate legislation is authorised, and it is the enabling Act that sets the limits to which a regulation must strictly conform. Subordinate legislation ideally serves as the means to implement these objectives and principles by providing the technical, procedural, and other details that are explicitly and unambiguously authorised by the enabling legislation. The essential theory of delegated legislation is that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail. Other justifications for the use of regulations include reducing pressure on parliamentary time, and allowing legislation to be made so as to accommodate rapidly changing or uncertain situations, or cases of emergency. Many Acts of Parliament contain a provision allowing a Minister to make regulations “required or permitted” by the statute to be made or “necessary or convenient to be prescribed for carrying out or giving effect” to the statute.²¹ Many statutes also refer to specific matters to be prescribed by regulation.

(b) Australia

3.37 In Australia subordinate legislation is subject to parliamentary control, mainly through the power of either House of the Australian Parliament to disallow any delegated legislation.²² This gives the Senate basically the same power it has in relation to other proposed laws: the power of veto. It was through recognition by the Senate of the need to preserve the principle of parliamentary control of law-making that this system was established. At an early stage in its history the Australian

²⁰ Gavin Murphy “Extended Parliamentary Power over Regulations in Canada” *Statute Law Review* 2005 161.

²¹ See sec 10(2)(e) of the Promotion of Administrative Justice Act, 2000; sec 40(1)(c) of the National Prosecuting Authority Act, 1998; or as provided in section 20(1)(q) of the Genetically Modified Organisms Act, 1997, “any matter which he or she considers necessary or expedient to prescribe in order that the objects of this Act may be better achieved”.

²² *Oggers' Australian Senate Practice Eleventh Edition Chapter 15 - Delegated legislation and disallowance: executive law-making* available at <http://www.aph.gov.au/senate/pubs/oggers/chap1502.htm> (accessed on 11 August 2006).

Parliament recognised the need for direct parliamentary control over subordinate legislation.²³

3.38 The principal features of the tabling and disallowance regime under the *Legislative Instruments Act* that came into force on 1 January 2005 are:

3.38.1 All regulations (now extended to a wider range of legislative instruments) have to be tabled in Parliament within a certain time after making. Prior to the commencement of the *Legislative Instruments Act* this was fifteen sitting days of Parliament. The *Legislative Instruments Act* will shorten this tabling time to six sitting days. Failure to table legislation initially led to its being a nullity with the consequence that anything done in reliance on the legislation was invalid. This necessitated the passage on occasions of legislation to validate action taken under delegated legislation where tabling had been overlooked. The effect of failing to table by the due date is now that the legislation thereafter ceases to have effect. The significant feature of the tabling requirement is that most delegated legislation comes into operation when it is made or on a date specified in it. It is thus likely to be in force when it is tabled. This can act as a constraint on disallowance.

3.38.2 After tabling, any member may, during the next ensuing 15 sitting day period, move a motion that the legislation be disallowed. This disallowance power is directed to existing legislation, not legislation that is yet to commence operation. This is known as negative resolution procedure. The legislation is set aside after it has been operating and this could be for some months. To disallow legislation after it has been operating for some time is a bold step as people will have conditioned their activities in accordance with the legislation. This is a constraint on the Parliament exercising its disallowance power. However, it has not proved, in practice, to present a total bar to the Parliament disallowing legislation.

3.38.3 The alternative approach would be for the legislation not to commence until the Parliament said that it could. This is described as an affirmative resolution procedure. It is seldom used in relation to Commonwealth delegated legislation but has greater use in England. The idea underlying it is to enable there to be public comment on the legislation and the opportunity for the Parliament to determine whether the legislation

²³ Dennis Pearce "Rules, Regulations and Red Tape: Parliamentary scrutiny of delegated legislation". This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 25 June 2004 (available at <http://www.aph.gov.au/senate/pubs/pops/pop42/pearce.pdf> (accessed on 10 August 2006)). See also http://www.aph.gov.au/senate/pubs/oc-ca_lect/transcripts/250604.pdf (accessed on

should be made. If a motion for disallowance is tabled, it must be passed, rejected or otherwise resolved within the next fifteen sitting days. If it is not dealt with, the motion is taken to have been carried. This is perhaps the most significant element of the regime as it obliges the government to take action. It cannot simply allow the disallowance notice to remain on the *Notice Paper* of the House in the expectation that it will lapse on the prorogation or dissolution of the particular Parliament.

3.39 Pearce explains that from 1 January 2005, the Legislative Instruments Act requires all instruments of a legislative character to be registered on a publicly available electronic register. An instrument is of a 'legislative character' if 'it determines the law or alters the content of the law, rather than applying the law in a particular case; and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.' Instruments on the Federal Register of Legislative Instruments must be tabled in the Parliament within six sitting days of registration and will be subject to disallowance. With the commencement of this legislation, the Parliament has finally moved to accepting responsibility for the oversight of all legislation whether it emanates from the Parliament itself or from a delegate of the Parliament.

3.40 Pearce considers that it is a valuable step in the process of oversight of delegated legislation for the Parliament to have all legislation brought to its attention. However, it is unrealistic to expect parliamentarians to have the time or the expertise to examine each of the now nearly 2000 pieces of legislation that are laid on the table of the Parliament each year. The Senate recognised this and on 17 March 1932 appointed the Standing Committee on Regulations and Ordinances. Senate Standing Order 23 presently provides:

- (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
- (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
- (3) The committee shall scrutinise each instrument to ensure:
 - (a) that it is in accordance with the statute;
 - (b) that it does not trespass unduly on personal rights and liberties;
 - (c) that it does not unduly make the rights and liberties of citizens

dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

- (d) that it does not contain matter more appropriate for parliamentary enactment.

3.41 Pearce remarks that the Committee has usefully expanded this bare outline of its role by publishing a statement setting out, under the heads of review, the issues with which it will be concerned. The Committee has concerned itself not only with the content of the legislation reviewed but also its manner of presentation to the public and the quality of its drafting. These matters have been recognised in the Legislative Instruments Act. Its principal purpose is to make legislation publicly available. However, it also makes reference to the need for quality of drafting and the publication of explanatory material.

3.42 Pearce notes that the Committee has also insisted on the preparation of explanatory memoranda to assist in the understanding of what might otherwise appear to be questionable provisions.²⁴ Apart from its concentration on these more technical matters, the Committee has overseen the need to protect personal rights and liberties through examining legislation to ensure that it does not impose retrospective burdens on persons; does not allow executive interference with accepted rights such as freedom from invasion of property and privacy; does not give a public official subjective discretions; and provides for rights of appeal on the merits against executive decisions.

3.43 Pearce considers that the Regulations and Ordinances Committee has been one of the great success stories of the Senate. Each year the Committee examines just under 2000 legislative instruments against its terms of reference. It raises issues of concern in relation to about ten per cent of the instruments. The majority of these concerns are dealt with by way of an explanation from the relevant minister or by the minister undertaking to attend to the Committee's concerns when next the legislation is being amended.

3.44 Pearce points out that the Committee will not examine the policy basis for the adoption of legislation — but it will look at the way in which that policy has been implemented. The existence of the Committee has also had an effect on the quality of legislation that is produced by the executive. The fact that the Committee will scrutinise

²⁴ He explains that it was hoped that a explanatory memorandum accompanied the Veterans' Entitlements (Special Assistance—Motor Cycle Purchase) Regulations 2001 which provide for a person to be entitled to assistance towards the purchase of a motor cycle if the person is a veteran who has lost a leg or both arms as a result of war-caused injury.

legislation against the stated criteria has sent the message to the executive that legislation that offends is likely to be questioned and possibly disallowed — to the embarrassment of the minister concerned. Pearce remarks that the Regulations and Ordinances Committee has been a key factor in the control that the Parliament has exercised over delegated legislation. The House of Representatives has not adopted any role in parliamentary oversight of delegated legislation.

3.45 Pearce considers if the Parliament is to play a useful function in overseeing delegated legislation it must be appraised of that legislation as soon as possible after it has been made. The time provided for tabling legislation started as 30 days, was changed to fifteen sitting days and from 1 January 2005 will be six sitting days. These time limits are all based on the time that it takes to print copies of the delegated legislation and physically deliver them to the Parliament for formal tabling. The use of sitting days as the time frame for action to be taken means that the time within which action must be taken can be lengthy. It also has the effect that the executive can manipulate the time taken for setting the parliamentary review process in motion. Until the legislation is tabled, no motion for disallowance may be moved. A senator can, with the permission of the Senate, table the legislation him or herself but first it is necessary to obtain a copy of the legislation. In the meantime it will be in force. This may be sufficient for it to achieve its purpose. Pearce remarks that the present physical tabling process represents another era when the authoritative version of delegated legislation will be that which is on the electronic Federal Register of Legislative Instruments.

3.46 Pearce points out that the Australian Parliament acted very sensibly in preventing the backdating of the commencement of regulations that would adversely affect a person other than the Commonwealth. This approach was carried through to disallowable instruments and will be applicable also to the new regime of legislative instruments. However, the process whereby legislation comes into force prior to parliamentary review limits the effectiveness of the disallowance power. People will be affected even though the legislation may subsequently be disallowed or amended following Regulations and Ordinances Committee intervention. This limitation flows from the negative resolution procedure that is used in Australia. He considers that this could be overcome by a greater willingness on the part of the Parliament to insist on the inclusion of the affirmative procedure process in legislation. Under this, delegated legislation does not commence unless a formal resolution approving it is passed. However, he recognises that this approach makes an extra demand on already limited parliamentary time. For this reason alone it is resisted in all but exceptional cases. He

suggests that the approach that is to be found in the *A New Tax System Family Assistance Administration Act 1999* is worthy of much wider use. Section 162 of that Act provides that instruments made under the Act do not take effect until the end of the period in which they can be disallowed by the Parliament. This gives full recognition to the review role of the Parliament without making any demands on parliamentary time.

3.47 Pearce states if this is thought to be too radical, commencement could at least be postponed until the legislation in question is tabled. He considers that there seems no great reason why, in the majority of cases, the commencement could not await tabling. Urgent cases could be dealt with as an exception to the general rule but with an explanation being required in the explanatory statement which could then be checked by the Senate Committee. This approach would provide an inducement to the executive to expedite the tabling process. It would also ensure that the Parliament was more immediately involved in the legislation-making process.

3.48 Pearce remarks that the *Rules Publication Act 1903* provided for advance notice of 60 days to be given of the intention to make a rule. This was intended to warn the public of the proposed law and to provide an opportunity to make representations as to its content. The requirement was repealed in 1916. The Administrative Review Council's Report 'Rule Making by Commonwealth Agencies' proposed a formal requirement for notice and consultation prior to making an instrument. Earlier versions of the Legislative Instruments Bill contained mandatory requirements in relation to consultation but these were omitted from the final version. Section 17 of the Act contains requirements to consult, particularly where business or competition is affected. However, the requirements are effectively only exhortatory as the only obligation is to describe the consultation processes in the explanatory statement for an instrument.

3.49 Pearce states that the major weakness in the oversight by the Australian Parliament of delegated legislation is that the Parliament seldom reviews the policy embodied in the legislation. The application of its criteria by the Senate Regulations and Ordinances Committee results in some policy issues being considered. However, these are limited to what might be termed interference with general human rights. The policy decisions that might be termed red tape — requirements for information, requirements for business licences, requirements for approvals to conduct an activity— are not questioned. As far as parliamentarians generally are concerned, it is only overtly political delegated legislation such as control over immigration, that attracts attention.

3.50 Pearce notes that it is of value that the Scrutiny of Bills Committee sees as one of its tasks the need to bring to the attention of the Senate the breadth of delegated legislation making powers that are included in Acts. For example, it protested about a provision that stated: "The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on applications, as prescribed, by prescribed persons". He states that it is, however, doubtful whether the interest of this Committee alone will be sufficient to contain excessive regulation. He suggests that there is some guidance to be found from the existing structure of the Senate Standing Committees. When first established, they were simply allotted a subject area and they dealt with any issues that were referred to them pertaining to that subject. They are now divided into legislation and references committees. The legislation committees look at bills and the references committees consider broader policy issues. He asks whether the Regulations and Ordinances Committee could be similarly divided. One division would continue to perform the valuable role that it presently carries out. The other would be a references committee to which could be referred delegated legislation that involves government policy issues of a significant kind that warrant investigation.

(c) New Zealand

3.51 In 1962 the Delegated Legislation Committee of New Zealand wrote:²⁵

If Parliament is accepted as the sole legislative authority, and if by force of circumstances it must delegate some of its authority to others, then it stands to reason that the public will expect Parliament to exercise something more than a merely nominal supervision over the work of those to whom law-making powers have been delegated.

3.52 Supervision of regulations by the New Zealand Parliament can take five forms: the laying of all regulations before the House of Representatives; confirmation of regulations by an Act of Parliament; approval of regulations by resolution of the House; amendment or disallowance of regulations under the Regulations (Disallowance) Act 1989; and scrutiny by the Regulations Review Committee.

3.53 Section 4 of the Regulations (Disallowance) Act 1989 requires regulations to be laid before the House no later than the sixteenth sitting day of the House after the day on which they are made. This applies to all regulations including deemed regulations. A mandatory laying requirement for all regulations ensures that both the

²⁵ *The Regulations Review Committee Digest* Chapter 2 Regulations Review Committee available at http://www.lawschool.vuw.ac.nz/vuw/fca/law/files/RRC_Chapter2.pdf (accessed on 16 August 2006).

House and the public are made aware that the regulations had been made and allows for parliamentary and public debate as to their merit.

3.54 On occasion an Act may provide that regulations made pursuant to it must be confirmed by an Act of Parliament. If statutory confirmation is not passed within a specified period the regulations become invalid. Such a mechanism provides Parliament with the opportunity to consider the policy issues raised by the regulations and provide its approval. Confirmation is achieved through the enactment of an annual Subordinate Legislation Confirmation and Validation Bill.

3.55 Approval of regulations by a resolution of the House provides a similar method of scrutiny. Rather than passing an Act to confirm regulations, approval is provided by a simple resolution of the House. For instance, under section 4 of the Misuse of Drugs Act 1975 a regulation that amends the schedules to the Act must be approved by a resolution of the House. If the resolution is passed, a commencement order may be made which has the effect of bringing the regulation into effect.

3.56 Parliament is able to exercise significant post-promulgation powers under the Regulations (Disallowance) Act 1989. In particular:

- Section 5 provides that the House may, by resolution, disallow any regulations or provisions of regulations.
- Section 6 provides that any member of the Regulations Review Committee may give a notice of motion to disallow any regulation. Unless Parliament disposes of the motion within 21 sitting days of it being made, the regulation is deemed to have been disallowed.
- Section 9(1) allows the House, by resolution, to amend any regulations or to revoke any regulations and substitute other regulations.

3.57 The key to these provisions lies in the automatic 21-day disallowance provision contained in section 6 of the Act. Under sections 5 and 9(1) of the Act any Member of Parliament may put forward a notice of motion to disallow or to amend regulations. Yet this type of notice of motion faces considerable hurdles within the parliamentary process. The notice of motion lapses if not debated within one week and has to compete with other members' business on a members' day in Parliament. In contrast, the automatic 21-day disallowance provision means that there is an incentive to allow Parliament the opportunity to debate and vote on a motion put forward by a member of the Committee. This means the Government must act in order to avoid the regulations being automatically disallowed.

3.58 The section 9(1) power to amend regulations or to revoke regulations also serves as a reminder to those that exercise regulation-making powers that Parliament ultimately retains control over the content of those regulations. So much so that Parliament can replace existing regulations with entirely new regulations. Indeed the Regulations Review Committee has observed that "this clause confirms the position of those who delegate in that a delegated power does not prevent the exercise of the same power by the person who delegates".

3.59 To date the disallowance procedure has only been exercised on four occasions in the House - none of which were successful. Yet the value of the Act lies simply in the fact that the power exists. In much the same way as the High Court's power to declare a regulation *ultra vires* ("outside the powers") acts as a deterrent to the making of unlawful regulations, the "existence of a power of disallowance provides the sanction that ensures that a Committee's views are taken seriously". In other words, the prospect of a disallowance motion moved by a member of the Committee may encourage the Executive to amend regulations to address the concerns of the Committee.

3.60 Standing Order 380 provides that a Regulations Review Committee is to be constituted at the commencement of each Parliament.²⁶ The Committee operates on two fundamental principles. The first is that the Committee does not examine or offer opinions on matters of policy. This is because policy matters are "seen to belong to primary legislation which is more appropriately dealt with in the House or by other subject Committees". Instead, the Committee provides 'technical scrutiny' of regulations. Thus there is a clear distinction between the policy within regulations and the proper use of regulations to implement policy decisions. The Committee is concerned only with the latter.

3.61 The Standing Orders as they relate to the Committee provide as follows:

380 Regulations Review Committee

The House establishes a Regulations Review Committee at the commencement of each Parliament.

381 Functions of committee

(1) *The committee examines all regulations.*

²⁶ *The Regulations Review Committee Digest* Chapter 3 Regulations Review Committee available at http://www.lawschool.vuw.ac.nz/vuw/content/display_content.cfm?school=law&id=1484 (accessed on 16 August 2006).

(2) *A minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister.*

(3) *The committee may consider any regulation-making power in a Bill before another committee and report on it to the committee.*

(4) *The committee may consider any matter relating to regulations and report on it to the House.*

382 Drawing attention to a regulation

(1) *In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).*

(2) *The grounds are, that the regulation –*

(a) *is not in accordance with the general objects and intentions of the statute under which it is made:*

(b) *trespasses unduly on personal rights and liberties:*

(c) *appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:*

(d) *unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:*

(e) *excludes the jurisdictions of the courts without explicit authorisation in the enabling statute:*

(f) *contains matters more appropriate for parliamentary enactment:*

(g) *is retrospective where this is not expressly authorised by the empowering statute:*

(h) *was not made in compliance with particular notice and consultation procedures prescribed by statute:*

(i) *for any other reason concerning its form or purport, calls for elucidation.*

383 Procedure where complaint made concerning regulation

(1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.

(2) Unless the committee decides, by leave, to proceed no further with the complaint, the person or organisation concerned is given an opportunity to address the committee on the regulation. The committee decides whether to examine the regulation and the complaint further.

3.62 The Standing Orders establish four different functions of the Committee. They are to consider: regulations; draft regulations; regulation-making powers in Bills; and

any matter relating to regulations. The consideration of regulations takes two forms. First, the Committee automatically examines all regulations after they are made pursuant to Standing Order 381(1). In 2001 the Committee scrutinised 422 regulations. Secondly, any person aggrieved at the operation of a regulation may place a complaint before the Committee pursuant to Standing Order 383(1). Unless the Committee decides to proceed no further with the complaint, the complainant is given an opportunity to address the Committee on the regulation (Standing Order 383(2)). The Committee may then decide to investigate the complaint further. The Committee will investigate the regulations based on the nine grounds listed in Standing Order 382(2).

3.63 As a result of an investigation, the Committee may choose to submit a report to the House. Such a report may include a recommendation that the regulations be revoked or amended so that they no longer offend against one or more of the grounds listed in Standing Order 382(2). As a result of that report, the Government may choose to revoke or amend the regulations in accordance with the Committee's recommendations, but is under no obligation to do so. Regardless of whether it acts on the recommendations of the Committee, the Government must table a response to that report in the House within 90 days. On at least four occasions the Committee has felt the need to submit a further report to the House on the basis that the Government has misunderstood or failed to adequately address the concerns of the Committee.

3.64 Unlike regulations that stand automatically referred to the Committee, the Committee can only consider draft regulations when they are referred to it by the relevant Minister. The Committee has stated that the optimal time to scrutinise regulations is before the regulations have come into force. While the Committee is usually unaware of regulations in draft form, occasionally it does hear of proposed regulations, mainly through complaints made to the Committee. In such a case the Committee may invite the relevant Minister to forward draft regulations for consideration by the Committee. Alternatively the Minister may forward draft regulations on his or her own initiative. On at least one occasion the forwarding of draft regulations has been formalised. Under an agreement with the Minister of Transport, all draft civil aviation rules, maritime rules, and land transport rules are automatically referred to the Committee for consideration. Time constraints can be an issue when the Committee is asked to consider draft regulations. If the time frame within which a Minister would like the Committee to report is deemed too short to provide a meaningful scrutiny, the Committee will choose not to scrutinise the draft regulations. Instead it will scrutinise the regulations after they are made using the power contained

in Standing Order 381(1) to scrutinise all regulations.

3.65 Standing Order 381(3) entitles the Committee to consider regulation-making powers contained in any Bill before another select committee. This power is significant for two reasons. Firstly, a regulation-making power in a Bill may be drafted in such a way that regulations made pursuant to that power are likely to breach one or more of the grounds listed in Standing Order 382(2). It is of considerable benefit if the Committee is able to effect a change to the regulation-making power before it is used to make regulations that may breach the Standing Order grounds. Secondly, the Committee has a discretion to consider any regulation-making power in a Bill before another select committee. When the Committee was first established it could only report on a regulation-making power at the request of the select committee considering the Bill. That the Committee's work is no longer subject to the whim of other select committees is a clear recognition of the preventative value of ensuring primary legislation delegates law-making powers appropriately. If the Committee chooses to consider a regulation-making power in a Bill it may provide the select committee considering the Bill with a report outlining the Committee's concerns. The select committee considering the Bill is under no obligation to adopt these recommendations. In practice, however, select committees will often recommend to the House that a regulation-making power be amended in accordance with the advice of the Committee.

3.66 Standing Order 381(4) is a general power that is used to report to the House on matters related to regulations. This power is used when the Committee makes an occasional report to the House, often dealing with principles or issues relating to delegated legislation. Such reports have included the principles relating to the setting of fees by regulation, access to regulations, and the commencement of legislation by Order in Council.

3.67 The Regulations Review Committee is at the heart of parliamentary scrutiny of regulations. The bulk of the Committee's work is reactive - it examines all regulations after they are made and ensures that they do not offend against the principles laid down in Standing Orders 382(2). Yet the Committee is also proactive in its operation by examining draft regulations and regulation-making powers in Bills in order to prevent the making of regulations, which once promulgated, are likely to breach the Standing Order grounds. It also issues occasional reports in an effort to educate and to clarify matters relating to the delegation of legislation-making powers. The Committee acts as a useful tool for those adversely affected by regulations. Whereas the High Court is limited to a finding of *ultra vires* when dealing with regulations, the Committee

can examine a regulation on the many grounds listed in Standing Order 382(2). While the Committee has a power of recommendation only (coupled with the automatic disallowance provisions in the Regulations (Disallowance) Act 1989), its ability to effect changes in regulations is significant.

(d) Canada

3.68 In 1969 the Canadian Special Committee on Statutory Instruments stated the following on Parliamentary scrutiny of delegated legislation:²⁷

. . . the central problem relating to legislative review of executive and administrative law-making is the degree to which Parliament should involve itself in attempting to influence and control the course of administration. If Parliament goes too far into the substance of day-to-day administration, it defeats many of the underlying reasons for delegating powers to make laws in the first place . . .

3.69 Systematic parliamentary scrutiny of delegated legislation is a relatively modern phenomenon in Canada. The sheer volume of regulations greatly outweighs that of statutes.²⁸ It was estimated in 2002 that at the federal level alone in Canada, there were approximately 3 000 regulations comprising over 30 000 pages, compared to 450 statutes totaling about 13 000 pages. About 1 000 regulations are proposed each year, whereas Parliament only enacts roughly 80 bills during the same period. Every year, over 3 000 pages of regulations are published in the Canada Gazette. Most regulations are brought into effect in Canada through four procedural steps. They must be pre-published, made, registered, and published. Pre-publication and publication take place in the Canada Gazette. Pre-publication gives various interested groups and individuals an opportunity to review and comment on a regulatory proposal, while publication is necessary to inform the public of the new provision.

3.70 Murphy points out that the Standing Joint Committee (of the Senate and the House of Commons) for the Scrutiny of Regulations (the 'Committee') was established in 1971 to monitor the exercise of regulatory power on behalf of Parliament. One of its primary mandates, as set out in section 19 of the Statutory Instruments Act, is to review subordinate legislation made on or after 1 January 1972 to ensure that these provisions do not exceed the powers approved by Parliament. Prior to the passage of Bill C-205 June 2003 which amended the Statutory Instruments Act, whenever the

²⁷ *House of Commons Procedure and Practice* edited by Robert Marleau and Camille Montpetit 2000 edition available at <http://www.parl.gc.ca/> (accessed on 10 August 2006).

²⁸ Gavin Murphy "Extended Parliamentary Power over Regulations in Canada" 2005 *Statute Law Review* 161 – 170.

Committee determined that some particular subordinate legislation was inconsistent with an Act as passed by Parliament, it would advise the regulation-making authority and suggest possible ways to resolve the problem. If there were no agreement on a solution, the Committee could make a report to the House of Commons on the matter. For the first 15 years of its existence, the Committee only had the power to scrutinise subordinate legislation and make a report to Parliament. There was no formalised process to actually initiate revocation. But, amendments were made to the standing orders in 1986 that required the House to either adopt or reject a report by the Committee that recommended revocation.

3.71 Murphy notes that this disallowance procedure had serious limitations. In the first place, it gave no role to the Senate. More generally, since the procedure was based not on legislation but on standing orders of the House of Commons, it only applied to statutory instruments made by those accountable to the House, such as the Governor-in-Council or a minister. Regulations made by agencies of the Crown were beyond the standing orders' reach. Bill C-205 attempts to address these shortcomings. Murphy considers that with the passage of Bill C-205 in June 2003, Members of Parliament in Canada won a major victory in the form of greater control over regulations.²⁹ The Bill amending the Statutory Instruments Act establishes a statutory disallowance procedure that applies to all regulations, subject to review and scrutiny by a standing joint committee of the Senate and the House of Commons. Unlike the previous disallowance procedures for statutory instruments, the new provisions ensure that both the Senate and the House of Commons have equal power to disallow any regulations made, subject to authority delegated by Parliament. Furthermore, the disallowance procedure is no longer limited to instruments made by the Governor-in-Council or a cabinet minister.

3.72 Murphy explains that the grounds for disallowance are not specified in Bill C-205. Nevertheless, the Committee reviews statutory instruments on the basis of criteria it provides to the Senate and the House of Commons in its initial report at the beginning of each session of Parliament. The House first adopted these criteria on 17 December 1986. The Committee only undertakes a technical review, examining matters related to legality and procedure, and does not consider the merits of any subordinate legislation. The review determines whether any subordinate legislation, in the judgement of the Committee:

²⁹ Gavin Murphy "Extended Parliamentary Power over Regulations in Canada" 2005 *Statute Law Review* 161.

- * is not authorised by the terms of the enabling legislation or has not complied with conditions set forth in the legislation;
- * is not in conformity with the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms;
- * purports to have retroactive effect when the enabling legislation does not expressly provide for this;
- * imposes a charge on the public revenues, requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;
- * imposes a fine, imprisonment, or other penalty, without express authority having been provided for in the enabling legislation;
- * tends directly or indirectly to exclude the jurisdiction of the courts, without express authority having been provided for in the enabling legislation;
- * has not complied with the Statutory Instruments Act with respect to the transmission, registration, or publication of subordinate legislation;
- * appears for any reason to infringe the rule of law;
- * unduly breaches rights and liberties;
- * makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
- * makes some unusual or unexpected use of the powers conferred by the enabling legislation;
- * amounts to the exercise of a legislative power that should properly belong to Parliament;
- * is defective in its drafting or, for any other reason, requires elucidation of its form or meaning.

3.73 Murphy explains that Bill C-205 of 2002 was the result of an effort by members of the Standing Joint Committee for the Scrutiny of Regulations to reform the disallowance procedure. The amendments found in Bill C-205 only apply to regulations, and there is no longer any disallowance procedure in place for other types of instruments that are not classified as regulations, as had been the case under the former standing orders. The new provisions would not apply to some instances of state action taken under the royal prerogative.³⁰ Bill C-205, which adds section 19.1 to the

³⁰ The royal prerogative allows the Crown to act without the backing of Parliament on several important matters. Orders for the summoning, prorogation, and dissolution of Parliament are rights held exclusively by the Crown and are not legislative powers

Statutory Instruments Act, applies to all regulations, regardless of the authority under which they were made. The new provisions, which are essentially mirrored in the revised Chapter XIV of the standing orders, empower a Committee of the Senate and the House of Commons to make a report, to both chambers, containing only a resolution that all or any portion of a regulation referred to the Committee be revoked. The Rules of the Senate have not been amended to reflect these new provisions, and the Senate intends to follow the procedures laid out in the Statutory Instruments Act until it amends the Rules.

3.74 No report is to be made unless the authority authorised to make the regulation has been notified, at least 30 days before the Committee adopts its report, that it intends to consider the report. When the regulation is authorised by the Governor-in-Council, the notice must be provided to the minister responsible for the provision under which the regulation may be made. The amendments allow for the disallowance report to be made by any joint committee of the two Houses rather than only the Standing Joint Committee for the Scrutiny of Regulations, as was the case under the former standing orders. But, since the revised standing orders make reference to the Standing Joint Committee for the Scrutiny of Regulations as the designated Committee, this body will be the Committee that prepares the disallowance report.

3.75 Murphy explains that as the report and resolution must be made in both the Senate and the House of Commons, each House has an equal role in the disallowance procedure. Only one report shall be laid before the Senate or the House of Commons each sitting day. The report shall state that it contains the resolution, identifies the regulation or portion of the regulation to which the report relates, and indicates that it includes the text of the regulation or portion thereof. The report must state that proper notice has been given in accordance with the procedure provided for in section 19.1(2) of the Statutory Instruments Act and paragraph 123(2) of the standing orders. The resolution stands in the name of the MP presenting it, and no notice of motion for concurrence in the report is placed on the Notice Paper.

3.76 By section 19.1(5) of the Statutory Instruments Act, the resolution is deemed to

conferred by or under an Act of Parliament. Therefore, these matters would not be subject to the new disallowance provisions. But, in the event, any action taken under the royal prerogative is legislative in nature, and it would fall within the definition of regulations found in section 2(1) of the Statutory Instruments Act and be subject to the new procedure.

have been adopted by either chamber on the fifteenth sitting day after the report was tabled, unless a minister files a motion with the speaker before then that the resolution not be adopted. According to paragraph 124 of the standing orders, when notice of a resolution is transferred to the Order Paper under the heading 'motions', it is deemed to have been moved and adopted by the House at the adjournment of the fifteenth sitting day following the transfer, unless an objection is raised by a minister and placed on the Order Paper. A minister's objection shall be taken up and considered for one hour only. The motion shall be debated without interruption, during which time no Senator or MP may speak for more than 10 minutes. On the conclusion of the debate, or at the end of the hour, the speaker shall immediately put every question necessary for the disposal of the motion without amendment or further debate. If more than one motion is made, the chamber shall consider them in the order in which they may be set down for consideration, provided they are grouped together for debate.

3.77 When both Houses have adopted, or deemed to have adopted, a resolution that all or any portion of a regulation be revoked, the authority authorised to make the regulation shall revoke it no later than 30 days after both Houses have adopted or deemed to have adopted the resolution. A longer period may be specified in the resolution to complete the revocation. The responsibility for revocation rests with the regulation-making authority after Parliament adopts the resolution. The requirement to take positive steps to revoke the regulation is a departure from the original version of Bill C-205, which provided for the automatic repeal of the regulation after the 30-day period following adoption of the resolution by both chambers. There appears to be little discussion on the reasons for this change in procedure, although it was suggested in parliamentary debates that instruments made by the government should be revoked by the government. Furthermore, the change may have been adopted to ensure that the regulation-making authority actually puts its mind to possible alternatives, to simply outright repeal of the provision in question.

3.78 Murphy considers that although not specifically provided for in either the Statutory Instruments Act or the standing orders, the regulation-making authority could inform the public of the regulation's revocation through publication in the Canada Gazette. If a regulation or portion thereof were replaced with a new provision, the normal procedure of pre-publishing, making, registering, and publishing would likely apply before the provision took effect. Publishing a revocation notice in the Canada Gazette would, therefore, provide a uniform and consistent approach to making public the status of regulations.

3.79 Murphy states that Bill C-205 gives both Houses of Parliament an equal say on the disallowance of any regulation that warrants revocation according to the Committee's report. The new process is more inclusive than the previous one, and, in recognising the equivalent legislative authority of both Houses, it is consistent with the bicameral nature of Canada's parliamentary system. The new provisions are more encompassing and include, for the first time, regulations made by all regulation-making authorities. The procedure is no longer limited in scope to statutory instruments made by the Governor-in-Council or cabinet ministers. But the new provisions only apply to regulations that are defined as regulations under the Statutory Instruments Act and do not cover other instruments such as some orders issued under the royal prerogative. If there is disagreement between the two chambers on the merits of any disallowance report, the regulation in question will continue to apply. Murphy explains that the disallowance procedure is seldom invoked in practice. Between 1987 and 2004, there has been concurrence with only eight reports. Furthermore, the new procedure adopted by Parliament in 2003 has not yet been tested. Nevertheless, these provisions send a signal to regulation-making authorities that regulations must conform to well-established and fully documented legal and procedural principles.

3.80 Murphy points out that Bill C-205 essentially levels the playing field between the legislative and executive branches of government. As well as the mandate to scrutinise regulations, the new provisions give the Committee the power to exercise an effective means of control over those regulations it considers technically invalid. But the procedure also has built-in safeguards to prevent arbitrary and potentially unjustified action by the Committee. Ministers have the right to challenge the Committee's disallowance resolution, leading to a debate and vote on the merits of the resolution on the floor of either House.

3.81 Murphy says that it could be argued that the passage of Bill C-205 is an important triumph for legislative accountability, since far greater amounts of government legislation are processed through regulations than through Bills debated and passed in Parliament. Only 20 per cent of Canada's laws originate as legislation enacted by Parliament, while 80 per cent of laws are made up of regulations, which rarely receive debate in the Senate or the House of Commons. Bill C-205 ensures that this vast quantify of law is now subject to both meaningful scrutiny and effective control. Laws enacted by Parliament have often been referred to as the bare bones for which regulations provide the meat. If this concept is true, Murphy notes then the new disallowance provisions should give parliamentarians better control over the entire

corpus of legislation and, at the same time, provide them with the tools necessary to implement effective regulatory surgery when required.

(e) England and Wales

3.82 The English Law Commission also considered the issue of parliamentary scrutiny of delegated legislation in their consultation paper entitled *Post-legislative Scrutiny* published in January 2006.³¹ They noted that Acts of Parliament often grant Ministers powers to make delegated or secondary legislation, usually by means of a Statutory Instrument ("SI"). This means that an Act can contain general provisions, which allows for the details to be framed in delegated legislation. About 3,000 Statutory Instruments are issued each year; they have the same legal force as the parent Act of Parliament. There are two main types of statutory instrument: affirmative instruments which must be expressly approved by Parliament and negative instruments which become law without a debate or vote but which may be "prayed against" by a member of either House. In both cases, Parliament can accept or reject an instrument but cannot amend it.

3.83 The English Law Commission stated that when considering the potential for post-legislative scrutiny of delegated legislation a paradox emerges. In one respect, it may be argued that the need is greater as Parliamentary scrutiny is not as thorough as for primary legislation. However, the sheer volume of secondary legislation means that practically, post-legislative scrutiny would be an extremely difficult task. Ideally, it would make sense to review secondary legislation post-enactment at the same time as reviewing the parent Act from which it flows, particularly where the meat of the provisions appears in the secondary legislation. But this approach fails to acknowledge that modern Acts are capable of spawning a huge amount of secondary legislation. For example, under just one Act, the Financial Services and Markets Act 2000 (which has 433 sections and 22 schedules), more than 100 statutory instruments have been made or have effect. This underlines the necessity of carefully selecting measures to evaluate. The House of Lords plays an important role in terms of the scrutiny of delegated legislation. The Delegated Powers and Regulatory Reform Committee reports on whether the provisions of any Bill inappropriately delegate legislative powers. The Merits of Statutory Instruments Committee plays a complementary role in examining the delegated legislation which results from the exercise of those powers. The Committee has power to draw the "special attention of the House" to any of the

³¹ See the consultation paper available at <http://www.lawcom.gov.uk/docs/cp178.pdf> at par 8.1 - 8.11 (accessed on 10 August 2006).

instruments which it considers may be:

- a) politically or legally important or that gives rise to issues of public policy likely to be of interest to the House;
- b) inappropriate in view of the changed circumstances since the passage of the parent Act;
- c) inappropriately implementing European Union legislation; or
- d) imperfectly achieving its policy objectives.

3.84 The Joint Committee on Statutory Instruments undertakes technical scrutiny of all statutory instruments. The Select Committee on Statutory Instruments considers instruments laid before the House of Commons only, and is comprised of the Commons members of the Joint Committee. The Hansard Society Commission in its 1992 Report, *Making the Law*, recommended that all the delegated legislation made under major Acts should be reviewed some two or three years after it comes into force. The Conservative Party Report, 'Strengthening Parliament' noted that:

There is a case for undertaking post-legislative scrutiny of SIs. As with primary legislation, it would be open to departmental select committees to commission research on the effect of particular SIs or to undertake a short inquiry. In the Lords, the small committees engaged in post-legislative scrutiny would be able to include delegated legislation within their remit.

3.85 The English Law Commission noted that the Hansard Society recently endorsed this view by including it in proposals for reform to improve the functioning and scrutiny of delegated legislation. They also pointed out that the House of Lords Constitution Committee Report, *Parliament and the Legislative Process*, did not include any specific recommendation with regard to post-legislative review of delegated legislation. The English Law Commission invited the views of consultees on post-legislative scrutiny of secondary legislation (in general) and on whether there may be advantages in making greater use of sunset clauses in secondary legislation (an issue which will be considered in detail below in this Chapter).

(f) South Africa

3.86 The Interpretation Act provides presently as follows:

17 List of certain proclamations and notices to be submitted to Parliament and provincial legislatures

When the President, a Minister or the Premier or a member of the Executive Council of a province is by any law authorized to make rules or regulations for any purpose in such law stated, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices and provincial notices under which such rules or regulations were published in the Gazette during the period covered in the list,

stating in each case the number, date and title of the proclamation, government notice or provincial notice and the number and date of the Gazette in which it was published, shall be submitted to Parliament or the provincial legislature concerned, as the case may be, within fourteen days after the publication of the rules or regulations in the Gazette.

3.87 In *Bloem v State President of the Republic of South Africa*³² the Court considered the Tabling in terms section 17 of the Interpretation Act of regulations in Parliament within 14 days of its promulgation. The Court held that the provisions relating to the time within which regulations are to be tabled are directory only and that non-compliance with such provisions do not resulting in annulment of the regulations or their ceasing to be of force and effect:

The test to be applied in determining whether a statutory provision is peremptory or merely directory, was formulated by the Appellate Division in *Sutter v Scheepers* 1932 AD 165 at 173 - 174, and applied inter alia in the Cape case of *R v Daniels and Another* 1936 CPD 331, where the effect of a "tabling provision" similar to the one here in issue was considered. . . .

Applying the said test and the reasoning in *Daniels'* case to the present matter, as I do, I am satisfied that the provisions relating to the time within which to table the said regulations are not peremptory but merely directory, aimed at expediting their laying before Parliament but not intended to annul or invalidate them for non-compliance, and that the regulations have consequently not ceased to be of force or effect by reason of the failure to table them as aforesaid. To my mind they therefore continue to apply and are still of full force and effect despite such failure.

3.88 Recent legislation provides as follows on parliamentary oversight over subordinate legislation:

* The Promotion of Administrative Justice Act of 2000:

10(4) Any regulation-

(a) made under subsections (1) (a), (b), (c) and (d) and (2)(c), (d) and (e) must, before publication in the Gazette, be submitted to Parliament; and

(b) made under subsection (2) (a) and (b) must, before publication in the Gazette, be approved by Parliament. . . .

(6) The code of good administrative conduct contemplated in subsection 5A must, before publication in the Gazette, be approved by Cabinet and Parliament and must be made within 42 months after the commencement of this section.

* The Promotion of Access to Information Act, 2000:

92 Regulations

(1) The Minister may, by notice in the Gazette, make regulations regarding –

³² 1986 (4) SA 1064 (O) at 1089G – 1091A.

...

(2) Any regulation in terms of subsection (1) must, before publication in the Gazette, be submitted to Parliament.

* The Judges' Remuneration and Conditions of Employment Act 47 of 2001:

2 Remuneration of Constitutional Court judges and judges

(1) Any person who holds office as a Constitutional Court judge or as a judge, whether in an acting or permanent capacity, shall in respect thereof be paid-

(a) an annual salary and such allowances or benefits –

...

(4)(a) A notice issued under subsection (1) (a) must be submitted to Parliament for approval before publication thereof.

(b) Parliament must, by resolution –

(i) approve the notice, whether in whole or in part; or

(ii) disapprove the notice.

* The Protected Disclosures Act, 26 of 2000 provides as follows:

(3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the Gazette.

(4)(a) The Minister must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety.

(b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the Gazette.

(g) Proposals for reform

3.89 In October 2002 the Parliamentary Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation published their *Interim Report*³³ which was based on Prof Hugh Corder's 1999 report submitted to the Subcommittee.³⁴ Prof Corder explains his proposals for a workable and inexpensive means of Parliamentary scrutiny of delegated legislation as follows:

³³ *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation* available at <http://www.pmg.org.za/viewminute.php?id=5874> (accessed on 3 September 2006).

³⁴ *Final Report on Methods for Scrutiny of Legislation by Parliament* of 1999 available at <http://www.pmg.org.za/docs/1999/minutes/991027scrutiny.htm> (accessed on 4 September 2006). See also the minutes of the meeting of the Joint Subcommittee on Delegated Legislation held on 10 October 2000 available at <http://www.pmg.org.za/viewminute.php?id=300> (accessed on 3 September 2006).

4.1 The adoption of legislation by Parliament (perhaps called the *Review of Delegated Legislation Act*) which would stipulate *at least* the following:

4.1.1 A definition of the types of delegated legislation to which the Act applied, including at least all generally applicable and binding regulations, proclamations, rules, guidelines, standards, codes and by-laws made by any organ of state, as defined in section 239 of the 1996 Constitution, which operates in the national sphere;

4.1.2 A general obligation on the executive lawmaker of all such delegated legislation to table it in Parliament *in draft form* prior to general promulgation, giving Parliament at least thirty sitting days' notice of intention to adopt it as law;

4.1.3 The power of Parliament to disapprove such delegated legislation in part or whole, by resolution adopted by majority vote either before or within thirty sitting days after promulgation in the *Gazette*, provided that such disapproval should be signified by majority vote in each House of Parliament, and further that such motion for disapproval should be initiated solely by the Joint Scrutiny Committee (see below) where the reason for such motion is technical or procedural in nature, but solely by the relevant Portfolio Committee where the reason for such motion is substantial or constitutional in nature;

4.1.4 The establishment and maintenance of a Central Register of all delegated legislation to which the Act applies, prospectively from the date on which the Act comes into force, and available both in hard copy and electronically, so as to facilitate public access to its contents; and

4.1.5 The automatic lapsing of the validity of all delegated legislation to which the Act applies after an initial period of its coming into force (say five years), and periodically after that.

4.2 The establishment under the Joint Rules of Parliament of a Joint Scrutiny Committee (or, perhaps more accurately, a Joint Committee for the Scrutiny of Delegated Legislation) and the description in a new Joint Rule of:

4.2.1 The composition of the membership of such Committee, drawn from both Houses of Parliament and all parties represented in it, co-chaired by a member from each House;

4.2.2 The role and duties of a sub-committee of the Joint Scrutiny Committee, whose members are drawn from the NCOP and whose particular brief it would be to monitor the effects of delegated legislation, as defined, on provincial interests and powers, and which would play a particular advisory role to the whole House in regard to the application of sections 146(3) to (6) of the Constitution;

4.2.3 The terms of reference for the Committee, including the standards against which scrutiny should take place, which should include at least the following:

- sufficient compliance with appropriate or required pre-adoption procedures, including consultation with relevant bodies;
- potential encroachment on the founding provisions in section 1 and the fundamental rights contained in Chapter 2 of the Constitution;
- non-compliance with the duties imposed by the rights to just administrative action contained in s33 and the basic values and principles governing public administration contained in s195 of the Constitution;
- unlawful lawmaking activity by the executive, in that such body exceeded the authority granted to it by Parliament (*ultra vires* action):

this act of scrutiny almost inevitably involves the further scrutiny of the constitutionality of the empowering Act of Parliament itself in so far as it grants powers to the executive; or

- that the executive lawmaker is in some sense usurping the constitutionally proper legislative authority of Parliament.

4.2.4 The general responsibilities of the Committee, for example:

- that it should endeavour to operate in as objective a manner as possible as regards party political interests;
- that its scrutiny should focus on a review of the procedure and impact of delegated legislation, rather than the policy expressed in it;
- that it should meet as often as necessary, but at least every fortnight during sessions, and at least monthly during recess;
- that it should alert all MPs speedily and simply to possible shortcomings of delegated legislation, after having given the originating authority an opportunity to comment on and if necessary to rectify the matters raised;
- that its function should cease after such alert, except if the disapproval procedure becomes necessary, and that the relevant Portfolio Committee should then assume monitoring responsibility, to which end each such Committee should establish a Sub-Committee on Delegated Legislation; and
- that it should be assisted by sufficient logistical support, which might be drawn from existing staff in Parliament and/or might make use of part-time professional advice.

3.90 The *Interim Report*³⁵ pointed out that it is clear that the Constitution requires two things with regard to delegated legislation:³⁶ Firstly, delegated legislation should be made accessible to the public. Secondly, the Constitution gives Parliament discretion as to whether or not to devise a mechanism that will specify the manner and extent to which proclamations, regulations and other instruments of subordinate legislation must be tabled and approved. Parliament has to decide whether it is feasible or desirable, after having delegated its law-making authority to another body, to require subordinate instruments to be scrutinised. The *Interim Report* noted that section 17 of the Interpretation Act requires all subordinate instruments to be tabled in

³⁵ Chapter 1 Constitutional mandate.

³⁶ Section 101(3) of the Constitution provides that proclamations, regulations and other instruments of subordinate legislation must be accessible to the public. Section 101(4) provides that national legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be – (a) tabled in Parliament; and (b) approved by Parliament. Section 140(3) and (4) of the Constitution govern provincial legislation. Section 140(3) provides that proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public. Section 140(4) provides that provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be – (a) tabled in the provincial legislature; and (b) approved by the provincial legislature.

Parliament. The status quo, therefore, is that where legislation is silent on the tabling of delegated legislation, section 17 of the Interpretation Act becomes applicable. The *Interim Report* explained that the Constitution distinguishes between tabling and approval. It can, for example, be decided that all delegated instruments have to be tabled but not all have to be approved. If Parliament decides in favour of approval, a further decision will have to be made about whether it means the same kind of approval for all delegated instruments. The *Interim Report* pointed out that the Constitution states that a scrutiny mechanism may be set out in legislation and that this is discretionary. The regulatory framework for such a mechanism could either be set out in legislation, the Rules of Parliament or in guidelines, or various aspects could be included in one or more of these vehicles. Most jurisdictions use legislation to set out the skeletal framework for a scrutiny mechanism, including procedures for approval and disapproval. In addition, they make use of the internal Rules of Parliament to set out the terms of reference of the relevant mechanism and grounds or criteria against which the delegated legislation can be measured.

3.91 The *Interim Report* explained that in terms of section 57 of the Constitution, Parliament may determine and control its own internal arrangements, proceedings and procedures, including making rules and orders concerning its business. It was said that it may be preferable to set out the scrutiny mechanism in an Act, so that a person or body tabling delegated legislation can know in advance what the requirements are. The terms of reference of the scrutiny mechanism, scrutiny criteria and procedures can be set out in the Rules. However, there is nothing precluding Parliament from setting out the whole mechanism in either legislation or in the Rules or deciding which elements should be dealt with in either.

3.92 Noting that Parliament has discretion as to the extent and manner in which delegated legislation may be tabled and approved, the Joint Subcommittee recommended that –

- legislation be passed setting out norms and standards for the implementation of the constitutional mandate, ie determining to what extent and in what manner delegated legislation will be tabled or approved; and
- the provisions of section 17 of the Interpretation Act be reinforced, at least in so far as tabling is concerned.

3.93 The Joint Subcommittee recommended further that their proposed legislation provide for:

- a) Parliamentary committees to specify, when drafting a bill,
 - i) which matters are to be dealt with in a delegated instrument;
 - ii) whether the instrument is
 - (1) a legislative instrument (an extension of the law), in which event its tabling and approval would be required, unless exempted by the relevant enabling statute with the approval of the scrutiny committee; or
 - (2) an administrative instrument (it has no binding legal status), in which event tabling and approval would not be necessary, unless specifically required in the enabling statute;
- b) the timeframes within which delegated legislative instruments are to be tabled and approved or disapproved and procedures to be followed in that regard.

3.94 The Joint Subcommittee also recommended that matters pertaining to the internal arrangements of Parliament, such as the nature of the scrutiny mechanism, its composition, powers and functions, and so forth, can be provided for in the Rules of Parliament.

3.95 The Interim Report noted that the Constitution mentions the following instruments with regard to scrutiny: proclamations; regulations; and other instruments of subordinate legislation.³⁷ It also noted a list of common instruments used in South Africa and the purpose for which they are used:

- *Proclamations* are usually issued by the President and Premiers to put Acts into operation, appoint commissions of enquiry, etc. The question is whether these should be scrutinised or only tabled. Currently such proclamations are tabled in Parliament for information.
- *Regulations*, the most common form of delegated legislation, are used by members of the executive (and other statutory bodies and administrative authorities) to complete the details of the parent legislation and the procedures to be followed by persons to whom the parent legislation applies. An example is the regulations issued by a council of a university in accordance with that particular's university's Act.
- *Rules*, eg the rules issued by the Rules Board in terms of the Supreme Court Act or made in terms of the Magistrates Court Act for purposes of

³⁷ Chapter 3 Delegated instruments with legislative status *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

governing the detailed procedures to be followed by litigants (and practitioners) and rules made by the councils of the different law societies that regulate certain matters relating to the profession.

3.96 The *Interim Report* stated that as in most jurisdictions, a problem of nomenclature exists in South Africa in respect of delegated legislation. People talk about proclamations, regulations and rules as if they are interchangeable and often no differentiation is made between the various instruments. It has to be decided which of these categories should be subjected to parliamentary scrutiny. They noted that a view was expressed that not all instruments of subordinate legislation require parliamentary scrutiny. While all instruments of subordinate legislation can be tabled, it is not necessary for all of them to be scrutinised or approved formally. For example, a proclamation issued by the President to put an Act of Parliament into operation should not necessarily require parliamentary scrutiny.

3.97 The *Interim Report* noted that when the President assents to an Act of Parliament, which gives that Act the status of law, the President is exercising original constitutional authority in terms of sections 84(2)(a) and 85(2)(a). The action of assenting to an Act must be distinguished from that of a proclamation announcing the commencement of an Act. Only when the date of assent is not the date of commencement and that date has to be fixed by the President by way of a proclamation, is the President acting in terms of an Act of Parliament and not the Constitution. In such a case it will be a delegated function, as sanctioned in the Act itself. The *Interim Report* stated that in order to determine whether an instrument of subordinate legislation should be scrutinised, one needs to establish whether that particular instrument is authorised by Parliament, whether it is of a legislative nature and, sometimes, even what the purpose of the instrument is. For example, although proclamations are an important type of subordinate instrument, not all proclamations are of a legislative nature nor do they all serve the same purpose.

3.98 The Joint Subcommittee was of the opinion that subordinate instruments of a legislative nature fall within the purview of Parliament's constitutional mandate in respect of scrutiny. It therefore recommended that subordinate instruments of a legislative nature be included in the requirements for tabling and approval as may be prescribed in the proposed standard-setting legislation, save as be may directed otherwise in original legislation by a parliamentary committee and provided that such exclusion is approved by a scrutiny mechanism.

3.99 The *Interim Report* noted that the question arises whether instruments such as

codes of practice and directives issued by various authorities or organs of state constitute delegated legislation,³⁸ since there are a myriad of such instruments, all with varying degrees of legislative authority – some could be applicable to a particular institution, while others could be applicable both extrinsically and intrinsically. The Interim Report pointed out that for example, the rules of court are made by a rules board and relate to court procedures. If they are not followed, the whole legal cause could be dismissed. These rules affect people’s rights and, as such, are just as valid as laws or statutes. Any enquiry would therefore have to focus on whether they are authorised by an Act of Parliament, made by an organ of the executive and are legislative in nature.

3.100 The Joint Subcommittee was of the opinion that subordinate instruments of an administrative nature do not have legal status and do not fall within the purview of Parliament’s constitutional mandate in respect of scrutiny. It therefore recommended that subordinate instruments of an administrative nature be excluded from the requirements for tabling and approval as may be prescribed in the proposed standard-setting legislation, save as be may directed otherwise in original legislation by a parliamentary committee.

3.101 The *Interim Report* explained that there is currently no formal mechanism for the scrutiny and approval of original or subordinate legislation in South Africa, although the majority of Acts of Parliament require that regulations made in terms of the parent Act be tabled and/or approved in Parliament.³⁹ The *Interim Report* also noted that this requirement is not uniform in all Acts:

- Certain Acts are silent on tabling, but merely state that the Minister/MEC may make regulations after giving notice of such intent in the *Gazette*.
- Certain Acts require a simple submission to Parliament without stating time periods.
- Certain Acts require regulations to be submitted to the Speaker and tabled in Parliament 30 days before publication in the *Gazette* if Parliament is in session.
- Certain Acts require publication of regulations in both the provincial and national *Gazette* and tabling in both Parliament and the provincial legislature.

³⁸ Chapter 4 Delegated Instruments Without Legislative Status *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

³⁹ Chapter 6 *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

- Certain Acts indicate specific time periods within which Parliament has to consider the regulations, including procedures should Parliament decide to reject the regulations.

3.102 The *Interim Report* stated that there can be no doubt that requiring the tabling of instruments of delegated legislation in Parliament is one of the most important and simple steps to foster executive accountability and legislative regulation. The development of electronic technology in recent times makes this step all the more feasible, and most countries require this as a rule. Furthermore, section 17 of the Interpretation Act provides that when the President or any Minister is authorised by law to make rules or regulations, a list of the proclamations and government notices under which such rules or regulations were published in the *Gazette* must be tabled in Parliament. Tabling on its own represents a formal or superficial acknowledgement of the executive's responsibility to the legislature. Most constitutional systems, however, require something more than mere tabling and the two most frequent methods used are to subject all delegated legislation to a procedure for either approval or disapproval by Parliament. Some mechanism is thus established and some process devised whereby a greater degree of scrutiny by Parliament is applied to delegated legislation.

3.103 The *Interim Report* considered that an option will be for portfolio and select committees, in considering original legislation, to categorise the delegated instruments envisaged, if any, and by such categorisation to predetermine the process to be followed in respect of such instrument, for example whether it will have to be tabled and approved or only tabled. A parliamentary committee could also decide to exempt a particular subordinate instrument from approval requirements. In terms of its constitutional mandate, Parliament has the discretion to create internal mechanisms for the scrutiny of delegated legislation. The scrutiny could be effected by the portfolio and select committees that are responsible for the parent legislation or a specialist committee could be set up that will be in a position to deal with the substantive issues and technical aspects of the subordinate instruments. If the powers of a scrutiny committee were to be extended to include the scrutiny of the enabling provisions in original legislation, it could be decided that a portfolio or select committee that wishes to exempt delegated legislation from scrutiny should first obtain the approval of the scrutiny committee. The scrutiny committee would then have to decide whether it actually wants to grant such approval. A specialist committee could involve the portfolio and select committees in a manner similar to the practice followed by the Standing Committee on Public Accounts (SCOPA), which scrutinises the accounts of all departments. SCOPA, when examining the accounts of a particular department or

institution, often invites the relevant portfolio or select committee to attend its proceedings.

3.104 The *Interim Report* noted that their comparative study indicated that most jurisdictions prefer to have a specialised committee (joint or separate or both) that specifically considers delegated legislation. In some cases the committee is assisted by legal officers who undertake an initial scrutiny against predetermined scrutiny criteria and alert the committee to problematic instruments. The *Interim Report* asked whether in the South African context this function can be adequately carried out by the portfolio and select committees that deal with the parent legislation, particularly given the constraints in respect of capacity and time; whether it should be performed by separate committees for the two Houses; or by a joint committee. It was said that it must be borne in mind that more than 90% of legislation that is passed by Parliament falls in the category of section 75 legislation. Consideration had therefore been given to the role of the National Council of Provinces in the scrutiny of subordinate instruments emanating from such legislation. As section 75 legislation is usually approved by both Houses, it was envisaged that the role of the NCOP would not be different to that of the National Assembly. However, if required, a different role for the NCOP with regard to section 76 legislation could be included in the enabling provisions of a parent Act. The *Interim Report* explained that Prof Hugh Corder, in his report to the subcommittee,⁴⁰ expresses the view that a specialised joint committee would be the most suitable structure to carry out the scrutiny function.

3.105 The *Interim Report* noted that if it is decided that a joint committee was the most suitable mechanism for the scrutiny of delegated legislation, it would have to be determined how it should be constituted; whether its members would require specialist skills; what capacity and support it would require; whether the committee would consider the full spectrum of delegated legislation, subordinate instruments with legislative status or monitor randomly; how the committee would rate in terms of seniority; and how much weight would be attached to a committee pronouncing itself on matters of constitutionality. Also, a decision would be required as to where such a scrutiny committee would be placed in the current structure of Parliament, what powers it would have in terms of the Rules of Parliament and to whom it would be accountable. If, for example, such a committee were to be attached to the Joint Rules Committee, certain practical considerations would have to be taken into account, such

⁴⁰ Professor Hugh Corder's 1999 *Final Report on Methods for Scrutiny of Legislation by Parliament* which is available at <http://www.pmg.org.za/docs/1999/minutes/991027scrutiny.htm> (accessed on 4 September 2006).

as the timeframes for approval contained in the subordinate instruments. The Joint Rules Committee generally only meets once in a parliamentary term. If the approval by the House of an instrument was required within 30 days, for instance, the task of the scrutiny committee could be complicated if it first has to submit its recommendations to the Joint Rules Committee before they could be submitted to the Houses for approval.

3.106 The Joint Subcommittee on Delegated Legislation was of the opinion that a specialist joint committee was the most appropriate mechanism for the scrutiny of delegated legislation and the delegating provisions in enabling legislation. It therefore recommended the following –

- The establishment of a joint scrutiny committee;
- How the committee will be constituted;
- Whether its members will require specialist skills;
- What capacity and support will be required;
- Whether the committee will look at the full spectrum of delegated legislation, at subordinate instruments with legislative status only or monitor randomly;
- How the committee will rate in terms of seniority and how much weight will be attached to a committee pronouncing itself on matters of constitutionality;
- The role of the joint scrutiny committee vis-à-vis portfolio and select committees;
- Where the committee will fit into the current structure of Parliament.

3.107 The *Interim Report* pointed out that criteria for the scrutiny of subordinate instruments are practically uniform in most jurisdictions and are usually set out in legislation,⁴¹ and include, *inter alia*, checking –

- the substance of delegated instruments, for example whether they impose levies, taxes or duties;
- procedural aspects around delegated legislation;
- whether they impinge on the jurisdiction of the courts, as that is not allowed;
- whether they are retrospective in nature and, if so, whether that is permitted in terms of the parent Act;

⁴¹ Chapter 7 Scrutiny Criteria *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

- whether they conform with the objects of the parent Act;
- whether they appear to make unusual use of powers conferred by the parent Act;
- whether they have been properly drafted;
- whether they trespass on personal rights and liberties, including those set out in the bill of rights; and
- whether they amount to substantive legislation, as delegated legislation should not purport to replace the parent Act.

3.108 The *Interim Report* pointed out that within this general framework, which is widely applied, there are additional requirements. One recent requirement is that the executive authority (proposing the delegated legislation) must perform a cost-benefit analysis (in financial or socioeconomic or environmental terms) or impact study, the outcome of which must be attached to the proposed legislation for the information of Members of Parliament and civil society generally. Typically, a set of ministerial regulations, in draft or final form, will be examined by a committee of Parliament and measured according to predetermined standards which usually focus on potential violations of protected rights or legal principles. Only after completion of this process the delegated legislation will come into force, and parliamentary approval can be either explicit or implied, ie if Parliament says nothing negative, within a particular period of time, approval will be assumed.

3.109 It was proposed in the *Interim Report* that a mechanism for disapproval of a provision in delegated legislation needs to be established. It had been suggested to the Committee that a “mixed” system could be adopted for expressing disapproval: where the ground for recommending invalidity is constitutional in nature (eg the unjustified invasion of rights protected in the bill of rights), the joint scrutiny committee should alert the portfolio or select committee concerned, which should have the power to initiate the disallowance procedure in the Houses; should the basis for recommending invalidity be “technical” in nature (eg the contravention of the rules of administrative law, such as the requirement of procedural fairness), the joint scrutiny committee should have the power to initiate disallowance. The *Interim Report* stated that in either event, three steps should be mandatory prerequisites for initiating any recommendation for disallowance: the executive law-maker should be notified at the earliest opportunity of the potential difficulty and afforded a proper opportunity to reply and comply; the relevant portfolio or select committee and all members of Parliament should always be alerted to such perceived shortcomings, whatever the apparent

basis; and disallowance should be the prerogative of both Houses, not the joint scrutiny committee or a portfolio or select committee.

3.110 The Joint Subcommittee on Delegated Legislation was of the opinion that all the criteria listed, or a combination of these criteria, can be set out in the Rules of Parliament, together with the terms of reference for a joint scrutiny committee, for application and implementation by the scrutiny committee. It therefore recommended that -

- a set of scrutiny criteria be identified and included in the provisions for the scrutiny committee in the Rules of Parliament; and
- a mechanism be established for the disapproval of provisions in delegated legislation.

3.111 It was noted in the *Interim Report* that the National Council of Provinces has a particular role in terms of sections 146(3), (4), (5) and (6) of the Constitution when there is a conflict between national delegated legislation and provincial delegated or original legislation.⁴²

146(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –

- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

3.112 The *Interim Report* explained that a narrow interpretation of section 146(6) is that it only refers to a conflict between national delegated legislation and provincial delegated legislation. In accordance with such an interpretation, national delegated legislation will prevail over provincial delegated legislation if that national delegated instrument has been approved by the NCOP within 30 days of its referral to that House. Such a narrow interpretation, however, does not make provision for cases where

⁴² Chapter 8 Role of the NCOP *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

national delegated legislation is in conflict with provincial original legislation. The Interim Report stated that a broader interpretation will be that since sections 146(2) to (5) provide for conflict between national original legislation and provincial original legislation in functional areas listed in Schedule 4, it can be argued that with sections 146(6) to (8) the drafters of the Constitution intended providing for cases where national delegated legislation is in conflict with either provincial original legislation or provincial delegated legislation. The Constitution therefore gives the NCOP the power to act as a deadlock-breaking mechanism in such cases by giving it the discretion either to approve or disapprove national delegated instruments within a period of 30 days of it being referred to that House. The Interim Report explained that in respect of the scrutiny of delegated legislation, a mechanism has therefore to be developed, in the context of the broader imperative, to enable the NCOP to fulfill this specific constitutional mandate. The Interim Report noted also that the Constitution requires the NCOP to approve or disapprove national delegated legislation under section 146(6) only if the legislation is referred to it for that purpose. Disapproval by the NCOP does not affect the validity of delegated legislation. Its approval will only be relevant if there is a conflict.

3.113 The Joint Subcommittee was of the opinion that the role of the NCOP in the approval of delegated legislation, as set out in section 146(6), can be accommodated by including a specific provision in the scrutiny criteria of the proposed scrutiny mechanism. It therefore recommended that a criterion be included in the scrutiny criteria to the effect that the attention of the NCOP must specifically be drawn to subordinate instruments relating to matters contained in Schedule 4 of the Constitution, as its approval of such instruments will play a role in the event of a conflict between such subordinate instruments and provincial delegated or original legislation.

3.114 At a meeting of the National Assembly Rules Committee on 5 February 2002, it was agreed that the Subcommittee on Delegated Legislation would expedite a separate proposal for an interim mechanism for the scrutiny of ministerial regulations while continuing with the broad task before it.⁴³ The *Interim Report* noted that for the purposes of standardisation and uniformity of norms and standards, it was necessary to have a generic statute similar to the Interpretation Act to override existing statutory arrangements in respect of the tabling of regulations. Such legislation could contain, *inter alia*, norms and standards with regard to the tabling and approval of regulations

⁴³ Chapter 9 Interim Scrutiny Arrangements *Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

and how they are to be made accessible to the public. However, it was not considered practical or realistic to create legislation setting out norms and standards for scrutiny only in respect of an interim mechanism. It was considered that a committee had to be established to draft such legislation and, moreover, in view of the timeframes involved in passing legislation, such an approach was not feasible in the short term. It was considered that Parliament should, in the interim, explore the option of providing for the parliamentary scrutiny of delegated legislation by an interim scrutiny committee in the Rules of Parliament.

3.115 The *Interim Report* considered that Portfolio and select committees could be utilised in the meantime to scrutinise regulations pertaining to their scope of work as they are responsible for the consideration of the parent legislation. Technical support and legal advice had to be provided to them in order to fulfill such a function, as the necessary expertise did not exist in all committees, particularly in respect of determining the constitutionality of delegated instruments. The Joint Subcommittee was of the opinion that portfolio and select committees, in view of the time and capacity constraints under which they operated, were not the most appropriate vehicles to conduct parliamentary scrutiny of subordinate instruments in the interim. It therefore recommended that an interim scrutiny committee be established, to –

- act in an advisory capacity to portfolio and select committees with regard to the scrutiny of delegating provisions in enabling statutes referred to it;
- scrutinise any delegated instruments requiring approval by Parliament; and
- be provided with the necessary capacity and legal expertise.

3.116 On 25 May 2005 the Joint Rules Committee of Parliament was briefed on the *Interim Report* of the Subcommittee. On 1 September 2006 the Joint Rules Committee (Subcommittee on Review of the Joint Rules) met to consider, inter alia, a draft resolution⁴⁴ for the establishment of an interim scrutiny mechanism to be adopted by

⁴⁴ The Parliamentary Monitoring Group (PMG) posted the following minutes reflecting the discussions held at this meeting:

‘As it was an interim committee, the Joint Rules Committee suggested a draft resolution in both Houses with interim rules that determined its function. There were two options for its composition: the first was to have 13 NA members and nine NCOP members (in line with Joint Rule 19). The second option was 11 members (six from the ANC [including two NCOP members]; two from the DA; one from the IFP and one from other parties). The second formulation was the preferable option as it was flexible.

Parliament.⁴⁵

That the House, subject to the concurrence of the National Council of Provinces/National Assembly, establishes an Interim Joint Committee on Scrutiny of Delegated Legislation, in accordance with the following interim Rules:

1. Establishment

There shall be an Interim Joint Committee on Scrutiny of Delegated Legislation.

2. Composition

Option 1:

The Committee shall consist of 13 National Assembly members and 9 Council members in accordance with Joint Rule 19.

Option 2

The Committee shall consist of 11 members, as follows: ANC 6 (including 2 Council members); DA 2; IFP 1; and other parties 2.⁴⁶

3. Functions and powers

The scrutiny criteria were all the criteria included in the report with additions about the Committee's reporting arrangements.

Mr Jeffery wanted to know how many Regulations had been drawn up that needed Parliamentary approval. He said that they were very few so he wanted more detail on this. This would help to determine if setting up a whole committee for this issue would be superfluous and a waste of time. He said that it would be helpful if they could put in a mechanism for the Scrutiny Committee to consult with the relevant Portfolio Committee that had expertise in the matter.

The Chairperson said that the purpose of the scrutinising committee was not to examine the policy considerations that underlay the subordinate legislative instrument. Even the Portfolio Committee could not really review the policy choices. Instead, the focus was on the criteria. For example, it would look to whether the instruments were drafted properly and whether they impinged on the jurisdiction of the courts. He added that the Committee still had to decide whether the criteria were adequate, so in that regard, there were policy decisions to be made.

Mr Jeffery was worried that the criteria were too limited. The fact that parliament retained its power to approve certain regulations meant that those regulations dealt with fairly serious matters. Thus, the criteria had to be similarly serious.

The Chairperson said that they could recommend to the Joint Rules Committee that an audit be done of the type of Regulations that had needed Parliamentary approval in the past. The Committee could then make additions or improvements to the current criteria."

These minutes of the meeting are available at <http://www.pmg.org.za/viewminute.php?id=8167> (accessed on 15 September 2006).

⁴⁵ Available at <http://www.pmg.org.za/docs/2006/060901draftsolutions.htm> (accessed on 15 September 2006) and also available at <http://www.pmg.org.za/docs/2006/060822scrutiny.htm> (accessed on 15 September 2006).

⁴⁶ The following indication is given as to which of the two options is seen as the preferable one: "As this is a technical committee along the lines of Scopa, we would recommend Option 2 as a more flexible composition".

The Committee shall –

- (1) exercise its powers and functions in accordance with the Rules applicable to joint committees generally, unless otherwise provided for in these interim Rules; and
- (2) scrutinise delegated instruments requiring approval by Parliament and delegating provisions in enabling legislation referred to it in accordance with the scrutiny criteria identified in these interim Rules.

4. Scrutiny criteria

Delegated legislation requiring the approval of Parliament or delegating provisions in enabling legislation shall be scrutinised by the Interim Joint Committee on Scrutiny of Delegation Legislation in accordance with some or all of the following criteria:

- (1) whether they impose levies, taxes or duties;
- (2) whether they comply with procedural aspects around delegated legislation;
- (3) whether they impinge on the jurisdiction of the courts;
- (4) whether they are retrospective in nature and, if so, whether that is permitted in terms of the parent Act;
- (5) whether they conform with the objects of the parent Act;
- (6) whether they appear to make unusual use of powers conferred by the parent Act;
- (7) whether they have been properly drafted;
- (8) whether they trespass on personal rights and liberties, including those set out in the Bill of Rights; or
- (9) whether they amount to substantive legislation, as delegated legislation should not purport to replace the parent Act.

5. Reporting

Upon completion of the scrutiny process, the Committee shall -

advise the relevant portfolio or select committee on its findings regarding delegating provisions in enabling legislation;

- (1) advise the relevant portfolio or select committee where a recommendation for invalidity of a subordinate instrument is constitutional in nature, the portfolio or select committee then to report to the relevant House and recommend its disallowance;
- (2) report directly to the Houses where a recommendation for invalidity of a subordinate instrument is technical in nature; and
- (3) in view of the provisions of section 146 of the Constitution, specifically report to the National Council of Provinces on delegated instruments relating to matters contained in Schedule 4.

6. Dissolution

The Committee shall be dissolved by resolution of both Houses.

3.117 We noted above that the issue of parliamentary scrutiny of subordinate legislation is not presently regulated by the rules of Parliament. Parliament will probably implement interim measures in the foreseeable future to regulate this. A provision has therefore been drafted to make provisions for the submission of subordinate legislation to Parliament and provincial legislatures based on the present position. The Commission invites comment on parliamentary scrutiny of subordinate legislation and submission of subordinate legislation to Parliament. The following provision is proposed on submission of subordinate legislation to Parliament and the provincial legislatures:

Subordinate legislation to be submitted to Parliament and provincial legislatures

13. (1) Within 14 days after its publication in accordance with section 10, subordinate legislation must be submitted to –

- (a) both Houses of Parliament, in the case of subordinate national legislation; or
- (b) the relevant provincial legislature, in the case of subordinate provincial legislation.

(2) Non-compliance with subsection (1) does not effect the validity, commencement or enforcement of such subordinate legislation.

E. ACCESSIBILITY OF LEGISLATION

3.118 Prof Jonathan Klaaren commented that one issue that should be considered is the relationship of the Interpretation Act to the rights of administrative justice and access to information (and their implementing statutes). In particular, the issue of the publication of laws and the effect of publication on their legality ought to be considered. A requirement for the publication of law in order for it to be binding would seem to have constitutional status, but is not (to his knowledge) clearly entrenched in statute. He states that there was some research on this issue done by Prof Mureinik's group with respect to the Open Democracy Bill in the mid-1990s. Although the issue of accessibility of legislation is a collateral issue to this investigation, the initiatives recently taken in other jurisdictions (and also recent proposals made in South Africa) to address this issue are nevertheless noteworthy.

3.119 A project was launched in New Zealand called *Public Access to Legislation (PAL) Project*.⁴⁷ Its objectives are:

⁴⁷ The New Zealand Parliamentary Counsel Office/*Te Tari Tohutohu Paremata* (PCO) is undertaking the project in collaboration with the Office of the Clerk and the Tax Drafting Unit of the Inland Revenue Department (IRD). Unisys New Zealand Ltd (Unisys) is the

- to make legislation available electronically and in printed form from a database owned and maintained by the Crown;
- to provide access to Acts and Statutory Regulations in electronic and printed form as soon as possible after enactment or making;
- to provide access to legislation with amendments incorporated as soon as possible after the legislation becomes law;
- to provide electronic access to Bills at key stages during their progress through the House;
- to provide free electronic access to Bills, Acts, and Statutory Regulations via the Internet;
- to make it possible (in selected cases) to see the effects of proposed amendments on existing legislation; and
- to make it easier to see the effect of amendments to proposed legislation during its passage through the House.

3.120 The New Zealand Human Rights Commission commented, inter alia, as follows on the discussion paper *Public Access to Legislation: a Discussion Paper for Public Comment*:⁴⁸

The Commission considers that improved delivery of legislation to the wider community may be achieved by such initiatives as provision of free Internet access to legislation, or by improved community legal education. . . .

“Ignorance of the law is no excuse”. This well-known principle of the legal system is not matched by “maxims reflecting the state’s duty to promulgate the law, to give access to primary legal materials, or to ensure that all citizens are aware of their obligations under the law”. Nevertheless the Commission believes the citizen has a right to know the law, and the state has an obligation to disseminate its laws as widely as is reasonably practicable. There appears to be an acceptance of a duty on the Crown to make legislation available to the public, at least in written form. It may be questioned whether that duty is effectively discharged by the present system of printing statutes and regulations. Some sectors of the public, e.g. people with disabilities, are not well served by the provision of statutes in small print. There may be a need for accessible summaries of legislation for those who cannot read, or who cannot afford the legislation, or to improve public legal education regarding new laws. The Acts and Regulations Publication Act 1989 requires the Chief Parliamentary Counsel to arrange for the printing, reprinting, and publication of Acts and regulations. These materials must be made available to the public at a “reasonable price” . . .

PCO’s implementation partner for the project. Implementation of the project is expected to be by late 2006 or early 2007. (See <http://www.pco.parliament.govt.nz/pal/palupdate.shtml> (accessed on 15 September 2006).

⁴⁸

The 1998 discussion paper raised the following issues: what role should the State and the private sector play in providing access to legislation; what forms (printed, electronic, on-line) should an official version of legislation take; on what basis should the Government charge for access to legislation; and in what forms (printed, electronic, on-line) should Bills be published. A press-release is available at <http://www.pco.parliament.govt.nz/pal/papers.shtml> (accessed on 16 August 2006).

3.121 The Australian Capital Territory Legislation Act of 2001 is another example of legislation the main object of which is to make legislation more accessible. The Act provides that this is to be achieved particularly by encouraging access to legislation through the Internet, while maintaining access to printed legislation; restating the law dealing with the 'life cycle' of legislation, improving its structure and content, and simplifying its provisions where practicable; and assisting users of legislation to find, read, understand and use legislation by facilitating the shortening and simplification of legislation; promoting consistency in the form and language of legislation; providing rules about the interpretation of legislation; and facilitating the updating and republication of legislation to ensure its ready availability. The '*life cycle*' of legislation includes the making (where relevant), notification, commencement, presentation and disallowance (where relevant), operation, interpretation, proof, republication, amendment and repeal of legislation and instruments made under legislation. The Act makes provision for a register of Acts and statutory instruments (the *ACT legislation register*) established and maintained by the parliamentary counsel and kept electronically. The parliamentary counsel must ensure, as far as practicable, that a copy of the contents of the register is accessible at all times on an approved web site. Access must to be provided without charge by the Territory.

3.122 The Commission's investigation into administrative justice (project 115) resulted in draft legislation which was proposed to give effect to section 33 of the Constitution. The Commission remarked in its report that there is a proclivity of administrators to make rules (which were defined in the proposed Bill as measures having the force of law) or standards (which do not have such force), to fail to disclose these to those upon whom they bear, and thereafter to invoke them. The Commission cautioned awareness on the other hand of the need not to hamstring administrators by unrealistic requirements relating to the making of rules or standards. The middle course devised was to require administrators in general and flexible terms to take appropriate steps to communicate rules to those likely to be affected by them, and to impose upon administrators flexible obligations relating to the manner in which this is to be achieved. It was proposed that administrators be required to compile registers and indices to ensure accessibility to rules and standards. The Commission's draft Bill provided also for an Administrative Review Council. The Bill envisaged that the Council would compile and maintain an up-to-date national register containing the text of all current rules and standards used by organs of state and compile and maintain an up-to-date and accessible national index of all current rules and standards used by organs of state, including a concise description of their contents and the particulars of

the places and times at which the rules and standards or further information regarding them can be inspected and copied. The Bill also imposed the duty on the Council to publish that national index weekly on the Internet; and annually in the *Government Gazette*, and to make available all current rules and standards for inspection and copying at all reasonable times by any member of the public at his or her own expense.

3.123 The Commission's investigation ultimately led to the adoption of the Promotion of Administrative Justice Act 3 of 2000. Drastic changes were effected to the Commission's proposals as contained in the draft Bill. The Act empowered the Minister of Justice and Constitutional Development to make regulations, *inter alia*, relating to the establishment, duties and powers of an advisory council to monitor the application of the Act. Other functions the Act confers on the Council is to advise the Minister on the appropriateness of publishing uniform rules and standards, as well as the compilation and maintenance of registers containing rules and standards, and the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards.

3.124 In *President of the Republic of South Africa and Another v Hugo*⁴⁹ the Constitutional Court remarked as follows in respect of knowledge about and accessibility to the law:

It can be seen then that several concerns underlie the interpretation of "prescribed by law". The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to

⁴⁹ 1997 (6) BCLR 708 (CC) para 102. See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W) [and 1998 (2) SACR 102 (W)] where Judge Heher was asked to consider vagueness in the context of the rule of law. It was pointed out to him that it is a fundamental principle of that rule that persons should be able to regulate their affairs secure in the knowledge that they will be at liberty to perform any action that has not expressly been criminalised by a law of general application. Counsel referred him to American jurisprudence in which a vague law constitutes a denial of due process, *inter alia*, to *Papachristou v City of Jacksonville* 405 US 156 where it was said that living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids'. Judge Heher also noted that in *the Sunday Times v The United Kingdom* 2 EHRR 245 (1979), the European Court of Human Rights was required to consider what was meant by the expression "prescribed by law" in the European Convention on Human Rights: "In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

conform his or her conduct to the law.

3.125 In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home*⁵⁰ the Constitutional Court remarked as follows on knowledge of and access to the law:

It is an important principle of the rule of law that rules be stated in a clear and accessible manner ... It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by sections 26(3) and (6) is constrained by the provisions of the Bill of Rights, and in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated.

3.126 Recently the Joint Subcommittee on Delegated Legislation of the South African Parliament considered, inter alia, the accessibility of legislation. They noted in their *Interim Report*⁵¹ that sections 15, 16, 16A and 17 of the Interpretation Act support the prominent role of the executive in ensuring the accessibility of instruments of delegated legislation, since these sections provide for the publication of proclamations, ordinances, Acts of Parliament and other enactments having the force of law in the *Gazette*. Specifically section 17 underlines the prominence of the role of the executive in that it mandates the executive to submit to Parliament a list of the proclamations, government notices and provincial notices under which rules and regulations have been published in the *Gazette*. The As far as Parliament is concerned, the need possibly to provide a period for public comment and participation after tabling has to be balanced with the understanding that regulations often have to be implemented urgently. Provision could be made for such instances.

3.127 The *Interim Report* noted that one has to ask whether the accessibility of subordinate instruments also includes the language used and whether it means that such instruments have to be made available in all official languages. Section 6(3)(a) determines that “the national government and each provincial government must use at least two official languages” for the purposes of government. For an extended period countries such as Zimbabwe and South Africa were governed by means of delegated

⁵⁰ 2000 (8) BCLR 837 (CC) para 47.

⁵¹ Chapter 5 Making Delegated Legislation Accessible *Interim Report of the Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

legislation, as it was convenient for the purposes of control. In Zimbabwe, for example, a number of statutory instruments made by ministers of the government of the Federation of Rhodesia and Nyasaland are still in force. However, the public cannot access these regulations as they are out of print. The same probably holds true for South Africa.

3.128 The *Interim Report* explained that regulations remain in force until they are repealed by the authority concerned or the parent Act is amended or repealed so as to nullify the delegated legislation made in terms thereof. Consideration could be given, they said, to subjecting all subordinate legislation to *sunsetting*, ie for such instruments to have a limited life of say five years, after which they will have to be re-enacted and thus re-scrutinised as regards form and content. In addition to keeping a central register of all Acts and their delegated instruments, such a provision would ensure that all subordinate instruments are up to date and will improve their accessibility. The *Interim Report* recommended that Parliament propose to the executive that it should investigate innovative ways of making subordinate instruments more accessible which could, *inter alia*, include the following:

- A central index or register to be kept of all Acts and their delegated instruments. Such a register could list details of the relevant *Gazette* reference, the administering department and where copies can be obtained.
- The register to be made available in both printed and electronic form, both forms also to be available from the Clerk of the Papers of Parliament.
- The register to be distributed in both printed and electronic form to all public libraries and municipal offices.
- Bound volumes of the full text of regulations to be kept up to date and be widely available, including in all major public and legal deposit libraries.
- Given South Africa's high levels of illiteracy, ways to be explored of popularising subordinate instruments such as regulations.
- Provisions in the standard-setting legislation being contemplated to provide for the automatic lapsing of subordinate instruments after a certain period, unless they are reinstated. All subordinate instruments, including existing instruments, will then be subject to this provision. That will provide certainty about the status of such instruments and, if a central index or register is kept, an up-to-date source of all valid instruments.

3.129 The Joint Subcommittee on Delegated Legislation therefore recommended that the executive, as it has the primary responsibility to make instruments of delegated legislation accessible, consider the proposals listed above and determine which would be practical to implement, while Parliament consider including a "sunsetting" provision

in the envisaged standard-setting legislation.

F. NUMBERING OF BILLS

(a) South Africa

3.130 In July 2006 the Department of Justice and Constitutional Development requested that the numbering of Bills also be considered as part of this investigation. Hardly any information is available on the numbering of Bills as they pass through the parliamentary stages in South Africa. Bills are numbered as follows in South Africa:⁵²

[B 1 - 2006]	-	Bill as introduced
[B 1A - 2006]	-	Amendments agreed to by Committee
[B 1B - 2006]	-	Bill as amended by Committee
[B 1C - 2006]	-	Further amendments by Committee / amendments by Committee of second House
[B 1D - 2006]	-	Bill as further amended by Committee
[B 1E - 2006]	-	Further amendments, e.g. by Mediation Committee
[B 1F - 2006]	-	Bill as further amended, e.g. by Mediation Committee

3.131 The South African Council of Churches explains the numbering of Bills as follows:⁵³

Bills are numbered in order of tabling within each year. Thus, Bill number B75-97 was the seventy-fifth Bill tabled in 1997. A letter following a Bill number specifies a revision of the original Bill, usually indicating that it has been amended by Parliament. For example, B54D-97 denotes the second revision of Bill B54-97 (where B54B-97 would have been the first revision). Intermediate documents (in this case, versions A and C) usually list the amendments made.

⁵² The Commission wishes to express its appreciation to Mr Neill Bell who is the Chief Editor, Legislation at Parliament for providing this information.

⁵³ Available at http://www.sacc-ct.org.za/wrap_299.html (accessed on 15 August 2006).

(b) Canada

3.132 When a Bill is introduced in the House of Commons in Canada, it is assigned a number to facilitate filing and reference.⁵⁴ Government Bills are numbered consecutively from C-2 to C-200, while private members' Bills are numbered consecutively from C-201 to C-1000. Although private Bills are rarely introduced in the House of Commons, they are numbered beginning at C-1001. In order to differentiate between Bills that are introduced in the two Houses of Parliament, the number assigned to Bills introduced in the Senate begins with an "S" rather than a "C". Senate Bills are numbered consecutively beginning at S-1, whether they are government Bills, private Members' Bills or private Bills, and are not renumbered or reprinted when they are sent to the Commons. On March 12, 1974, Speaker Lamoureux announced the implementation of the numbering system now in effect in the House. At the beginning of each new session the numbering starts over.

(c) England

3.133 On the day of presentation, a "dummy" copy of the Bill is placed on the Table. Once it has been presented, each Bill is allocated a Bill number, which is printed on the bottom left-hand corner of the front page in square brackets (e.g. [Bill 4]). Each time the Bill is re-printed (for example, after the committee stage), it is given a new number. This First Reading stage also forms the House's order to print the Bill, which is done for the House by the Stationery Office.⁵⁵ Citation of Bills include initials of the House, the session of parliament, the Bill number in parenthesis (if Lords Bill) or brackets [if Commons Bill]: H.L. Bill 1994-95 (15) Ministry of Defence Police Bill.⁵⁶ Minor amendments to a Bill result in a change to the original number (15a), however complete overhaul of a Bill results in a new number. A New Bill number is used when it is passed to the other House for approval. Formerly the number was enclosed in square brackets for Bills originating in the House of Commons and in round brackets for Bills originating in the House of Lords. House of Commons Bills are still numbered in this manner, but House of Lords Bills are now designated 'HL Bill' followed by a

⁵⁴ The number C-1 is reserved for the *pro forma* bill that is traditionally introduced at the beginning of each new session. *House of Commons Procedure and Practice* edited by Robert Marleau and Camille Montpetit 2000 edition available at <http://www.parl.gc.ca/> (accessed on 14 August 2006).

⁵⁵ "Parliamentary Stages of a Government Bill" available at <http://www.parliament.uk/documents/upload/101.pdf> (accessed on 14 August 2006).

⁵⁶ "UK: primary legislation" available at <http://tarlton.law.utexas.edu/vlibrary/outlines/ukleg.html> (accessed on 14 August 2006).

number without brackets, eg: *Education (Student Loans) Bill* HC Bill (1989 - 90) [66] *Further and Higher Education Bill* HL Bill (1991 - 92) 27.

(d) Scotland

3.134 Bills are numbered sequentially as they are published, in the following way - SP Bill 1, SP Bill 2 etc. Accompanying papers have the same numbering system as the Bill they relate to but with the addition of an explanatory abbreviation, eg, SP Bill 1-EN (explanatory notes), SP Bill 1-PM (policy memorandum).⁵⁷ Subsequent versions of the Bill are numbered SP Bill 1A, SP Bill 1B etc. Each stage of the Bill has an addendum to the title describing which version it is- [As Introduced], [As Amended at Stage...], [As Passed]. A distinctive feature of Scottish Parliament Bills is that they retain their original numbering throughout their passage through the Parliament. Bills are given a running number as they are published within a particular four-year session of the Parliament with the year of publication in brackets: eg: Freedom of Information (Scotland) Bill, SP Bill 36, Session 1 (2001).⁵⁸

(e) Texas

3.135 Individual Bills can be distinguished in Texas by a tracking system used by the Legislature to tell one Bill from another⁵⁹. Under this system, each Bill is assigned a prefix (either HB or SB, depending on if it was introduced in the House or Senate, respectively) and a number that shows when it was introduced. For example, the first Bill filed in the House would be HB No.1, the second HB No.2, and so forth. Similarly, the first Bill introduced in the Senate is SB No.1. (Sometimes this is shortened to HB 1, SB 1, etc.) These prefixes and numbers stay with the Bill throughout the legislative process and are the easy way to identify a particular Bill.

3.136 In Texas the versions or printings of a Bill are as follows: Filed; Committee Substitute; Committee Amendments; Floor Amendments; Engrossed; Conference Committee Report; and Enrolled.

3.137 The "FILED" version shows the Bill as it was when it was first introduced into

⁵⁷ "Scottish Parliamentary and Statutory Papers July 2002 – March 2003" available at http://www.scottish.parliament.uk/corporate/bibliographies/biblio_0207-0303.pdf (accessed on 14 August 2006).

⁵⁸ "Finding Scottish Parliament & Scottish Executive Papers" available at <http://www.lib.gla.ac.uk/Subject/Law/ULPS%20and%20Database%20Guides/ulp13.s.html> (accessed on 14 August 2006).

⁵⁹ "Reading a Bill: What to Look for When Analyzing a Bill" available at http://www.uhsa.uh.edu/gov/process/st_process_bill.html (accessed on 14 August 2006).

the Legislature and before it has been considered by a legislative committee. This version can be identified by the fact that the word "Filed" or the word "Introduced" is often printed on the first page. The "COMMITTEE REPORT" version shows the Bill after it has been considered by House or Senate committees and after that committee has made whatever changes it believed were necessary. There are two types of committee reports, a "Committee Substitute" and "Committee Amendments." A Committee Substitute is a complete replacement for the original Filed version. A Committee Substitute is adopted when substantial changes are made to the original Bill. It can be readily identified by the fact that the phrase "Committee Substitute for (HB or SB No.)" is printed on the first page by the name of the legislator who offered the substitute in committee. In addition, the letters CS are printed in front of its normal prefix at the top right hand corner of the second and subsequent pages - i.e. - HB No 4 becomes CSHB No 4. A Committee Amendments version shows only the specific changes, usually minor, that the committee has voted to make in the Bill and does not reprint the full measure. It can be identified by the fact that the phrase "House or Senate Committee Amendments to HB or SB" are printed on its first page. To analyze the impact of these amendments, one will have to have both the original Filed version and the Committee Amendments version since the two will have to be compared to see what changes have been made.

3.138 The word "House" or "Senate" is printed in front of the phrase which identifies a Committee Substitute or Committee Amendments version - i.e. -a House Committee Substitute is identified by the words "House Committee Substitute for . . ." while a Senate version would be "Senate Committee Substitute for . . .". The full House or Senate must adopt committee amendments when the Bill reaches the Floor for a vote. The "FLOOR AMENDMENTS" version shows the specific changes made in a Bill or resolution when it was debated on the Floor of the full House or Senate. These versions can be identified by the phrase "House (or Senate) Floor Amendments" printed on the first page, and the word "Adopted" often appears at the top of that page. Again, there can be both House and Senate Floor Amendments versions that can be quite different.

3.139 The "ENGROSSED" version shows the Bill as it was when it passed in the house in which it originated. This version incorporates into its text all the changes made to the document in that chamber. It can be identified by the fact the word "Engrossed" is printed on the top of the first page. There is only one Engrossed version of a Bill, as a Bill can originate in only one of the two legislative chambers. A Bill that

has passed both legislative houses is called an "Enrolled" Bill.

3.140 The "SENATE (OR HOUSE) AMENDMENTS" version shows the changes made by the other chamber. This is the version that would actually be before the House or Senate when it decides to either accept the changes or ask for a conference.

3.141 The "CONFERENCE COMMITTEE REPORT" version shows the Bill as it was after it has been considered and approved by a conference committee of House and Senate members. This version can be identified either by a first page, which shows the signatures of the conference committee members who voted for it, or by the phrase "Conference Committee Report" printed on the first page.

3.142 The "ENROLLED" version presents the full text of the Bill as it appears after it was approved by both houses of the Legislature and has been sent to either the Comptroller for certification, or to the governor for his/her approval or veto. The word "Enrolled" or "As Finally Passed & Sent to the Governor" is printed on the first page of this version. Joint and Concurrent Resolutions can go through a similar series of versions in the House and Senate. Simple Resolutions (the HSR's and SR's) are only considered by the chamber in which they were originally filed so there is only one filed committee report and floor amendment version.

(f) Request for comment

3.143 The Commission invites comment in particular on whether respondents have views on the way in which different versions of Bills as they pass through the parliamentary stages are numbered in South Africa.

G. EXPIRATION/DEMISE OF LEGISLATION

3.144 An issue that needs to be considered is whether the new Interpretation Act should refer to the other ways in which legislation comes to an end. Since an Interpretation Act must be a comprehensive practical guide to the interpretation and application of legislation, should the new Interpretation Act not at least explain the other ways in which legislation lapses (eg implied repeal, invalidation, unconstitutionality, etc)? It is a general rule that legislation cannot be abrogated by disuse: it must be repealed by a competent legislative body.⁶⁰ In terms of section 172 of the Constitution, the High Court or Supreme Court of Appeal or the Constitutional Court may declare legislation unconstitutional. Such a declaration may have

immediate effect, or may be suspended to give the relevant legislature the opportunity to correct the defect. Earlier legislation may be repealed by implication by later legislation dealing with the same topic if there is a conflict between such legislation. Furthermore, legislation in force when the 1996 Constitution took effect, remains in force until amended or repealed, or declared unconstitutional (item 2(1) Schedule 6 of the 1996 Constitution).

3.145 A court may invalidate subordinate legislation if it is vague, *ultra vires*, etc. Although the grounds for the invalidation of subordinate legislation are dealt with under administrative law, it was initially considered that a new Interpretation Act could at least mention this, since all users of legislation (including the drafters) do not necessarily have a sound knowledge of the rules of administrative law. It was thought that such a provision would serve the purpose of bringing the effect of the demise of legislation to the attention of everybody, as it is not sufficiently clear at present.

(a) Express repeal of legislation

3.146 A *repeal* of legislation or a provision revokes or abrogates an Act or part of an Act.⁶¹ A repeal of legislation may be either express or implied. The *repeal* of a provision of an Act constitutes the amendment of the Act containing it. The current Interpretation Act deals in sections 11 and 12 with repeal of legislation. Section 11 deals with repealed legislation remaining in force until substituted provisions operate, and section 12 deals with the effect of repeal of legislation. Section 11 provides that when a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.⁶²

3.147 The court considered the effect of section 11 in *S v Koopman*.⁶³ The accused in this case had been convicted in a magistrate's court of a contravention of s 122(1)(a) of the Road Traffic Act 29 of 1989 and was sentenced to a fine and in addition it was ordered that his licence be endorsed. On review the question was raised whether the order that the licence be endorsed was legally competent. The reason for the doubt

⁶⁰ *R v Detody* 1926 AD 168.

⁶¹ *Statutory Interpretation* at 251.

⁶² The Australian Acts Interpretation Act provides similarly in section 9: Where an Act repeals in the whole or in part a former Act and substitutes provisions in lieu thereof, the repealed provisions shall remain in force until the substituted provisions come into operation.

⁶³ 1991 (1) SA 474 (NC).

was that the Road Traffic Ordinance 21 of 1966 (C) had been repealed by s 153 of the Road Traffic Act 29 of 1989 with effect from 1 June 1990. Sections 54 to 56 of the Act which provided for the endorsement of licences were however not put into operation at the same time and in place thereof the Minister purported to make certain regulations which were almost a word for word repetition of what appeared in ss 54 to 56. The Court held that the Minister was not entitled in terms of s 132 to make regulations in relation to a matter which had been specifically provided for in the Act. The Court was, however, of the opinion that, although s 153 of the Act repealed the whole of the ordinance, the provisions of the Act relating to the endorsement of licences had not been put into operation and accordingly, in terms of s 11 of the Interpretation Act 33 of 1957, s 146 of the ordinance, which provided for the endorsement of licences, was still in force and the accused's licence could be endorsed in terms thereof.

3.148 In *S v Eley's Bakery (PTY) Ltd and Others*⁶⁴ the court explained that if legislation had been partially repealed, the remaining provisions must be interpreted in their context, which includes the repealed provisions:

As pointed out in *Morake v Dubedube*, 1928 T.P.D. 625 at p. 632, a court, in construing the remaining provisions of a statute of which other provisions have been repealed, must look to the intention in the law as it was originally framed and not in its truncated form, except where the partial repeal is clearly intended to alter the meaning of what is left unrepealed. Although this Notice, following, as it does, the language of the empowering section, is not expressed as a partial repeal of the award, the effect is no different. The definitions formed part of the provisions in which the defined expressions occur, as if incorporated in those provisions, and every provision, including clause 13 (2), had to be read with clause 1, which defined its area of operation. There is no indication in the Notice of an intention to alter the meaning and scope of application of this remaining clause, as ascertained from the definitions and from clause 1, and it has to be read and understood in the light of the definitions and of that clause.

3.149 A legislative drafter sometimes uses a drafting technique known as incorporation by reference.⁶⁵ By this technique, the drafter includes in a statute a reference to a second statute for the purpose of incorporating the terms or effects of the second statute into the first. The material is included without reproducing it word-for-word within the legislative text. The material is not only referenced, it is also incorporated into the text.⁶⁶ The length of a statute is therefore kept down by the drafter using this technique.

⁶⁴ 1969 (3) SA 345 (A) at 349. See also *S v Masondo* 1989 (3) SA 734 (N) at 736.

⁶⁵ "Incorporation of certain statutes by reference" *Texas Legislative Council Drafting Manual* Appendix 9 available at <http://www.tlc.state.tx.us/legal/dm/appendix9.htm> (accessed on 23 January 2006).

⁶⁶ John Mark Keyes "Incorporation By Reference In legislation" *Statute Law Review* 2004 vol 25 p 180.

3.150 The case of *End Conscription Campaign and Another v Minister of Defence and Others*⁶⁷ illustrates the applicable rules on repeal of incorporated provisions. The court noted that s 2(1)(b) of the Defence Act referred to 'white persons as defined in s 1 of the Population Registration Act 30 of 1950'. It was of the view that Parliament presumably found the definition of whites in s 1 of the Population Registration Act adequate for its purposes at that time. Rather than to repeat the substance of that definition in the Defence Act, the Legislature adopted the definition in the Population Registration Act. The applicants argued that s 2(1)(b) of the Defence Act merely refers to the Population Registration Act. The court did not agree and held that the former Act, in so many words, adopted the definition of 'white person' in the definition section and made it its own. The adoption of the definition gave force and content to s 2(1)(b) which it would, but for such incorporation, probably not have had. The court considered whether the passing of the Repeal Act carried with it the repeal of that portion in s 2(1) which adopted the definition of 'white person'. The court explained that the authority frequently referred to in this type of situation is the decision in *Solicitor-General v Malgas*:⁶⁸

It is no doubt a rule of interpretation in England that where the provisions of one statute are incorporated by reference in another, the repeal of the earlier measure does not operate to repeal the incorporated provisions. That of course is logical and correct whenever the intention to incorporate by reference is clear; because the provisions referred to become part of the second statute. They have, in effect, been enacted twice as separate Acts, and the repeal of the one does not affect the operation of the other.

3.151 The court also said in the *End Conscription Campaign* case that it has to be accepted that this rule is but an aid to construction and that the ultimate objective must be to ascertain the intention of the Legislature. The court noted that it was nevertheless an important factor which in the absence of cogent countervailing indications goes far to dispel any notion that the repeal of the earlier statute leads to the repeal from the

⁶⁷ 1993 (1) SA 589 (T).

⁶⁸ 1918 AD 489 at 491. See also *R v Van Vuuren* 1954 (3) SA 619 (E) at 622: "... it is a rule of construction that where any statute incorporates certain provisions in another statute repeal of the second statute does not affect those provisions in the former statute.

Craies on Statute Law (5th Ed.) in the light of leading English cases, some after the enactment of sec. 38 (1) of the English Interpretation Act, 52 and 53 Victoria, C.63 (1889) from which sec. 13 (1) of our Interpretation Act is derived and formulated in almost identical terms, states the rule as follows: -

'Sometimes an Act of Parliament, instead of expressly repeating the words of a section contained in a former Act, merely refers to it, and by relation applies its provisions to some new state of things created by the subsequent Act. In such a case the 'rule of construction is that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second'.'

latest statute of the incorporated provisions. The applicants also contended the repeal of the relevant part of s 2(1)(b) by implication. Referring to *Halsbury's Laws of England*⁶⁹ who says that repeal by implication is not favoured by the Courts for it is to be presumed that Parliament would not intend to effect so important a matter as to repeal a law without expressing its intention to do so, the court pointed out that that an intention to repeal by implication is not readily assumed. The court also considered that it should be also the attitude to be adopted by it.

3.152 The case of *Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others*⁷⁰ is also instructive. This case concerned the allocation of fishing quotas in the transitional period between the operation of the Sea Fishery Act 12 of 1988 and its replacement, the Marine Living Resources Act 18 of 1998. The issue was whether the applications for allocation of quotas for the 1998/99 season had to be considered in terms of Act 18 of 1998 or the guidelines pursuant to Act 12 of 1988. The closing date for applications for quotas occurred before the effective date of Act 18 of 1998. The applications were considered in terms of provisions of Act 18 of 1998 by the Chief Director, Department of Environmental Affairs and Tourism and the newly formed Fisheries Transitional Council. Fifty-nine newcomers to industry were granted quotas and all existing quota holders suffered a 25% reduction in quota allocation. The principle and purpose of Act 18 of 1998 were to transform the fishing industry and ensure access to industry by previously excluded small businesses. The applicants submitted that the first respondent considered the various applications on an illegal basis by having relied on the incorrect legislation. It was necessary to examine the correct legal basis upon which the rights for fishing lobster for the 1998/9 season should have been allocated. The old Act was repealed with the exception of certain provisions which were not relevant to the application. In dealing with the argument that the repeal of the old Act also repealed the guidelines, the applicants submitted that as the intention of the Act was to preserve the quota board for a period of six months, guidelines passed under the old Act would continue to operate insofar as they might be necessary to give content to the applicable provision of the new Act. The Court noted section 11 of the Interpretation Act which provides that repealed law remains in force pending the operation of substituted provisions, and Steyn *Uitleg van Wette* at 175 - 6 which refers

⁶⁹ 4th ed vol 44 para 966.

⁷⁰ 1999 (4) SA 734 (C).

to the rule as set out in *Solicitor-General v Malgas*⁷¹. The court held that the guidelines continued to operate for the period in which the Minister acted as the quota board and exercised its powers pursuant to s 18 of the old Act.

(b) Effect of repeal

3.153 Section 12(1) in the current Act provides as follows:

- (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

3.154 Section 12(2) of the Interpretation Act is a typical transitional provision. All actions, transactions, processes, prosecutions, etc, which were instituted, but not yet completed, in terms of legislation which has meanwhile been repealed, must be completed as if the legislation has not been repealed. It forms a bridge between pending actions and the repealed legislation: the current position is preserved until the pending case is finished.⁷² All court proceedings which were pending when the 1996 Constitution took effect, must be finished in terms of the repealed 1993 Constitution, unless the interests of justice require otherwise (item 17 Schedule 6 of the 1996 Constitution). On the other hand: any unfinished parliamentary matters which were started in terms of the repealed 1993 Constitution, must be finished in terms of the 1996 Constitution (item 5 Schedule 6 of the 1996 Constitution).

3.155 The current section 12(2) (identical to section 8 of the Australian Acts Interpretation Act 1901 and section 43 of the Canadian Interpretation Act of 1985) reads:

- (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –
- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
 - (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
 - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
 - (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

⁷¹ 1918 AD 489 at 491.

⁷² *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A).

- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

3.156 Prof Julien Hofman comments that section 12 really deals with two different situations and it might make the Act clearer if there were two separate sections. He also says that the word 're-enactment' in section 12(1) raises the problem of when a new piece of legislation re-enacts another. The current section 12(1) is difficult to explain and the wording may cause confusion. A typical explanation of this provision reads: "Section 1 of Act ABC of 1995 is a re-enactment of section 3 of Act XYZ of 1980. If section 100 of Act PQR of 1988 refers to section 3 of Act XYZ of 1980, the reference must now be interpreted as a reference to section 1 of Act ABC of 1995."

3.157 The case of *Berman Brothers (Pty) Ltd v Sodastream Ltd And Another*⁷³ illustrates the application of section 12(1) of the Interpretation Act. The respondents contended that in terms of s 12(1) of the Interpretation Act the reference in the definition of "trade mark" in s 1 of the Merchandise Marks Act to the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 must be construed as a reference to the Trade Marks Act 62 of 1963. Appellant, on the other hand, contended that s 12(1) did not apply. The court had no doubt that respondents' contention was the correct one, saying that Act 62 of 1963 repealed so much of Act 9 of 1916 as related to trade marks and replaced what had been repealed with its own provisions. It was argued by appellant's counsel that the provisions of s 12(1) did not apply as there was no "provision" of the 1916 Act which was re-enacted in the 1963 Act and which was referred to in the Merchandise Marks Act: s 82 of the Trade Marks Act of 1963 repealed the 1916 Act in its entirety, in so far as it related to trade marks. The court held that in so far as it may suggest that s 12(1) did not apply where the repealed provision forms part of an Act, or portion of an Act, which has been repealed and replaced in its entirety the argument was clearly wrong. The court considered that the argument may, however, merely mean that there had not been a repeal and re-enactment "with or without modifications" of a provision (or provisions) of the 1916 Act by the 1963 Act.

3.158 The court noted in *Berman Brothers (Pty) Ltd v Sodastream Ltd And Another* that the reference in the Merchandise Marks Act, under the definition of "trade mark",

⁷³ 1986 (3) SA 209 (A).

to the Act of 1916 relates to a trade mark registered in the register of trade marks. There are differences between the provisions of the 1916 Act relating to trade marks and those of the 1963 Act. And in this connection appellant's counsel emphasized in particular the fact that the definition of "trade mark" had been widened in the 1963 Act to include container marks and marks in respect of services. The court assumed in appellant's favour that the reference in the Merchandise Marks Act comprehended the definition of "trade mark" in the Act of 1916 and that, therefore, the new definition of "trade mark" in the 1963 Act was relevant to the enquiry. The question then was whether or not, bearing in mind these differences, there had been a re-enactment with modifications of the relevant provisions of the 1916 Act. In *D v Minister of the Interior*⁷⁴ held that in this context the word "modifications":

"is not limited to the action of limiting or qualifying or toning down or restricting any statement; it can mean to make partial changes or to make changes in respect of certain qualities or to alter or vary without radical transformation. Insofar as the meaning of the word 'modifications' in s 12(1) of the Interpretation Act is concerned it seems to me that Williamson J was correct when he held that it must mean any alteration which does not change the essential nature or character of the repealed provisions."

3.159 Applying the test in *Berman Brothers* the question was whether or not the relevant provisions of the 1963 Act, in repealing and re-enacting with alterations the corresponding provisions of the 1916 Act, changed "the essential nature or character" of the repealed provisions. In the court's opinion, they did not. In particular, the court did not think that the inclusion of container marks and service marks within the definition of "trade mark" changed the essential nature and character of a trade mark.

3.160 Repeal and re-enactment of legislation was also at issue in *Inter Aviation Services (Pty) Ltd T/A Interair V Chairman, International Air Services Council, and Others*.⁷⁵ The crucial terms in this case were 'operate' and 'international air service'. 'Operate' is not defined in s 1 of the Air Services Licensing Act 115 of 1990. 'International air service' is defined in s 1(xiii) to mean 'an air service which passes through the air space over the territory of the Republic and at least one other country'. 'Air service' means 'an air service as defined in s 1 of the Air Services Licensing Act 115 of 1990'. As originally enacted in s 1 of Act 115 of 1990 'air service' was defined to mean 'any service operated by means of an aircraft for reward'. However, the definition of 'air service' was substituted by s 1 of the Air Services Licensing Amendment Act 83 of 1995. In terms of the amendment it means 'any service operated

⁷⁴ 1962 (1) SA 655 (T) at 659D.

⁷⁵ 2002 (6) SA 51 (T) at 58.

by means of an aircraft for reward, but shall not include, inter alia, the hiring out of an aircraft together with the crew to a licensee. Relying on *Solicitor-General v Malgas*⁷⁶ it was contended that the original definition of 'air service' in s 1 of the 1990 Act continued to be operative, despite the provisions of s 1 of Act 83 of 1995. The court noted that the passage from the *Malgas* case relied upon related to the repeal of an earlier statutory provision, and did not deal with the repeal and re-enactment thereof. The court considered that section 12(1) of the Interpretation Act 33 of 1957 was applicable. Since no contrary intention appears, the amended definition of 'air service' in s 1 of Act 83 of 1995 applied to s 1(ii) of the Act.

3.161 In *Garydale Estate and Investment Co (Pty) Ltd v Johannesburg Western Rent Board*⁷⁷ it was held that the rights referred to in section 12(2)(c) of the current Act are rights derived from legislation only, and not any rights stemming from common-law.

3.162 If enabling legislation is repealed, all delegated legislation issued in terms of such enabling legislation also ceases to exist,⁷⁸ unless new legislation expressly provides otherwise (eg item 24(3) Schedule 6 of the 1996 Constitution, which provides that the regulations made in terms of the repealed 1993 Constitution remain in force). In view of the chaos which resulted in the case of *Pharmaceutical Manufacturers Association of SA: in re: ex parte President of the Republic of South Africa*⁷⁹ the proposed legislation should deal with the effect of repeal of enabling legislation on subordinate legislation.

3.163 The Australian Acts Interpretation Act 1901 is very similar to section 12 of the South African Interpretation Act and reads as follows:

7 Effect of repeal of Act

The repeal of an Act or part thereof by which a previous Act or part thereof was repealed shall not have the effect of reviving such last-mentioned Act or part thereof without express words.

8. Effect of repeal

Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:

⁷⁶ 1918 AD 489 at 491.

⁷⁷ 1957 (2) SA 466 (T).

⁷⁸ *Hatch v Koopoomal* 1936 AD 197.

⁷⁹ 2000 2 SA 674 (CC).

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed; or
- (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
- (d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any Act so repealed; or
- (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

8B. Effect of expiration of Act

Where an Act or a part of an Act expires, lapses or otherwise ceases to have effect, sections 7 and 8 apply as if the Act or part had been repealed by another Act.

10. References to amended or re-enacted Acts Where an Act contains a reference to a short title that is or was provided by law for the citation of another Act as originally enacted, or of another Act as amended, then, except so far as the contrary intention appears:

- (a) the reference shall be construed as a reference to that other Act as originally enacted and as amended from time to time; and
- (b) where that other Act has been repealed and re-enacted, with or without modifications, the reference shall be construed as including a reference to the re-enacted Act as originally enacted and as amended from time to time and, where, in connection with that reference, particular provisions of the repealed Act are referred to, being provisions to which provisions of the re-enacted Act correspond, the reference to those particular provisions shall be construed as including a reference to those corresponding provisions.

11. Expiration of Act

The expiration of an Act shall not affect any civil proceeding previously commenced under such Act, but every such proceeding may be continued and everything in relation thereto be done in all respects as if the Act continued in force.

3.164 The corresponding provision in the New Zealand Interpretation Act provides as follows:

22 References to repealed enactment

- (1) The repeal of an enactment does not affect an enactment in which the repealed enactment is applied, incorporated, or referred to.
- (2) A reference in an enactment to a repealed enactment is a reference to an enactment that, with or without modification, replaces, or that corresponds to, the enactment repealed.

(3) Subsection (1) is subject to subsection (2).

3.165 The Canadian federal Interpretation Act provides in section 44(h) that where a former enactment is repealed and a new enactment is substituted therefore, any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

3.166 Section 23 of the New Zealand Interpretation Act provides that an amending enactment is part of the enactment that it amends. The effect of this section is two-fold. First, it is not necessary to state that an amending Act is part of another Act or that amending regulations are part of other regulations. Secondly, it is no longer necessary, when repealing a principal Act, separately to repeal Acts that have amended the principal Act or, when revoking principal regulations, separately to revoke the amending regulations.

3.167 The New Zealand Interpretation Act deals as follows with repeals:

17 Effect of repeal generally

- (1) The repeal of an enactment does not affect-
- (a) the validity, invalidity, effect, or consequences of anything done or suffered:
 - (b) an existing right, interest, title, immunity, or duty:
 - (c) an existing status or capacity:
 - (d) amendment made by the enactment to another enactment:
 - (e) the previous operation of the enactment or anything done or suffered under it.
- (2) The repeal of an enactment does not revive-
- (a) an enactment that has been repealed or a rule of law that has been abolished:
 - (b) any other thing that is not in force or existing at the time the repeal takes effect.

3.168 It is explained that it is usual for a new Act to repeal an existing Act that it replaces, or a new Act may simply repeal an existing Act without replacing it.⁸⁰ Section 17 of the New Zealand Interpretation Act generally sets out the effect of repeals. It explains what effect the repeal has on existing situations and things that have been done under the repealed Act. One particular effect of section 17 is that the repeal of an Act will not automatically repeal any amendment made by that Act to some other Act (see section 17(1)(d)). This avoids the need for savings provisions, but amendments made by an Act to other Acts that are not intended to survive a repeal will have to be considered separately and specific provision will have to be made for them.

3.169 Section 18 of the New Zealand Interpretation Act deals with the effect of repeal of legislation on the enforcement of existing rights. It is explained that section 18 does not avoid the need for detailed transitional provisions to be included in legislation whenever existing law is changed or replaced and things that had been commenced under an old regime are intended to be completed under that regime, rather than the new regime.⁸¹ Section 18 is merely a backstop provision. The application of section 18 was considered by both the New Zealand High Court and the Court of Appeal in *Foodstuffs (Auckland) Ltd v Commerce Commission*.⁸² In that case, Progressive Enterprises Ltd (Progressive) had applied to the Commerce Commission for clearance to acquire Woolworths New Zealand before the commencement of the Commerce Amendment Act 2001. As the 2001 Act set out a stricter test for competition, the issue was whether the Commerce Commission should, in determining the application, apply the test in force at the time the application was made or the new test enacted by the 2001 Act. The High Court had held that as Progressive's application had been made before the new test came into force, it should be determined under the test in force at the time of the application. The Court of Appeal reversed that decision and held that the Commerce Commission should have applied the new test. In reaching its decision, the Court of Appeal held that section 18 should not be read disjunctively. The

⁸⁰ See *Guidelines on Process & Content of Legislation* available at http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html (accessed on 23 January 2006).

⁸¹ *18 Effect of repeal on enforcement of existing rights*

- (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
- (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

⁸² [2002] 1 NZLR 353.

reference to "completion of a matter or thing" in section 18 must be read to relate to an existing right, interest, title, immunity, or duty. In the context of that case, the Court of Appeal held that the interest Progressive had in the determination of its application under the Commerce Act 1986 was not a right or interest for the purposes of section 18.

3.170 In the Court of Appeal (and also in the High Court), the judgment turned on whether section 18 applied and, in particular, whether the clearance application was a proceeding relating to an existing right or interest to which the old law would apply. When the case reached the Privy Council, however, the judgment focused on the meaning of the term "proceedings" in section 26(b) of the Commerce Amendment Act 2001.⁸³ That section provides that nothing in the 2001 Act "affects any proceedings commenced before the commencement of this Act". The Privy Council held that, in this context, "proceedings" are not limited to court proceedings and include the clearance process as a single statutory proceeding involving the Commerce Commission and potentially, on appeal, the High Court or Court of Appeal.⁸⁴ Given that the Privy Council judgment did not address the same grounds covered in the decision of the Court of Appeal, the status of the Court of Appeal's interpretation of section 18 is unclear.

3.171 Section 19 of the New Zealand Interpretation Act confirms that the repeal of an enactment does not prevent prosecutions from being brought under the repealed provision as long as the offence or breach was committed before the repeal.⁸⁵ It

⁸³ See *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* (2002) 7 NZBLC 103 available at [http://www.privy-council.org.uk/files/other/PROGRE~2%20\(No.%2025%20rtf\).rtf](http://www.privy-council.org.uk/files/other/PROGRE~2%20(No.%2025%20rtf).rtf) (accessed on 21 September 2006).

⁸⁴ "37. In the light of all these points their Lordships consider that Mr Sumption was right when he argued that the correct view is that Parliament saw the clearance process as a single statutory proceeding involving the Commission and potentially the High Court and the Court of Appeal. Parliament can hardly have intended that there could be an application on one basis and a decision on another. An orderly, logical and fair transition to the new test is achieved by reading the word "proceedings" in section 26(b) as including applications for clearance. Not to do so is apt to produce the opposite result, namely a disorderly, illogical and unfair transition. The word "proceedings" is, in its context, perfectly capable of including clearance applications and in their Lordships' opinion, for the reasons given, it must have been used by Parliament in that sense rather than in a more limited sense. Hence the old test applied to Progressive's application for clearance as a proceeding commenced before the commencement of the 2001 Act. The clearance issued by the Commission on 13th July 2001 was accordingly valid."

⁸⁵ 19 Effect of repeal on prior offences and breaches of enactments

(1) The repeal of an enactment does not affect a liability to a penalty for an offence or for a breach of an enactment committed before the repeal.

should be noted that section 19 is slightly broader in effect than the corresponding provision (section 20(h)) of the Acts Interpretation Act 1924) as it expressly refers to the "investigation" of the offence or breach of an enactment. This change was made in light of the decision in *Comptroller of Customs v ML Hannigan*⁸⁶ where the High Court held that section 20(h) did not apply to the investigative process.

3.172 Sections 20⁸⁷ and 21⁸⁸ of the New Zealand Interpretation Act of 1999 provide for the continuation of subordinate legislation (for example, regulations, notices, orders, and rules) made, or acts done, under a repealed enactment.⁸⁹ The subordinate legislation, or the act done, continues as if it had been made under a later enactment that *corresponds to* the repealed enactment. The notion that the later enactment must correspond to the repealed enactment is carried over from sections 20(d) and 20A of the Acts Interpretation Act 1924. The term "corresponds" has been retained, despite the recommendation of the New Zealand Law Commission that it be replaced with the term "substitution", because the meaning of "corresponds" is well settled under the

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- (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of –
 - (a) investigating the offence or breach:
 - (b) commencing or completing proceedings for the offence or breach:
 - (c) imposing a penalty for the offence or breach.

⁸⁶ High Court Auckland M 697/97 25 September 1997.

⁸⁷ 20. Enactments made under repealed legislation to have continuing effect

- (1) An enactment made under a repealed enactment, and that is in force immediately before that repeal, continues in force as if it had been made under any other enactment-
 - (a) that, with or without modification, replaces, or that corresponds to, the enactment repealed; and
 - (b) under which it could be made.
- (2) An enactment that continues in force may be amended or revoked as if it had been made under the enactment that replaces, or that corresponds to, the repealed enactment.

⁸⁸ 21. Powers exercised under repealed legislation to have continuing effect

Anything done in the exercise of a power under a repealed enactment, and that is in effect immediately before that repeal, continues to have effect as if it had been exercised under any other enactment-

- (a) that, with or without modification, replaces, or that corresponds to, the enactment repealed; and
- (b) under which the power could be exercised.

⁸⁹ See http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/ chapter_3.html (accessed on 23 February 2004).

common law. In *Re Eskay Metalware Limited (in liquidation)*⁹⁰ the Court of Appeal held that the new provision must be of the same character as its predecessor and must have the same kind of function. The new provision does not need to be identical in scope but it must deal with a subject-matter that is essentially the same as that of its predecessor. If the new provision is directed to the same end, there need not be precise correspondence in the manner of dealing with the subject-matter.

(c) Implied repeal

3.173 As pointed out earlier, express repeal is not the only way legislation comes to end. Implied repeal is dealt with under the common-law presumption that the legislature does not intend to change the existing law more than is necessary (including related case law). In order to explain this rule and in view of the plethora of legislation emanating from the large number of legislative bodies in South Africa, implied repeal should be dealt with in a provision in the new Act. Judge Budlender explained implied repeal of legislation in *Rates Action Group v City Of Cape Town*⁹¹ as follows:

[32] As will appear below, the City relied on the LGTA [Local Government: Municipal Systems Act 32 of 2000] for much of what it did. Mr Abel, for the applicant, submitted that the financial provisions of the LGTA must be read to have been impliedly repealed by the Systems Act because the Systems Act was the later Act. On this basis, he submitted that the Council was obliged to apply the Systems Act, and not the LGTA, when it imposed the charges in issue. In this regard, he relied on the principle enunciated in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397:

'There are many illustrations in the books of the repeal by implication of earlier statutes by later ones, for subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. Such an implied repeal will arise wherever the contents and operation of a later Act are repugnant to or cannot be harmonised with those of an earlier one.'

[33] There are three difficulties with this submission.

[34] In the first place, it is not altogether clear which of the Acts can properly be described as the later statute. Parliament first passed the Systems Act and then passed the Local Government Municipal Structures Amendment Act 33 of 2000, which extended the life of the LGTA. Parliament must have known that it had just passed an Act dealing with municipal charges. Despite this, it passed Act 33 of 2000, which further extended the life of the financial provisions of the LGTA. The fact that the President chose to bring the Systems Act into operation a few months before the extension of the LGTA financial provisions, does not detract from the fact that, when Parliament extended the life of the LGTA, it had already enacted the Systems Act.

⁹⁰ [1978] 2 NZLR 46.

⁹¹ 2004 (5) SA 545 (C) at 557C – 559I.

[35] Subsequently, the Systems Act was amended by the Local Government Laws Amendment Act 51 of 2002, which inserted s 75A in the Systems Act. Section 75A contains what is described in the heading of the section as a 'general power to levy and recover fees, charges and tariffs'.

[36] It is clear that we are dealing here with a series of more or less simultaneous statutes and amendments which 'leapfrog' each other. It strikes me as artificial to rely on which principal statute came before another principal statute, or which amendment to one statute came before a different principal statute. On the logic of the applicant's argument, when Parliament extended the financial provisions of the LGTA by passing Act 33 of 2000, it repealed or amended part of the Systems Act, which it had just passed. That conclusion would be far-fetched.

[37] Secondly, the statement in the *New Modderfontein* case that a later statute is taken to have repealed an earlier statute which is inconsistent with or repugnant to it, is not a mechanical rule of interpretation. It is an approach which is derived from the fundamental purpose of interpretation, namely, to seek to give effect to the intentions of the Legislature. When the Legislature passes an Act which is inconsistent with or repugnant to an earlier Act, one can generally draw the inference that the Legislature intended to reverse or repeal the earlier statute.

[38] That logic does not apply to two Acts which are enacted more or less simultaneously. Under those circumstances, the inference of an intention to repeal or amend simply can not arise, except where it appears very clearly from the language used. This must apply both to the extension of the life of the financial provisions of the LGTA by Act 33 of 2000, and to the enactment of s 75A of the Systems Act, which took place only a year after the President had brought into operation the extension of the life of the financial provisions of the LGTA.

[39] It seems to me that, when Parliament, at about the same time, enacts two pieces of legislation which deal with a similar or related matter, it must be taken to have intended both of them to have effect, unless the contrary indication clearly appears. This is all the more so in relation to the LGTA, given that this was the second time that Parliament had deliberately extended the life of the provisions in question. If one asks the real question, which is what the intention of the Legislature was, one is driven to the conclusion that it was that both of these laws should have effect.

[40] Thirdly, this conclusion is strengthened by the overall scheme of the suite of legislation dealing with local government matters. . . .

[44] The legislative scheme was thus the following. At the time relevant to these proceedings, we were in the second of the three phases which constitute the legislative transition. The Structures Act and the Systems Act had already been enacted, and most of the provisions of the LGTA had consequently been repealed, having served their transitional purpose. However, further legislation, dealing with municipal finance and property rates, had yet to be enacted. The financial provisions of the LGTA had therefore been expressly saved. It must therefore have been the intention of the Legislature that, during this phase of the transition, the Systems Act and Structures Act were to exist alongside the financial provisions of the LGTA. There is nothing about this which strikes me as either unlikely or irrational, or as indicating that Parliament 'nodded', not once but twice, when it extended the relevant provisions of the LGTA.

[45] When the third phase of the legislative transitional process has been completed, there will no longer be any need for the transitional Act, the LGTA. For this reason, s 179(1) of the Local Government: Municipal Finance Act repeals s 10G of the LGTA. However, in s 179(2) of that Act, Parliament has again (for the third time) extended the life of the provisions in question in this case. It provides that, despite the repeal of s 10G, the provisions in ss (6), (6A) and (7) of s 10G remain in force until the legislation envisaged in s 229(2)(b) of the Constitution is enacted. Section 229(2)(b) envisages national legislation regulating the power of a municipality to impose rates on property,

surcharges on fees for municipal services, and other taxes, rates or levies. The Local Government: Municipal Rates Act is plainly such legislation.

[46] It follows that when the latter legislation has been enacted, the relevant provisions of the LGTA will finally fall away, having served their purpose. Their life will by then have been extended three times by Parliament. It would be quite extraordinary if in the midst of that process these provisions had impliedly been repealed by the Systems Act, but Parliament had continued repeatedly to extend their life.

[47] It seems to me that under these circumstances - two Acts enacted at about the same time, as part of a broader legislative scheme - one must accept that Parliament intended both of them to have effect. The task of the interpreter is then to seek to harmonise the two Acts in such a way that both of them can be given effect.

3.174 Section 8A of the Australian Acts Interpretation Act 1901 states as follows:

8A. Implied repeals etc.

A reference in section 7 or 8 to the repeal of an Act or of a part of an Act includes a reference to:

- (a) a repeal effected by implication;
- (b) the abrogation or limitation of the effect of the Act or part; and
- (c) the exclusion of the application of the Act or part to any person, subject-matter or circumstance.

3.175 Sections 147 to 150 of the South African Constitution are also relevant:

147 Other conflicts

(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to-

- (a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;
- (b) national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or
- (c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation referred to in section 44 (2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

148 Conflicts that cannot be resolved

If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

149 Status of legislation that does not prevail

A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the

conflict remains.

150 Interpretation of conflicts

When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

3.176 Professor Lourens du Plessis explains that section 149, irrespective of exactly how extensively it is read, has a far-reaching impact on the common law regarding the non-specific repeal of subordinate legislation, for it pertains to an appreciable volume of statute law.⁹² He notes that there is a limit to the operation of this section, though. He states that its application is dependent on a decision of a court of law to the effect that legislation X prevails over legislation Y. He points out that an apparent inconsistency between X and Y cannot, of itself, suspend the operation of Y in accordance with section 149. Judicial intervention is a prerequisite. Prior to such intervention, both X and Y are operative, the conflict notwithstanding. If a court cannot resolve a dispute concerning a conflict between national and provincial legislation, the former prevails over the latter.

3.177 Implied repeal of legislation may occur when courts make use of the mechanism of reading down or reading in of legislation.⁹³ The Constitutional Court explained *reading in* and *reading down* as follows in *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another*:⁹⁴

Though this is not the place for a semantic discourse, it should be observed that the technical sense in which the term “reading down” is ordinarily used by this Court, is a method of constitutional construction whereby a more limited meaning is given to a statutory provision, where it is reasonably possible to do so, in order that the provision in question may not be inconsistent with the Constitution; whereas the term “reading in” is used to connote a possible constitutional remedy following on a finding of the constitutional invalidity of such provision.⁹⁵

⁹² “Interpretation of Statutes and the Constitution” in Butterworths’ *Bill of Rights Compendium* at 2C9.

⁹³ See also Du Plessis “Interpretation of Statutes and the Constitution” *Bill of Rights Compendium* 2C13, who concludes that reading in conformity with the Constitution can, first, require a narrowing of the scope of a statutory provision, and the canons of restrictive statutory interpretation could (but need not) be used to this end. He notes secondly, that such reading can consist of expanding the scope of a statutory provision and, to this end, the canons of extensive interpretation could (but also need not) be invoked. He remarks thirdly, that reading in conformity with the Constitution can amount to a “reading –in”.

⁹⁴ 2002 (7) BCLR 663 (CC) see the footnote to par 21.

⁹⁵ The Court noted the cases of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) para 23–4; and *Investigating Directorate: Serious Economic Offences and Others*

3.178 The Constitutional Court noted in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*⁹⁶ that, like severance, reading down of legislation is an important mechanism of judicial restraint, which permits constitutionality to be upheld at minimum legislative and social cost. The Constitutional Court noted in *Coetzee v Government of the RSA*⁹⁷ that section 232(3) of the Interim Constitution would permit a pared-down construction of legislation so as to rescue it from being declared invalid; it would not require a restricted interpretation of fundamental rights so as it interfere as little as possible with pre-existing law. The Court said it would not be the function of the Court to fill in lacunae in statutes that might not have been visible or regarded as legally significant in the era when parliamentary legislation could not be challenged, but which would become glaringly obvious in the age of constitutional rights; the requirement of reading down would not be an authorisation for reading in. The Court explained that section 232(3) of the Interim Constitution provided that if a restricted interpretation of the law concerned is possible, which would save it from making unconstitutional inroads into fundamental rights, then such interpretation must be favoured, even if it went against the prima facie meaning of the words in question.⁹⁸ This section gives expression to the principle well-known in other jurisdictions as “reading down”. The Court pointed out that the Canadian Professor Peter W Hogg points out that reading down allows the bulk of the legislative policy to be accomplished, while trimming off those applications that are constitutionally bad. Like severance, reading down mitigates the impact of judicial review, but reading down achieves its remedial purpose solely by the interpretation of the challenged statute, whereas severance involves holding part of the statute to be invalid. The Court noted that it is still primarily the task of Parliament, not the Constitutional Court, to adapt the laws of the country to the new democratic and rights-based dispensation.⁹⁹

v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) par a 22-5.

⁹⁶ 1995 (10) BCLR 1289 (CC).

⁹⁷ 1995 (10) BCLR 1382 & 1995 (4) SA 631 (CC).

⁹⁸ Page 1414 of 1995 (10) BCLR 1382 (CC).

⁹⁹ See also *S v Bhulwana*; *S v Gwadiso* 1995 (12) BCLR 1579 (CC) at par 26 – 29, *Bernstein and Others v Bester* 1996 4 BCLR 449 (CC) at par 59 and *Case and Another v Minister of Safety and Security* 1996 5 BCLR 609 (CC) at par 76 – 79: “Reading down . . . is appropriate only where the language of the provision will fairly bear the restricted reading. Otherwise, it amounts to naked judicial law-making.” In *Mistry v Interim National Medical and dental Council of SA* 1998 7 BCLR 880 (CC) at par 25 the Constitutional Court noted that it was asked in effect not only to read down the

3.179 The Constitutional Court also considered “reading in” in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister Home Affairs*.¹⁰⁰ The Court stated that the question of remedial precision is directly related to respect for the role of the legislature. The Court noted that unless “reading in” can be effected with precision, the court runs the risk of becoming the legislative drafter and accordingly displacing the legislature from its constitutional position. The Court noted that in this case there is no such remedial precision, and that were the court to read the reference to “spouse” to mean “spouse or same-sex life partner,” this would have the effect, not merely of extending section 25(5) but also of affecting the meaning of section 25(6) and section 30(2)(e):

[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.

[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading-in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading-in would add to the group already enjoying the benefits. Where reading-in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.

[76] It should also be borne in mind that whether the remedy a court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, ‘fine-tuning’ them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.

3.180 The Court stated the following in the case of *S v Manamela (Director-General*

inspectors’ powers of search and seizure under the Medicines Act but to read down their general functions as well, that is, to re-write their mandate, and that the court cannot do this. The Court held that even if the mandate were to be narrowed, it would be the responsibility of the legislature to enact legislation that embodied appropriate safeguards, not the duty of the Court to read such safeguards in.

¹⁰⁰ 1999 3 BCLR 280 (CC) at 295.

*of Justice Intervening)*¹⁰¹

[54] The 1996 Constitution is different. It also makes provision for a competent court to “grant appropriate relief, including a declaration of rights” to anyone whose rights under the Bill of Rights have been infringed or threatened. It does not, however, contain specific provisions equivalent to sections 98(5), (6) and (7) which dealt with the Court’s powers in cases where laws or executive or administrative acts or conduct were found to be inconsistent with the interim Constitution. Nor are there provisions in the 1996 Constitution similar to sections 35(2) and 235(3) of the interim Constitution. Instead section 172(1) of the 1996 Constitution now affords the courts greater flexibility. It empowers and obliges a court in broad terms to make any order that is “just and equitable” if any law or conduct is declared inconsistent with the Constitution. The section provides:

“Powers of courts in constitutional matters

172(1) When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[55] In the Gay and Lesbian Immigration case Ackermann J held that

“The Court’s obligation to provide appropriate relief must be read together with section 172(1)(b) which requires the Court to make an order which is just and equitable.”

He went on to hold that, depending on the circumstances, reading in could be an appropriate form of relief, and that

“The real question is whether, in the circumstances of the present matter, reading in would be just and equitable and an appropriate remedy.”

The reference to “just and equitable” in this passage is clearly a reference to the court’s powers under section 172(1)(b) to which he had previously referred.

...

[57] We would add that reading in is not necessarily confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right. Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential. There is no single formula. In

¹⁰¹ 2000 (5) BCLR 491 (CC).at page 514.

appropriate cases it may be necessary to delete words from a provision and read in other words to make the provision consistent with the Constitution, where the deletion of the words alone would result in the declaration of invalidity to an extent greater than that required by the Constitution. The considerations referred to in the *Gay and Lesbian Immigration* case would then have to be borne in mind. But if they are met there is no reason why this should not be done. (Footnote omitted)

3.181 In *Minister of Health v New Clicks South Africa (Pty) Ltd*¹⁰² which dealt with regulations introducing a transparent pricing system for medicines and Scheduled substances the Constitutional Court remarked as follows on severability and the reading in of words into regulations:

[14] . . . the Court has unanimously accepted the validity of a single exit price being established for medicines sold in South Africa, and the validity of the regulatory structure put in place for its realization by the Minister on the recommendation of the Pricing Committee. Although the regulatory scheme as a whole passes muster, there are a number of detailed provisions that fall short of the requirements of the Medicines Act. In most cases the Court has decided that the defects in the regulations can be cured by severance of certain words and/or reading in other words. In other cases the defects relate to relatively unimportant aspects of the scheme, which could continue to function while the defects are being corrected. Special attention, however, needs to be given to the invalidation of regulations 10 and 11 on the ground that the dispensing fee arrived at is not appropriate.

[15] It is necessary to consider whether because of the defects in regulations 10 and 11 the entire scheme fails, or whether the remainder of the regulations can stand without a dispensing fee for pharmacists. Whilst recognising that severability in constitutional cases may often require special treatment, this Court has applied the conventional test for severance laid down in *Johannesburg City Council v Chesterfield House (Pty) Ltd*

‘where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute.’

[16] Bearing in mind the important constitutional purpose served by the pricing system, we are satisfied that the correct remedy in the present case is to preserve as much of the scheme as is possible, as long as this can be done in a manner that serves the main object of section 22G of the Medicines Act. The main object of section 22G is to make medicines more accessible and more affordable by means of a transparent pricing system. Regulations 10 and 11 deal with the dispensing fee which is an important part of the pricing system, but what remains if these regulations are declared to be invalid, will not be inconsistent with the main object of the legislation. What remains will be a system which makes provision for a single exit price for each medicine and Scheduled substance, which must be the only price at which manufacturers may sell that medicine. Wholesalers, distributors and retailers may not sell medicine at a price higher than the single exit price. Wholesalers and distributors may charge only an agreed logistics fee subject to the controls imposed by the regulations. That is a coherent system, consistent with the Medicines Act, that gives effect to the main object of section 22G.

. . .

[20]. . . The effect of this Court’s ruling is that portions of the published regulations no

¹⁰² 2006 (1) BCLR 1 (CC). Also available at <http://www.constitutionalcourt.org.za/site/pharm.html> (accessed on 10 October 2005).

longer accurately reflect the legally valid content of the regulations as the Court orders that certain words be severed, and in some cases, that other words be read into the regulations. . . .

3.182 In *Fourie and Another v Minister of Home Affairs and Others*¹⁰³ Cameron JA considered constitutional interpretation and reading in:

. . . [26] In their founding affidavit the appellants ask the Court to develop the common law to recognise same-sex marriages. Their notice of motion seeks to cast this relief by way of a declarator that their (proposed) marriage be recognised as a valid marriage in terms of the Marriage Act 25 of 1961, and that the Minister and Director-General of Home Affairs be directed to register their marriage in terms of the Marriage Act and the Identification Act 68 of 1997. In the High Court, Roux J concluded that the provisions of the Marriage Act were 'peremptory' and that they constituted an obstacle to granting the appellants any relief. This is not correct.

[27] The Marriage Act contains no definition of marriage. It was enacted on the assumption - unquestioned at the time - that the common-law definition of marriage applied only to opposite-sex marriages. That definition underlies the statute. This Court has now developed it to encompass same-sex marriages. The impediment the statute presents to the broader relief the appellants seek is only partial. This lies in the fact that s 30(1) prescribes a default - but not exclusive - marriage formula. That formula must be used by (a) marriage officers who are not ministers of religion or persons holding a 'responsible position' in a religious denomination or organisation; and (b) marriage officers who are ministers of religion or who do hold such a position, but whose marriage formulae have not received ministerial approval. The statute requires that such marriage officers 'shall put' the default formula to the couple, and it requires each to answer the question whether they accept the other 'as your lawful wife (or husband)'. The statute empowers the Minister however to approve religious formulae that differ from the default formula.

[28] Farlam JA suggests that we can change even the default formula by a process of innovative and 'updating' statutory interpretation by reading 'wife (or husband)' in this provision as 'spouse'. I cannot agree. There are two principal reasons. The first is that I think this would go radically further than the process of statutory interpretation can appropriately countenance. The second is that in my view the particular words, because of their nature and the role the statute assigns to them, are not susceptible to the suggested interpretative process.

[29] First, as Ackermann J explained in the Home Affairs case, there is 'a clear distinction' between interpreting legislation in conformity with the Constitution and its values, and granting the constitutional remedies of reading in or severance. The two processes are 'fundamentally different':

'The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.'

[30] That it is not always easy to determine 'what the text is reasonably capable of meaning' emerges from *Daniels v Campbell NO and Others*. . . .

[31] The majority in *Daniels* assigned a broad meaning to a word whose purport was not certain. It applied the constitutionally interpretative approach. This involved attributing a wide meaning to a word, without changing the word. The approach suggested by Farlam JA goes radically further. It does not assign a broad meaning to a

¹⁰³

2005 (3) SA 429 (SCA).

contested word or phrase, but substitutes a phrase with an entirely different word. In the circumstances of this case I do not consider that this is permissible. Radically innovative statutory interpretations of this kind were devised, as the authority Farlam JA quotes shows, for jurisdictions which do not, or at the time did not, have the ample remedies of constitutionalism. Under our Constitution, the proper interpretative approach is plain. If statutory wording cannot reasonably bear the meaning that constitutional validity requires, then it must be declared invalid and the 'reading in' remedy adopted.

[32] . . .

[33] In my view, where the Legislature prescribes a formula of this kind, its words cannot be substituted by 'updating' interpretation. If the Court, and not the Legislature, is to make a constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of 'reading in'. That remedy is appropriate because it changes in a permissible manner the nature of the action the statute requires, without purporting merely to interpret its words. . . .

[44] The reference in the judgment of Farlam JA to the recent decision of the Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* (15 October 2004)¹⁰⁴ does not, with respect, take the matter any further. *Zondi* re-emphasises three clear strands of the remedial jurisprudence of the Constitutional Court. The first is that the Court 'should be slow to make those choices which are primarily choices suitable for the Legislature'. The second is that, for this reason, the Court frequently suspends an order of statutory invalidity - as it did in *Zondi* - in order to give the Legislature the opportunity to fulfil its particular function of matching legislation with constitutional obligation.

[45] What my colleague's allusion to *Zondi* leaves out of account is that the case itself illustrates a third, equally vital, strand of Constitutional Court remedial jurisprudence. This is the 'important principle of constitutional adjudication that successful litigants should be awarded relief'. In *Dawood*, that had the consequence that (a) the provisions of the statute at issue were declared invalid; (b) the order of invalidity was suspended to enable Parliament to do what was constitutionally necessary; but (c) an extensive order was also granted, requiring Home Affairs officials in the interim to act in accordance with the principles of the judgment, pending the legislative modifications. In *Zondi*, too, an order of invalidity was issued and suspended, but extensive remedial assistance was granted.

[46] In my respectful view the appellants in this case are entitled to no less. Our order developing the common law trenches on no statutory provision. Deference to the particular functions and responsibilities of the Legislature does not therefore require that we suspend it. Instead, the appellants are entitled to appropriate relief. They should be awarded the benefit of a declaration regarding the common law of marriage that takes effect immediately. . . .

3.183 In *Minister of Home Affairs and Another v Fourie and Others*¹⁰⁵ Sachs J noted the following on *reading in* and the appropriate remedy to be granted in the case:

[32] . . . both judgments were in agreement that the SCA could and should rule that the common law definition discriminated unfairly against same-sex couples. The majority judgment by Cameron JA held, however, that although the common law definition should be developed so as to embrace same-sex couples, the Marriage Act could not be read in such a way as to include them. In the result, the only way the parties could

¹⁰⁴ *Zondi v Mec for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).

¹⁰⁵ 2006 (1) SA 524 (CC).

marry would be under the auspices of a religious body that recognised same-sex marriages, and whose marriage formula was approved by the Minister of Home Affairs. The right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act. The minority judgment of Farlam JA, on the other hand, held both that the common law should be developed and that the Marriage Act could and should be read there and then in updated form so as to permit same-sex couples to pronounce the vows. In his view, however, the development of the common law to bring it into line with the Constitution should be suspended to enable Parliament to enact appropriate legislation. In support of an order of suspension he pointed out that the SALRC had indicated that there were three possible legislative responses to the unconstitutionality, and, in his view, it should be Parliament and not the judiciary that should choose.

...

[135] What these cases highlight is the need to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable. In the present matter I have considered ordering with immediate effect reading-in of the words “or spouse” after the words “or husband” in section 30(1) of the Marriage Act. This would remedy the invalidity while at the same time leaving Parliament free, if it chose, to amend the law so as to provide an alternative statutory mechanism to enable same-sex couples to enjoy their constitutional rights as outlined in this judgment. For reasons which follow, however, I have come to the conclusion that correction by the Court itself should be delayed for an appropriate period so as to give Parliament itself the opportunity to correct the defect.

[136] This is a matter involving status that requires a remedy that is secure. To achieve security it needs to be firmly located within the broad context of an extended search for emancipation of a section of society that has known protracted and bitter oppression. The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.

...

[159] Reading-in of the words “or spouse” has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word.

...

[161] In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words “or spouse” will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples. (Footnotes omitted)

(d) Proposal on amendment and repeal

3.184 *Amendment and repeal of legislation* should be defined in the Bill. The Bill should also set out the circumstances when legislation is regarded as having been repealed, the effect of repeal and replacement of legislation, the effect of repeal of enabling legislation on assigned or subordinate legislation, the effect of repeal or amendment of legislation on references in other legislation and that amendment becomes part of the legislation that is amended. The following provisions are proposed on amendment and repeal of legislation:

Amendment and repeal of legislation**Definitions**

19. (1) In this Part –

"amendment" means to change by means of legislation, either expressly or by implication;

"repeal" means to abolish by means of legislation, either expressly or by implication.

(2) For the purposes of this Part legislation which –

- (a) is enacted for a period or until a specific condition is met must be regarded as having been repealed when it lapses –
 - (i) at the end of the period; or
 - (ii) when the condition is met; or
- (b) is restricted in its scope, application or effect through or as a result of an amendment must be regarded as having been repealed to the extent of the restriction.

Effect of repeal of legislation

20. (1) If legislation is repealed the mere fact of its repeal does not –

- (a) affect the operation or application of that legislation when it was in force;
- (b) affect the consequences of such operation or application, including –
 - (i) any status, right, privilege, interest, title or immunity acquired in terms of that legislation; or
 - (ii) any obligation, liability, forfeiture, punishment or penalty imposed in terms of that legislation;
- (c) affect the institution or completion of any judicial, administrative or other proceedings arising from the operation or application of that legislation or any consequences of that legislation;

- (d) affect the prosecution of a person charged with having committed an offence under that legislation when that legislation was in force, subject to section 35(3)(n) of the Constitution;
- (e) revive anything repealed, abolished or cancelled in terms of that legislation; or
- (f) affect any previous amendments effected by that legislation to other legislation.

(2) Any provisions in the repealed legislation pertaining to proceedings referred to in subsection (1)(c) or to an offence referred to in subsection (1)(d) may for purposes of such proceedings or the prosecution of such offence be applied as if that legislation has not been repealed.

(3) This section does not apply to legislation –

- (a) declared unconstitutional or invalid; or
- (b) repealed following a declaration of unconstitutionality or invalidity.

Effect of repeal and replacement of legislation

21. If legislation is repealed and simultaneously replaced by new legislation –

- (a) the repealed legislation remains in force until the new legislation takes effect; and
- (b) anything issued or done in terms of the repealed legislation which may or must be issued or done in terms of the new legislation and which was in force immediately before the repeal –
 - (i) remains in force; and
 - (ii) must be regarded as having been issued or done in terms of the new legislation.

Effect of repeal of enabling legislation on assigned or subordinate legislation

22. (1) If legislation enabling the enactment of assigned or subordinate legislation is repealed, all assigned or subordinate legislation enacted in terms of the enabling legislation must be regarded as having simultaneously been repealed.

(2) Subsection (1) does not apply in a case where section **21**(b) applies.

Effect of repeal or amendment of legislation on references in other legislation

23. (1) (a) If legislation is repealed and, whether simultaneously or not, replaced by any new legislation, a reference in any other legislation to the repealed legislation must be read as a reference to the new legislation.

(b) If legislation referred to in other legislation is repealed and not simultaneously replaced by any new legislation, the reference to the repealed legislation in that other legislation becomes ineffective but paragraph (a) becomes applicable if replacing legislation is enacted at any time after the repeal.

(2) If legislation is amended, a reference in any other legislation to the legislation that is amended must be read as a reference to the legislation as amended.

(3) (a) Subsections (1) and (2) also apply to legislation that has been incorporated by reference into other legislation except when the context of that other legislation read as a whole indicates that the incorporation was specifically confined to the legislation as it existed at the time it was incorporated.

(b) If the exception in paragraph (a) applies, the repeal or amendment of the incorporated legislation does not affect its continued application –

(i) as part of the legislation into which it was incorporated; and

(ii) in the form it was originally incorporated.

Amendments

24. If legislation is amended the amendment becomes part of the legislation that is amended.

F. SUNSETTING OF SUBORDINATE LEGISLATION

(a) Introduction

3.185 In July 2006 the Department of Justice and Constitutional Development requested the Commission to consider the sunseting of subordinate legislation as part of this investigation. Already in 1993 Justice Catherine O'Regan¹⁰⁶ proposed that a system should be considered of periodically reviewing subordinate legislation to ensure that it is still applicable.¹⁰⁷ (Her suggestions are reflected further below in this Chapter.)

3.186 In 1997 Mr Victor Pertou, a Member of Parliament of Victoria remarked as follows on subordinate legislation and regulatory review:¹⁰⁸

As the 21st century looms, those in government charged with the responsibility of making regulation are under increasing pressure. This is reflected in the observation that "[t]o some business spokespeople, government interference in the marketplace is regarded as the embodiment of evil. Others adopt a more flexible approach, objecting strenuously to some forms of regulation, but tolerating, indeed, embracing, those forms of government involvement which happen to foster their own business interests."

There is increasing pressure to improve the business environment by reducing costs and other impediments. There are increasing demands that regulations be "efficient and effective". In response, governments (or, at least, those that wish to be elected and

¹⁰⁶ At that stage she was Associate Professor of Criminal Law and Procedure at the University of Cape Town.

¹⁰⁷ "Rules for Rulemaking: Administrative Law and Subordinate Legislation" 1993 *Acta Juridica* 157 at 169 – 170.

¹⁰⁸ Commonwealth Conference on Delegated Legislation Wellington, New Zealand 10-13 February 1997. He was the inaugural Chairman of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament from 1992-96 and from May of 1996 until 1999 Chairman of the Victorian Law Reform Committee. Available at http://www.parliament.vic.gov.au/lawreform/Regulatory_Efficiency/nw/chap1.html (accessed on 10 August 2006).

re-elected) increasingly pledge that they will "cut red tape". However, there is a general business ignorance of what those in government are doing enough to make the regulatory process more efficient.

In 1995, Christopher Booker, an English author and journalist, asserted that the British government had:

recently unleashed the greatest avalanche of regulations in peacetime history; and wherever we examine their working we see that they are using a sledgehammer to miss a nut.

We can laugh at this hyperbole, but, it seems, this thinking has a high level of credibility amongst our business constituency and even among the general public.

Parliamentarians are not oblivious to this concern. The Fourth Report of the UK House of Commons Procedure Committee tabled in June 1996 observed that *'There is widespread concern at the growing volume and complexity of delegated legislation, and the obvious deficiencies in its consideration and scrutiny by Parliament.*

(Footnotes omitted)

(b) The Australian Legislative Instruments Act 2003

3.187 In 1992, the Australian Administrative Review Council (ARC) published its report *Rule-making by Commonwealth Agencies*.¹⁰⁹ The Report observed that there had been a vast growth in the volume and diversity of delegated legislative instruments. The ARC raised a number of concerns in relation to these instruments including inaccessibility and quality of drafting, and made 31 recommendations, including the sunseting of rules on a 10-year, rotating basis. Sunseting of delegated legislation had already been established in New South Wales, Victoria, Queensland and South Australia. In Victoria, the provision for sunseting was introduced in 1984 after the Legal and Constitutional Committee of the Victorian Parliament found that many statutory rules were no longer operative, mainly through the passage of time. The Committee therefore recommended a staged repeal of all existing statutory rules, subject to some limited exceptions, and an ongoing 10-year sunseting period for all other statutory rules.

3.188 In 2003 the Australian Federal Parliament passed the Legislative Instruments Act 2003 (Cth), (LIA) which is significantly based on recommendations made by the

¹⁰⁹ The Administrative Review Council is responsible for overseeing and monitoring the Australian system of administrative review. It was established to provide advice to the Attorney-General on strategic and operational matters relating to that system. More information on the report is available at http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No.35 (accessed on 16 August 2006).

ARC.¹¹⁰ The LIA was assented to on 17 December 2003 and commenced on 1 January 2005. The purpose of the LIA was to establish a regime to reform and manage procedures for the making, scrutiny and publication of Commonwealth legislative instruments by –

- establishing a Federal Register of Legislative Instruments;
- encouraging rule-makers to undertake appropriate consultation;
- encouraging high standards in drafting legislative instruments to promote their legal effectiveness, clarity and their intelligibility to users;
- providing public access to legislative instruments;
- establishing improved mechanisms for Parliamentary scrutiny of legislative instruments;
- establishing 'sunsetting' mechanisms to ensure periodic review of legislative instruments and if they no longer have a continuing purpose, to repeal them.

3.189 The LIA sets out a procedure for registering "legislative instruments" (which include all regulations, statutory rules currently in force, other instruments that are disallowable under the current system, and proclamations) on an online database (FRLI) that is maintained by the federal Attorney-General's Department. The Act provides that legislative instruments are to be kept up-to-date and only remain in force for so long as they are needed. The basic rule is that such instruments should reach their sunset approximately 10 years after the date that they commence or are required to be lodged for registration. There are listed exceptions to this general rule and a procedure in place for the Attorney-General to defer sunsetting in certain circumstances and a procedure for Parliament to resolve that instruments continue in force. The Act provides that it will be reviewed generally after three years and that the operation of the sunsetting provisions will be reviewed after 12 years.

3.190 Prior to 2003, regulations were subject to parliamentary scrutiny and disallowance under Part XII of the *Acts Interpretation Act 1901*. Other instruments could be declared to be disallowable instruments in accordance with section 46A of the *Acts Interpretation Act 1901*. Section 46A has now been repealed by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* and Part XII of the *Acts Interpretation Act 1901* has been substantially repealed to accord with the changes brought about by the *Legislative Instruments Act 2003*.

¹¹⁰ See <http://www.aph.gov.au/LIBRARY/pubs/bd/2005-06/06bd011.htm> (accessed on 10

3.191 Will all registered legislative instruments be sunsetted? Almost all registered legislative instruments will sunset after 10 years, on either a 1 April or a 1 October. Section 54 of the Act provides for limited exemptions. Exemptions may also be set out in the Legislative Instruments Regulations or in the enabling legislation under which the instrument is made. The Attorney-General will table in Parliament lists of the instruments that are due to sunset 18 months before the sunseting day. Selected instruments on the sunseting list may be continued in force for another 10 years if either House of Parliament passes a resolution to that effect within 6 months after the sunseting list is tabled. For instruments made before 1 January 2005 the sunseting day is the first 1 April or 1 October that falls on or after the tenth anniversary of the day before which the instrument must be lodged for registration. Any amendments to a principal instrument will sunset on the same day as the principal instrument (subsection 50(1)). The day before which the instrument must be lodged depends on when the instrument was made, and whether it has been amended by an instrument made before or after 1 January 2005 (subsection 29(1)).

3.192 For instruments made after 1 January 2005 the sunseting day is the first 1 April or 1 October that falls on or after the tenth anniversary of the commencement day of the principal legislative instrument. Any amendments to the principal instrument will sunset on the same day as the principal instrument (subsection 50(2)). If an instrument is remade (and not just amended or added to by another instrument), then it sunsets in the normal way for instruments made on or after 1 January 2005. Therefore, it is due to sunset on the first 1 April or 1 October after the tenth anniversary of its commencement.

3.193 The Legislative Instruments Act 2003 provides as follows:

Part 6—Sunsetting of legislative instruments

49 The purpose of the Part

The purpose of this Part is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

50 The sunsetting of legislative instruments to which this Part applies

(1) Subject to subsection 51(1), if a legislative instrument to which this Part applies (the *principal legislative instrument*):

- (a) is made before the commencing day and does not amend an earlier legislative instrument that continues in force after the making of the principal legislative instrument; and

- (b) is required to be lodged for registration before a day (the **deadline day**) determined in accordance with section 29;

then

- (c) the principal legislative instrument; and
- (d) the provisions of any other legislative instrument (whether or not made before the commencing day) that amend, or otherwise affect the operation of, the principal legislative instrument;

as in force immediately before whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of the deadline day, cease to be in force on that 1 April or 1 October as if they had been repealed by another legislative instrument.

- (2) Subject to subsection 51(1), if a legislative instrument to which this Part applies (the **principal legislative instrument**) is made on or after the commencing day and does not amend an earlier legislative instrument that continues in force after the making of the principal legislative instrument, then:

- (a) the principal legislative instrument; and
- (b) the provisions of any other legislative instrument that amend, or otherwise affect the operation of, the principal legislative instrument;

as in force immediately before whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of the day of commencement of the principal legislative instrument, cease to be in force on that 1 April or 1 October as if they had been repealed by another legislative instrument.

- (3) Subject to subsection 51(1), if a legislative instrument to which this Part applies (the **partially amending legislative instrument**) contains:

- (a) provisions that amend an earlier legislative instrument that continues in force after the making of the partially amending legislative instrument; and
- (b) other provisions that do not amend an earlier legislative instrument;

then:

- (c) the provisions of the partially amending legislative instrument that do not amend an earlier legislative instrument; and
- (d) the provisions of any other legislative instrument that amend, or otherwise affect, the operation of the provisions referred to in paragraph (c);

As in force immediately before whichever of 1 April or 1 October falls on, or next follows, the tenth anniversary of a day (the **critical day**) in relation to the partially amending legislative instrument, determined in accordance with subsection (4), cease to be in force on that 1 April or 1 October as if they had been repealed by another legislative instrument.

- (4) For the purposes of subsection (3):

- (a) if a partially amending legislative instrument is made before the commencing day—the critical day in relation to that instrument is the

day on which, under section 29, it is required to be lodged for registration; and

- (b) if a partially amending legislative instrument is made on or after the commencing day—the critical day in relation to that instrument is the date of commencement of the provisions that do not amend an earlier legislative instrument.

(5) If a principal legislative instrument referred to in subsection (2) has 2 or more days of commencement, then, for the purposes of that subsection, the day of commencement of that instrument is the earliest of those days.

(6) If the provisions of a partially amending legislative instrument referred to in subsection (3) that do not amend an earlier legislative instrument have 2 or more days of commencement then, for the purposes of subsection (4), the day of commencement of those provisions is the earliest of those days.

51 Attorney-General may defer sunseting in certain circumstances

(1) If:

- (a) a legislative a legislative instrument or particular provisions of a legislative instrument would be taken to cease to be in force under this Part (whether because of the operation of subsection 50(1), (2) or (3) on a particular day (the ***sunsetting day***); and
- (b) the Attorney-General is satisfied, on written application by the rule-maker:
 - (i) that the instrument or provisions would (apart from the operation of this Part) be likely to cease to be in force within 12 months after the sunseting day; or
 - (ii) that an instrument proposed to be made in substitution for the instrument or provisions will not be able to be completed before the sunseting day for reasons that the rule-maker could not have foreseen and avoided or because the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed;

then:

- (c) The Attorney-General may issue a certificate providing that the first-mentioned instrument or provisions are taken to cease to be in force under this section on whichever of the 1 April and 1 October next following the sunseting day the Attorney-General specifies as the more appropriate; and
 - (d) if the Attorney-General issues the certificate, the first-mentioned instrument or provisions are taken to cease to be in force on the specified day instead of the sunseting day as if repealed by another legislative instrument, unless they have earlier ceased to be in force.
- (2) If the Attorney-General issues a certificate under paragraph (1)(c), he or she must:
- (a) include in the certificate a statement of the reasons for the issue of

a certificate; and

(b) cause a copy of the certificate to be laid before each House of the Parliament not later than 6 sitting days of that House after the issue of the certificate.

(3) A certificate issued under paragraph (1)(c) is a legislative instrument and, as such, is required under Part 4 to be registered.

52 Attorney-General must lay lists of instruments due for sunseting before each House of the Parliament

(1) In this section:

list tabling day, in relation to a sunseting day and to a House of the Parliament, means the first sitting day of that House occurring within 18 months before that sunseting day.

principal legislative instrument means an instrument that is a principal legislative instrument within the meaning of subsection 50(1) or (2), whichever is appropriate.

sunseting day means the first possible day on which any legislative instrument will cease to be in force because of the operation of this Part and each 1 April and 1 October occurring after that day.

(2) The Attorney-General must arrange for the laying before each House of the Parliament, on each list tabling day in relation to that House, of a list of:

- (a) the principal legislative instruments; and
- (b) the provisions (if any) of other legislative instruments that amend or otherwise affect, the operation of those principal legislative instruments;

that will, because of the operation of section 50 or 51, cease to be in force on the sunseting day to which that list tabling day relates.

(3) As soon as practicable after the laying before either House of the Parliament of a list in accordance with subsection (2), the Department must arrange for a copy of that list to be provided to the rule-maker responsible for each principal legislative instrument, and each provision of a legislative instrument, appearing on the list.

(4) If subsection (2) requires the Attorney-General to arrange for the laying of a list of the kind referred to in that subsection before the Houses of the Parliament on different days, subsection (3) need only be complied with in relation to the earlier of those days.

53 Resolution that instruments continue in force

(1) Either House of the Parliament may, by resolution passed within 6 months after:

- (a) the laying before that House, under subsection 52(2), of a list; or
- (b) the laying before that House, under subsection 51(2), of a copy of a certificate issued under paragraph 51(1)(c);

indicate the legislative instruments and provisions of legislative instruments on that list or referred to in that certificate (***selected instruments or provisions***) that that House considers should continue in force.

(2) A selected instrument or provision continues in force, subject to any later instrument amending or repealing it, as if it had been remade on the date on which if the resolution had not been passed, it would cease to be in force.

54 Instruments to which this Part does not apply

(1) This Part does not apply in relation to a legislative instrument made before, on or after the commencing day, if the enabling legislation for the instrument (not being the *Corporations Act 2001*):

- (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and
- (b) authorises the instrument to be made by the body or for the purposes of the body or scheme.

(2) This Part does not apply to any legislative instrument that is included in the table below:

Legislative instruments that are not subject to sunseting	
Item	Particulars of instrument
1	Instruments made under section 8 or 9 of the <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>
2	Instruments relating to aviation security made under the <i>Air Navigation Act 1920</i> or under the regulations made under that Act
3	Instruments relating to aviation safety made under the <i>Air Services Act 1995</i> or the <i>Air Services Regulations</i>
4	National Capital Plan made under the <i>Australian Capital Territory (Planning and Land Management) Act 1988</i>
5	Determinations specifying drugs, made under section 4A of the <i>Australian Federal Police Act 1979</i>
6	Statutes made under the <i>Australian National University Act 1991</i> or rules or orders made under those statutes
7	Instruments made under section 32 of the <i>Australian Postal Corporation Act 1989</i>
8	Instruments made under section 25 or 26 of the <i>Broadcasting Services Act 1992</i>
9	Instruments relating to aviation safety made under the <i>Civil Aviation Act 1988</i> , the <i>Civil Aviation Regulations 1988</i> or the <i>Civil Aviation Safety Regulations 1998</i>
10	Fee waiver principles made under subsection 91(1A) of the <i>Classification (Publications, Films and Computer Games) Act 1995</i>
11	Notifications under section 28 or 43 of the <i>Commonwealth Authorities and Companies Act 1997</i>
12	Determinations made under paragraph 153J(1)(c), 153L(1)(c), 153P(2)(c) or 153Q(1)(c) of the <i>Customs Act 1901</i>

Legislative instruments that are not subject to sunseting	
Item	Particulars of instrument
13	Revocations made under subsection 153K(3) or 153LA(3) of the <i>Customs Act 1901</i>
14	Instruments made under subsection 161J(2) or (3) of the <i>Customs Act 1901</i>
15	Instruments made under section 178, 181, 183, 184, 207A, 248, 249, 303CA, 303DB, 303DC, 303EB, 303EC, 303FG, 344 or 350 of the <i>Environment Protection and Biodiversity Conservation Act 1999</i>
16	Excise By-law No. 75, 114, 127, 129, 151 or 154 made under section 165 of the <i>Excise Act 1901</i>
17	Determinations made under subsection 20(1), (2) or (3), agreements made under section 31, directions given under section 32, or instructions given under section 52, of the <i>Financial Management and Accountability Act 1997</i>
18	Determinations made under Order 6.2.1 of the Financial Management and Accountability Orders 1997 made under section 63 of the <i>Financial Management and Accountability Act 1997</i>
19	Guidelines issued under regulations made pursuant to section 64 of the <i>Financial Management and Accountability Act 1997</i>
20	Plans of management made under section 17 of the <i>Fisheries Management Act 1991</i> and instruments amending such plans made under section 20 of that Act
21	Proclamations made under section 5, warrants made under section 6, or rules made under section 7, of the <i>Flags Act 1953</i>
22	Proclamations made under section 31 of the <i>Great Barrier Reef Marine Park Act 1975</i> , zoning plans prepared under section 32 of that Act, instruments made under section 37 of that Act amending or revoking such zoning plans, plans of management prepared in accordance with Part VB of that Act, instruments made under section 39ZG of that Act amending such plans of management, or instruments made under section 39ZH of that Act revoking such plans of management
23	Statutes made under the <i>Maritime College Act 1978</i> or rules made under those statutes
24	Instruments made under section 7 or 9 of the <i>Motor Vehicle Standards Act 1989</i>
25	Declarations made by Ministers under section 32 of the <i>Mutual Recognition Act 1992</i>
26	Instruments made under subparagraph 26(1)(c)(iv), subsection 26A(1), 26B(1) or 26C(2), paragraph 43(1)(b) or 43A(1)(b), section 203AD, 203AE, 203AF or 203AG, subsection 203AH(1) or (2), 207A(1), 207B(3), 245(4) or 251C(4) or (5), or paragraph (i) of the definition of <i>infrastructure facility</i> in section 253, of the <i>Native Title Act 1993</i>
27	Instruments made under section 421, or Marine Orders made under subsection 425(1AA), of the <i>Navigation Act 1912</i>
28	<i>Navigation (Collision) Regulations 1982</i> made pursuant to section 258, or <i>Navigation (Orders) Regulations 1980</i> made pursuant to subsection 425(1), of the <i>Navigation Act 1912</i>

Legislative instruments that are not subject to sunseting	
Item	Particulars of instrument
29	Directions issued under section 20 of the <i>Parliamentary Service Act 1999</i>
30	Instruments made under section 23 or subsection 24(3) of the <i>Parliamentary Service Act 1999</i>
31	Approvals made under section 9 of the <i>Payment Systems and Netting Act 1998</i>
32	Access regimes imposed under section 12, variations of access regimes under section 14, revocation of access regimes under section 15, standards determined, or instruments varying or revoking such standards, under section 18, or instruments made under section 25, of the <i>Payment Systems (Regulation) Act 1998</i>
34	Protection of the Sea (Powers of Intervention) Regulations made under section 23 of the <i>Protection of the Sea (Powers of Intervention) Act 1981</i>
35	Marine Orders made under subsection 34(1) of the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>
36	<i>Protection of the Sea (Prevention of Pollution from Ships) (Orders) Regulations 1994</i> made under subsection 33(1) of the <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>
37	Directions issued under section 21 of the <i>Public Service Act 1999</i>
38	Instruments made under section 23 or subsection 24(3) of the <i>Public Service Act 1999</i>
39	Instruments required to be laid before the Parliament under subsection 7(7) of the <i>Remuneration Tribunal Act 1973</i>
40	Declarations made by Ministers under section 31 of the <i>Trans-Tasman Mutual Recognition Act 1997</i>
41	Instruments made under Annual Appropriation Acts
42	Instruments (other than regulations) relating to superannuation
43	Legislative instruments the sole purpose of which, or a primary purpose of which, is to give effect to an international obligation of Australia
44	Legislative instruments the sole purpose of which, or a primary purpose of which, is to confer heads of power on a self-governing Territory
45	Legislative instruments that establish a body having power to enter into contracts for the purposes of the body's functions
46	Ministerial directions to any person or body
47	Ordinances of the non self-governing Territories
48	Proclamations that provide solely for the commencement of Acts or provision of Acts
49	Certificates issued by the Attorney-General under section 10 or 11 of this Act

Legislative instruments that are not subject to sunseting	
Item	Particulars of instrument
50	Regulations made for the purposes of item 24 of the table in subsection 7(1), item 44 of the table in subsection 44(2) or item 51 of this table
51	Legislative instruments that are prescribed by the regulations for the purposes of this table

(3) The inclusion of a kind of instrument in the table in subsection (2) does not imply that every instrument of that kind is a legislative instrument.

(c) Sunsetting in Victoria

3.194 Automatic revocation or 'sunsetting' of all statutory rules 10 years after their making is required under section 5 of the *Subordinate Legislation Act* of Victoria.¹¹¹ It provides for the staged revocation of existing statutory rules by setting out a schedule for sunsetting. In so providing, the Act contains an invaluable mechanism for reducing the volume of regulations applying in Victoria. Part of the rationale behind this assertion is that, in deciding whether or not to re-make regulations that have been repealed, government departments are forced to consider whether or not the regulations in question are really necessary. Automatic revocation of statutory rules ('sunsetting') commenced in Victoria in 1985 as a result of amendments to the *Subordinate Legislation Act 1962*. The operation of this process for over a decade has placed Victoria in the unique position that all existing regulations have gone through the automatic revocation process and, unless excepted or exempted, have been subject to an Regulatory Impact Statement. This has not only ensured that redundant regulations are no longer on the Victorian statute book, but has meant that most regulations have regulatory objectives identified as part of the RIS process.

(d) Sunsetting in Tasmania

3.195 The *Subordinate Legislation Act 1992* (SLA) of Tasmania provides for the staged automatic repeal of Tasmania's subordinate legislation. The Act sets out a timetable for the repeal of existing subordinate legislation and provides that all new subordinate legislation has a ten year sunset clause. The SLA also provides that new subordinate legislation that imposes a significant cost, burden or disadvantage on any sector of the community should not be introduced unless it can be justified as being in

¹¹¹ *Report on Regulatory Efficiency Legislation* par 6.19 – 6.20 Oct 1997 available at http://www.parliament.vic.gov.au/lawreform/Regulatory_Efficiency/reir/chapt6.html#fnB260 (accessed on 10 August 2006).

the public benefit. In these cases, a Regulatory Impact Statement must be prepared to demonstrate that the cost, burden or disadvantage can be justified as being in the public benefit. Importantly, the SLA has resulted in a reduction in the number of statutory rules introduced each year. In 1992, 228 statutory rules were produced. In 1999, only 190 statutory rules were produced. The SLA has also meant that old statutory rules have been progressively rescinded to ensure that only relevant statutory rules remain on the statutes. Statutory rules may be re-made, but if so, they will be required to comply with SLA procedures.

3.196 The Subordinate Legislation Act 1992 (No. 30 of 1992) of Tasmania provides as follows on sunseting of subordinate legislation:

11. Staged repeal of subordinate legislation

(1) Subject to subsection (5), unless it sooner ceases to be in force, subordinate legislation made before a date specified in Column 1 below is repealed on the date specified opposite in Column 2 –

Column 1	Column 2
1 January 1954	1 January 1996
1 January 1964	1 January 1997
1 January 1967	1 January 1998
1 January 1973	1 January 1999
1 January 1977	1 January 2000
1 January 1981	1 January 2001
1 January 1984	1 January 2002
1 January 1987	1 January 2003
1 January 1991	1 January 2004
date of commencement of this Act	1 January 2005

(2) Unless it sooner ceases to be in force, subordinate legislation made on or after the commencement of this Act is repealed on the tenth anniversary of the date on which it was made.

(3) For the purposes of this section, a reference to "subordinate legislation" is a reference to the subordinate legislation as amended from time to time and not to any of the amending subordinate legislation.

(4) Where subordinate legislation is repealed by virtue of this section, any subordinate legislation which amends that subordinate legislation and any provision in subordinate legislation which is a provision that amends that subordinate legislation is also repealed.

(5) The Governor, by order, may postpone by a period not exceeding 12 months the date on which any subordinate legislation specified in the order would otherwise be repealed under subsection (1).

(6) An order under subsection (5) is to be made before the date on which the subordinate legislation to which the order applies would, but for the order, be repealed under subsection (1).

(e) Sunsetting proposals in Scotland

3.197 In 2005 the Subordinate Legislation Committee of the Scottish Parliament (Committee) noted¹¹² that one of the Organisation for Economic Co-operation and Development (OECD)¹¹³ guidelines for improving regulatory quality is for regulations to be updated through automatic review methods, such as sunsetting clauses or review clauses. The Committee explained that a “sun-setting” clause is a provision inserted into a new piece of legislation which provides for it to cease to have effect after a fixed period of time and a “review” clause is where provision is made for the regulation to be reviewed within a certain period. Either clause would require consideration to be given as to whether the regulation was still necessary.

3.198 The Committee heard opposing views in relation to whether there should be a statutory requirement to review legislation, rather than it being left to policy guidance, but there was general agreement from consultees and witnesses that, in appropriate circumstances, review should be conducted as a matter of good practice. The Committee noted the view of the Law Society and others that the specified review period should be five years. The Committee also heard that review should be flexible and that in certain circumstances it should be undertaken earlier than this, for example in the area of environmental legislation where the Scottish Environment Protection Agency (SEPA) would support a statutory review after three years. Current Scottish executive policy is to review, “within 10 years, all post-devolution regulations which have a significant impact on business to ensure that the impact continues to be justified.”

¹¹² *Inquiry into the regulatory framework in Scotland Subordinate Legislation Committee Report 31st Report 2005 (Session 2)* available at <http://www.scottish.parliament.uk/business/committees/subleg/reports-05/sur05-31-01.htm> (accessed on 11 August 2006).

¹¹³ Available at http://www.oecd.org/home/0,2605,en_2649_201185_1_1_1_1_1,00.html (accessed on 10 August 2006).

3.199 The Committee noted that sunset provisions are used in a number of jurisdictions in Australia and form part of review process. The Committee heard conflicting views on the issue of blanket use of sunset clauses but there was wide support for the use of sunset provisions in the circumstances identified in the Mandelkern Report,¹¹⁴ namely where the regulation—

- was introduced at short notice;
- was based on a precautionary motive;
- was based upon technology or market conditions which are liable to change;
- was a pilot project; or
- conferred rights upon the State.

3.200 The Committee was sympathetic to concerns it heard in relation to how “sunsetting” might create unnecessary administrative burden but noted the importance of the Scottish Executive taking account of existing regulation and its impact in order to improve quality. The Committee believed that there is a duty to those regulated to assess whether a regulation is functioning well or could be improved. It considered that the Scottish Executive’s current policy of review at 10 years of those new regulations impacting on business is insufficient in this regard. The Committee therefore recommended that the Executive undertakes to review areas of new regulation every five years. The Committee also recommended that sunsetting

¹¹⁴ Report by the Mandelkern Group on Better Regulation, which contains at par 2.3, inter alia the following remarks on the advantages and disadvantages of sunset clauses:

The advantage of sunset or review clauses is that they force the administration and Parliament to look anew at the necessity for a particular regulation. If adopted systematically for all new regulation, they would ensure a rolling review of regulation, with the opportunity of weeding out or streamlining provisions that are no longer needed.

A significant disadvantage of the widespread use of sunset or review clauses is that this is very expensive in terms of legislative time. Although sunset or review clauses may be a good way of forcing an allocation of legislative time to be made for the purposes of review, it is impractical to think that the whole body of regulation could simply be allowed to disappear and have to be re-enacted. In addition, combined with pressure on legislative time, the presence of a sunset clause can be misused to obstruct progress, especially at EU level. A further disadvantage is that, in some circumstances, sunset (and to a lesser extent review) clauses would increase uncertainty and thus have an adverse effect on the investment climate and on individuals’ confidence in the protection afforded them by regulation. This would be particularly the case where the regulation required investment in new equipment or facilities or dealt with the rights of individuals or businesses. Even when a track record had been established of reviews leading to improvements and a reduced burden of regulation, an element of this would still remain. (Available at <http://www.cabinetoffice.gov.uk/regulation/documents/europe/pdf/mandfinrep.pdf> (accessed on 11 August 2006))

provisions should be included in regulations made in the circumstances set out in the Mandelkern Report. The Committee considered this to be sound regulatory practice.

(e) Sunsetting proposals in England and Wales

3.201 The English Law Commission also considered the issue of sunsetting of delegated legislation recently. They published a consultation paper entitled *Post-legislative Scrutiny* on 31 January 2006.¹¹⁵ They noted that sunsetting provides one way in which secondary legislation could be managed as it has the effect of time limiting the life of legislation which is otherwise left on the statute book, often beyond the end of its useful life. A sunset clause represents a decision that a provision should have a limited life. Therefore, they explain, such a provision may simply fall after the specified time and will not necessarily be subjected to a formal review. A review clause would allow for consideration of whether it is necessary to continue the life of the provision to which it relates.

3.202 The English Law Commission stated that it is worth considering whether there is any scope to make greater use of sunset clauses in delegated legislation in order to assist with the management of the huge and increasing volume of secondary legislation. They remarked that it is an unhappy state of affairs if those affected by legislation have to trawl through provisions contained in a variety of legislative instruments to which they have no centralised means of access. They said that until there is some form of database available to the public, by which all the relevant provisions can be accessed by ordinary search methods with appropriate hyperlinks, there is a strong argument that departments should do more than at present to consolidate the various legislative instruments so that their provisions can be found together. They consider that sunsetting of secondary legislation could be used as a way of pressing departments to do this. It may be possible to exclude by category some types of secondary legislation which are not suitable for sunsetting, such as regulations reducing burdens, giving effect to EU Directives or underpinning procedural systems (such as the Civil Procedure Rules) or commencement orders. It may also be possible for a committee (the House of Lords Merits Committee or the House of Commons Select Committee on Statutory Instruments (Sis)) to refer certain categories of SI to the House if it thinks that the House might consider it inappropriate that the SI should be made without a sunset clause or review clause. The English Law Commission noted that on 6 June 2005, the Chairman of the Delegated Powers and

¹¹⁵ Par 8.8 – 8.11 of the consultation paper which is available at <http://www.lawcom.gov.uk/docs/cp178.pdf> r 8.8 - 8.11 (accessed on 10 August 2006).

Regulatory Reform Select Committee, Lord Dahrendorf said:

In many cases, we should give much more serious consideration to the possibility, feasibility and usefulness of sunset clauses, or at any rate, of procedures which move in the direction of sunset clauses; that is, reviews in set periods and at particular times . . . My personal preference would be for every piece of secondary legislation to contain a sunset clause or . . . a severe review clause.

3.203 The English Law Commission pointed out that some sunset clauses in the parent Act time-limit the effect of secondary legislation made under it. For example, section 2(2) of the Education Act 2002 stipulates that any orders made under that section shall not have effect for a period exceeding three years. Section 2(7) further limits the power of the Secretary of State by stating that no orders under section 2 can be made after the end of the period of four years beginning with the commencement date of the Act. They invited the views of consultees: (1) on post-legislative scrutiny of secondary legislation (in general); and (2) on whether there may be advantages in making greater use of sunset clauses in secondary legislation.

(f) Sunsetting proposals in South Africa

3.204 As was seen at the beginning of this discussion, sunsetting of provisions have been under consideration in South Africa already since 1993. Justice Catherine O'Regan (then Professor O'Regan) proposed then that a system should be considered of periodically reviewing subordinate legislation to ensure that it is still applicable.¹¹⁶ She noted that by 1983, such provisions had been adopted in 36 of the American states, and that in 1992, the Australian Administrative Review Council recommended that all subordinate legislation be subject to 'sunsetting provisions', which would stipulate that the regulations would be valid for a set period of time only. She noted that the ARC recommended ten years as the appropriate period. New South Wales has adopted a five-year period, Queensland and South Australia a seven-year period, and Victoria a ten-year period. Justice O'Regan pointed out that although there has been criticism of the system of periodical review in the United States, this has generally been aimed at its effect on administrative agencies whose existence depended on the renewal of the administrative rules. She considered that it may well be that those criticisms are peculiar to America. Justice O'Regan proposed that all existing subordinate legislation be made subject to periodic review by providing that they will be automatically repealed within a set (probably staggered) period of time. This would ensure that all regulations in force would be reviewed. Justice O'Regan also

¹¹⁶ "Rules for Rulemaking: Administrative Law and Subordinate Legislation" *Acta Juridica* 1993 157 at 169 – 170.

suggested that provision be made to ensure that all new subordinate legislation should similarly be subject to periodic review.

3.205 It was noted above that the Department for Justice and Constitutional Development requested the Commission to consider the issue of sunseting of subordinate legislation as part of this investigation. It is acknowledged that although the adoption of these or similar practices are more a matter for the executive than the legislature, they are matters on which it seems legitimate for the general public to express a view and to inform a dialogue with the executive.¹¹⁷ It is also noteworthy that this issue has recently been considered and reported on by a subcommittee of Parliament. In October 2002 the Joint Subcommittee on Delegated Legislation suggested that Parliament should consider subjecting all subordinate legislation to “sunseting”, ie for such instruments to have a limited life of say five years, after which they will have to be re-enacted and thus re-scrutinised as regards form and content.¹¹⁸ It was also recommended that Parliament consider including a “sunseting” provision in the envisaged standard-setting legislation.

3.206 The question arises how sunseting of subordinate legislation should be regulated and whether a separate statute should be adopted for this purpose, as was done in the Australian States and by the Commonwealth Parliament. The latter adopted the Legislative Instruments Act in 2003. The Commission invites respondents to comment on the issue of sunseting of subordinate legislation in particular.

F. RETROSPECTIVITY

3.207 The issue of retrospective legislation is complex,¹¹⁹ and is at present dealt with

¹¹⁷ At the International Conference on Regulation Reform Management and Scrutiny of Legislation: Re-Engineering Regulations and Scrutiny of Legislation for the 21st Century held at the New South Wales State Parliament in Sydney, Australia on 9th - 13th July 2001 the following remarks were made on sunseting measures: “Although the adoption of these or similar practices are more a matter for the executive than the legislature, they are matters on which it seems legitimate for a committee such as the Subordinate Legislation Committee to express a view and to inform a dialogue with the executive” (par 43). Available at <http://www.scottish.parliament.uk/business/committees/historic/subleg/reports-01/sur01-36-01.htm> (accessed on 17 August 2006.)

¹¹⁸ Chapter 5 Making Delegated Legislation Accessible *Interim Report of the Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation*.

¹¹⁹ See Lourens du Plessis *Bill of Rights Compendium* par 2C25 in *Constitutional Law Direct* and also *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA):

[13] It is true that if s 118(3) is applied to bonds existing before 1 March 2001, it would reduce the security enjoyed by mortgagees under those bonds and in that sense

under the common-law presumption against retrospective legislation.¹²⁰

There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation. . . .¹²¹

3.208 In *Adampol (Pty) Ltd v Administrator, Transvaal*¹²² the origin of and exceptions to the presumption was explained as follows:

The origin of the rule is to be found in an imperial decree enacted during 440 AD by the Emperors Theodosius and Valentian. It is recorded in Cod 1.14.7, reading as follows:

. . . 'It is certain that the laws and decrees give shape to future matters and are not applied to acts of the past, unless express provision is made for past time and for matters which are still pending.'

. . . The rule has been developed by the Courts in England with many exceptions to it. . . . Lord Simon P said in *Williams v Williams* [1971] 2 All ER 764 (PDA) at 770j - 771a :

'This rule is a presumption only; and it may be overcome either by express words in the statute showing that the provision is intended to be retrospective, or "by necessary and distinct implication" demonstrating such an intention.'

The rule has developed along similar lines in America. See *Corpus Juris Secundum* vol 82 (1953) s 412:

interfere with existing rights. However, that in itself would not mean that the section is afforded retrospective effect. As was pointed out by Buckley LJ in *West v Gwynne* [1911] 2 Ch 1 (CA) at 11 - 12: 'Retrospective operation is one matter. Interference with existing rights is another.'

In the same case Buckley LJ formulated the following test to determine the difference between the two:

'If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.'

The test thus formulated has been approved and applied by our Courts on various occasions . . .

[14] It follows that an enactment can be described as retrospective in the true sense only if it requires the law to be taken as amended prior to its date of amendment. Applying this formula, I find myself in agreement with the Court a quo that . . . the section requires no such thing. It does not expressly or impliedly purport to state that before 1 March 2001, the law in Gauteng was in any way different from what it was under the 1939 Transvaal Ordinance. . . .

¹²⁰ See Du Plessis *Re-interpretation of statutes* 182ff, Devenish *Interpretation of Statutes* 186 - 194).

¹²¹ *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) 1148F-G).

¹²² 1989 (3) SA 800 (A).

'Literally defined, a retrospective law is a law which looks backward or on things that are past; a retroactive law is one which acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may be broadly defined as having reference to a state of things existing before the act in question. A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. However, a statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing, but is retroactive only when it is applied to rights acquired prior to its enactment.'

The rule has been adopted in Roman-Dutch law and is being developed by our Courts along similar lines as in England and America. Compare Steyn *Uitleg van Wette* 5th ed at 82 - 97.

In our law there are two exceptions to the rule of construction against the retrospective operation of statutes which, in my judgment, require careful consideration in resolving the issue in the present case, viz:

1. The first exception is stated by Voet (1647 - 1713) 1.3.17:

. . . (Gane's translation: 'It is certain further that laws give shape to affairs of the future, and are not applied retrospectively to acts of the past. . . . An exception is when the legislator has nevertheless expressed himself otherwise in clear words, treating both of past time and of present affairs. This particularly happens when special favours are conferred by new laws; for there is no injustice in extending such grants, by enlargement as it were of the favours, to cases which have indeed already arisen, but have not yet been decided or set at rest by compromise. Neither equity nor public safety admits of affairs, long since set at rest by the dictates of ancient right, being revived or upset by the happening of a new law. That would provide a very great handle for litigation, confusion and uncertainty of things and rights.') . . .

2. The second exception was applied by the great medieval Commentator Bartolus (1313 - 1357) ad D 1.1.9 nr 47:

. . . Where a statute provided that a husband was entitled to retain a third part of a dowry upon the death of his wife who died during the marriage without being survived by sons, Bartolus was of the opinion that the husband was entitled to the third part of the dowry even where the dowry had been furnished before the passing of the statute. . . . In modern parlance such a statute would not properly be called a retrospective statute because a part of the requisites for its operation was drawn from time antecedent to its passing. . . .

Upon closer analysis it appears that both exceptions have much in common. Neither of them purports to revive past events which have already been disposed of (*negotia praeterita et decisa*). They cannot therefore be said to seek retrospective operation of statutes. (Compare *West v Gwynne* [1911] 2 Ch 1 (CA) per Buckley LJ at 12: 'If an Act provides that as at a past time the law shall be taken to have been that which it was not, that Act I understand to be retrospective.') Both exceptions concern the same subject-matter albeit from different angles and for different reasons. The first exception is applicable to *negotia praesentia et facta de praeterito tempore* on the grounds of absence of injustice where the statutes confer benefits. The second exception is also applicable to *negotia praesentia et facta de praeterito tempore* obviously for reasons of expediency and logic. Both exceptions contain features or elements of a retrospective nature without affecting the prospective operation of the statutes as such.

3.209 The presumption has different strengths in different contexts. It is strongest in

relation to legislation that imposes obligations or penalties, or takes away acquired rights.¹²³ In the case of beneficial social legislation, a court may be much more inclined to find that the legislation operates retrospectively as well as prospectively. Among the matters taken into account will be the words of the legislation in question, its purpose, its context, and the injustice or otherwise of finding retrospectivity. The much-quoted maxim that procedural Acts are more likely to be interpreted retrospectively than substantive ones is at best only a guideline; the effect of statutes upon previously acquired rights is more important than any label which may be attached to them.¹²⁴ In terms of section 35 of the Constitution no new crimes of higher penalties may be introduced retrospectively.¹²⁵ Section 35(3)(l) of the Constitution provides also that

¹²³ See *National Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475 (A)* at 483 – 484:

There is at common law a prima facie rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. (This definition appears to merge two canons of interpretation: the presumption against retrospectivity and the presumption against interference with vested rights. This, however, is not of great moment, as both canons lead in the same direction: . . .

There is an exception to this rule in the case of a statute which is purely procedural and operates prospectively on all matters coming before the Court after the passing of the statute, though even here it is the intention of the Legislature which is paramount. Moreover, a provision which is procedural in form may in essence affect the substantive rights of persons.

¹²⁴ *Minister of Safety and Security v Molutsi and Another 1996 (4) SA 72 (A)* at 90F - J:

. . . something must be said about the distinction which is often drawn when interpreting statutes between those which are classified as 'procedural' and those which are not. The former are regarded prima facie as being applicable even to situations which arose before their enactment whereas the latter are not so regarded prima facie. The imprecision of the dichotomy and the sometimes elusive nature of the distinction has been frequently remarked upon. . . . It is sufficient to say that while there can be no vested right in purely procedural provisions, it is now well recognised that even although a statute may have procedural dimensions, if it adversely affects vested right which are not purely procedural, it will be construed as pro tanto prospective. . . . As it was pithily put by Sloan JA in the Australian case of *Dixie v Royal Columbian Hospital (1941) 2 DLR 138* at 139-40:

'[U]nless the language used plainly manifests in express terms or by clear implication a contrary intention:

- (a) A statute divesting vested right is to be construed as prospective.
- (b) A statute, merely procedural, is to be construed as retrospective.
- (c) A statute which, while procedural in its character affects vested rights adversely is to be construed as prospective".'

¹²⁵ 35(3)(n) Every accused person has a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

every accused person has a right to a fair trial, which includes the right not be convicted of an act or omission that was not an offence under national or international law at the time it was committed or omitted. The presumption against retrospectivity has therefore been recognized in the Constitution although to a limited extent.

3.210 The Interpretation Act of New Zealand provides in section 7 that an enactment does not have retrospective effect. Apparently section 7 of the Interpretation Act 1999 lays down a blanket rule.¹²⁶ However, given that all the provisions of the Interpretation Act 1999 apply only so far as they are consistent with the words and context of the particular legislation under scrutiny, it is clear that section 7 does no more than codify the long-standing presumption against retrospectivity which existed at common law.

3.211 The Commission invites comment in particular on the question whether there is a need to include a provision dealing with the issue of prospective or retrospective application of legislation in the Bill.¹²⁷

F. EXTENT TO WHICH LEGISLATION BINDS THE STATE

(a) Introduction

3.212 The state is presumed at common law not to be bound by its own legislation. Hahlo & Kahn¹²⁸ define the presumption as follows:

An enactment does not apply to the state or its executive arm or to a provincial council, local authority or other public body from which it emanates.

3.213 This presumption is rebutted expressly¹²⁹ or by necessary implication. In *Union Government v Tonkin*¹³⁰ it was held that the intention that the state should indeed be bound can be inferred not only from the wording of the law, but also from the surrounding circumstances and other indications.

¹²⁶ Available at http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html (accessed on 10 October 2005).

¹²⁷ It was initially considered that a general provision should be included in the Bill at least to alert drafters, interpreters and policymakers to the possible dangers of retrospective legislation, drafted as follows: "No legislation will have retrospective operation, unless, subject to the Constitution, expressly provided by the legislation in question".

¹²⁸ Hahlo & Kahn *The South African legal system and its background* (1973) 204.

¹²⁹ Eg section 24 of the Interpretation Act which provides that "This Act shall bind the State" or section 88 of the National Road Traffic Act 93 of 1996 which provides that "This Act shall bind the State and any person in the service of the State: Provided that the Minister may, by notice in the Gazette, exempt the State or any department thereof or any such person from any provision of this Act, subject to such conditions as the Minister may determine".

¹³⁰ 1918 AD 533.

(b) New Zealand

3.214 Section 27 of the Interpretation Act 1999 of New Zealand provides that no enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment. This provision reflects the common law position that a statute binds the Crown only if such an intention is clear from its terms. Despite the reference to the word “expressly” in the current and the earlier provisions, it is clear from a number of New Zealand cases that an intention to bind the Crown can be implied from the terms of a statute e.g. *Re Buckingham* [1922] NZLR 771.¹³¹ Historically, the presumption against the Crown being bound by statute appears to have applied only to statutes that would strip the King of his prerogative, that is, the rights, powers, privileges or immunities that were peculiar to him. However, over time the presumption eventually came to be applied to all statutes whether or not they affected the King’s prerogative and irrespective of their purpose. Section 28 of the New Zealand Interpretation Act of 1999 provided for a review of the position stated in section 27. The Act required the Ministry of Justice to report to the Minister of Justice by 30 June 2001 whether it was desirable that the law be changed so that all enactments bind the Crown unless provided otherwise, and whether changes in the law were required to impose criminal liability on the Crown for the breach of any enactment. It was also required that the Minister as soon as practicable after having received a report from the Ministry present a copy thereof to the House of Representatives.

3.215 One of the issues the New Zealand Law Commission examined in its report of 1990 which preceded the adoption of the Interpretation Act of 1999 was whether section 5(k) of the Acts Interpretation Act should be amended. Section 5(k) provided that no provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby. The report proposed that the principle espoused in section 5(k) be reversed (the reversal of the presumption) so that every enactment binds the Crown unless provided otherwise or the context requires.¹³² The New Zealand Law Commission gave the following two principal reasons for the reversal of the presumption – in principle, the Crown should be subject to the general law of the land, including the statute law - the rule of fairness requires that;

¹³¹ See the report on section 28 of the new Zealand Interpretation Act by the New Zealand Ministry of Justice to the Minister of Justice at <http://www.justice.govt.nz/pubs/reports/2001/interpretation/report.pdf> (accessed on 10 October 2005).

¹³² Clause 10 of the draft Bill provided that every enactment binds the Crown unless it otherwise provides or the context otherwise requires.

and the law was unclear and confusing. The Law Commission rejected the idea of limiting reversing the presumption for future statutes only, on the grounds that there was a successful precedent for a full reversal of the presumption (British Columbia in Canada), and because having two opposing regimes operating at the same time would create unnecessary confusion. The Law Commission also rejected the idea that there should be a general exemption for the Crown from criminal liability. It noted that departments have legally separate appropriations and that the public finance legislation and practices emphasise the responsibility of individual departments. It thought the imposition of financial penalties would make formal the condemnation of a particular agency that breached the law, and would help promote future compliance with the law.

3.216 The New Zealand Ministry of Justice developed an Interpretation Bill to implement the recommendations made by the Law Commission. During this development process the Ministry extensively examined the proposal to reverse the presumption. The Ministry received comments from the Treasury, the Office of the Clerk of the House of Representatives and the New Zealand Law Society that indicated that the application of the reversed presumption to existing statutes could have some undesirable and unforeseen effects. In particular, it had not been possible to quantify the precise effects (fiscal and otherwise) of implementing the recommendation to reverse the presumption. Consequently, clause 27 of the Bill as introduced in the House on 25 November 1997 contained a provision re-enacting section 5(k) of the Acts Interpretation Act. The Bill was referred to the Justice and Law Reform Committee on 2 December 1997. In its submission on the Bill the New Zealand Law Society proposed reversing the presumption in respect of future enactments – ie those enacted after the enactment of the Interpretation Bill. The Society argued that a requirement that the Crown would include a provision in legislation expressly stating that it will not be bound would be a salutary discipline on drafters and officials alike to address the issue. The reasons for this proposal were:

- The importance of the basic constitutional assumption that the Crown is under the law;
- There is little incentive for the Crown to address the issue of whether it should be bound; and
- It appears that the issue of whether the Crown should be bound has, in a number of cases, been overlooked in the process of preparing legislation.

3.217 During the process of the Bill being considered by the Select Committee, a general consensus was reached between the Ministry, the Law Commission, the New Zealand Law Society and Parliamentary Counsel Office that a reversal of the presumption contained in section 5(k) of the Interpretation Act 1924 was too complex an issue to address in the context of an interpretation statute. This was because the reversal of the presumption would have the following practical effects:

- Uncertainty in law, especially on the question of Crown criminal liability;
- Uncertainty about fiscal and other risks the Crown could face arising from error or inadequate consideration of whether the Crown should be bound by legislation;
- Special attention (and probably an exemption) would be required in relation to amendment Acts if the reversal of the presumption only applied to new Acts.

3.218 Consequently, the Committee recommended that section 5(k) of the Acts Interpretation Act be re-enacted in the Bill. However, the Committee also recommended the addition of a provision that became section 28 of the Interpretation Act to “ensure that the question of whether the presumption is reversed is addressed, while allowing for careful consideration of the wider issues involved”. In December 2000, the New Zealand Law Commission produced the *Kings Report* which examines the two matters referred to in section 28(1)(a) and (1)(b).¹³³ With respect to the issue referred to in section 28(1)(a), the *Kings Report* rejected the proposal contained in the Law Commission’s 1990 report to reverse the presumption so that the Crown would be bound by all statutes unless otherwise provided. The Law Commission’s main reasons for rejecting its earlier proposal were that:

- while in principle, the Crown should be subject to the general law, governments must be allowed to govern, therefore in some circumstances it will be appropriate that the Crown be bound by some or all provisions of a statute, in others it will not;
- the logical corollary of this is that any rule, even a rebuttable one, imposing blanket liability is insupportable;
- the optimum solution is that each statute should expressly address the question of whether and to what extent the Crown is bound;
- reversing the presumption would not make the law any less uncertain.

¹³³ Study Paper 6 *To Bind Their Kings in Chains – An Advisory Report to the Ministry of Justice* available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_109_278_SP6.pdf (accessed on 10 October 2005).

3.219 The *Kings Report* recommended that the New Zealand Cabinet Office Manual be amended to require that every proposed Bill should expressly state whether and to what extent the Crown is to be bound by the Bill, and to the extent that it is not, the reasons. With respect to the issue of whether changes in the law are required to impose criminal liability on the Crown for a breach of a statute (section 28(1)(b) of the Interpretation Act), the Law Commission concluded as follows:

- no changes in basic constitutional law are needed to impose criminal liability on the Crown;
- however, it would be necessary to define what is meant by the Crown for this purpose, and sensible for issues relating to such matters as procedure and penalties and mens rea (a guilty intention) to be dealt with.

3.220 The New Zealand Law Commission also suggested that an alternative approach might be to impose substantial pecuniary penalties on the Crown in a civil process as a disciplinary device, rather than impose criminal liability. A further development since the enactment of section 28 of the Interpretation Act was the introduction on 10 April 2001 of the Crown Organisations (Criminal Liability) Bill. This Bill implemented the recommendation in Judge Noble's report into the Cave Creek tragedy, that the Crown's exemption from prosecution for offences under the Building Act 1991 and the Health and Safety in Employment Act 1992 be removed. This marked a significant change in the longstanding principle that the Crown is indivisible and immune from criminal prosecution and established a precedent for Crown criminal liability. The key elements of the Bill were:

- Government departments, Crown entities and other Crown-related organisations ("Crown organisations") can be prosecuted for offences under the above two Acts;
- Separate legal personality is conferred on Crown organisations, where necessary, for the purposes of a prosecution and they will be prosecuted in their own name and not in the name of the Crown;
- On conviction, a Crown organisation will be liable to the same penalties that can be imposed on a body corporate (ie pecuniary penalties) convicted of the same offence.

3.221 In June 2001 the New Zealand Ministry of Justice submitted its report in response to the requirement under section 28(1) of the Interpretation Act.¹³⁴ The report concluded –

¹³⁴ Available at <http://www.justice.govt.nz/pubs/reports/2001/interpretation/report.pdf> (accessed on 16 August 2006).

- (a) in relation to the question posed by section 28(1)(a) that it was not desirable to change the law so that all enactments bind the Crown unless otherwise provided. It was proposed that there should be a requirement that all Cabinet papers seeking policy approval for proposals that will result in Government Bills must address the issue of whether the legislation is to bind the Crown;
- (b) in relation to the question posed by section 28(1)(b), changes in the law would be required to impose criminal liability on the Crown. It was proposed as with Crown immunity in relation to enactments generally, the issue of Crown criminal liability should be considered on a case by case basis.

3.222 The *Ministry of Justice Report* noted that the principal arguments in favour of reversing the presumption in section 27 were –

- that the Crown should be subject to the law and the same legal processes as everyone else, - in other words, there should be equality before the law;
- it would reduce the uncertainty of the current law;
- it would increase the incentives to address the issue of whether statutes should bind the Crown.

3.223 The *Ministry of Justice Report* explained that reversing the presumption could be seen as providing greater consistency with the principle of equality before the law. Over the last century the scope of both government activity and legislative regulation has increased considerably. It can be argued that where the Crown engages in an activity that is controlled by statute, it should generally be subject to those statutory controls. However, the issue is not so much about the principle as how it may be given practical effect. There appear to be few examples where the current presumption that the Crown is not bound has had a substantial detrimental impact on citizens. Possible examples were in the area of rating and income tax laws and the Crown's exemption from payment of some local authority rates and from income tax. With regard to income tax, government departments do not generally receive income other than from Parliamentary appropriations – that could properly be the subject of income tax, and in any event departments must pay GST like anyone else. Ultimately, it had to be acknowledged that the Crown has special powers and responsibilities and it was undeniable that it does in some circumstances require special statutory provisions and immunities in order to govern effectively. Governments will wish to ensure that the Crown is not bound in these circumstances, regardless of how the presumption is expressed in legislation. Reversing the presumption would therefore not of itself achieve in any practical sense equality between the Crown and citizens under statute law.

3.224 Currently a large number of statutes in force in New Zealand do not expressly state that they bind the Crown. As the Law Commission noted in its 1990 report, a number of these statutes do, however, clearly bind the Crown because they confer powers and rights on the Crown that plainly bind it. In other cases, it is possible that application may be implied by the content of legislation (such as when the central purpose of the legislation would otherwise be frustrated). While the lack of clarity in some statutes on whether the Crown is bound may be seen as creating uncertainty, in practice there appear to have been only a small number of cases in New Zealand where the matter has been in issue. However, it was not considered that simply reversing the presumption will by itself remove the perceived uncertainty in the current law.

3.225 The *Ministry of Justice Report* noted that whether the Interpretation Act provides that no enactment binds the Crown unless it expressly provides that the Crown is bound, or that every enactment binds the Crown unless it provides otherwise or the context otherwise requires (the form of words suggested by the 1990 Law Commission report), the interpretation of statutes would ultimately remain a matter for the courts. The word “expressly” in the current provision includes the concept of necessary implication. Whatever form of words is used, it is likely that the courts will still have to grapple with the issue of whether, in light of the particular words used in the statute, or having regard to its scheme, Parliament intended to depart from the presumption set out in the interpretation legislation. In relation to this issue, the *Kings Report* states that “We do not accept that either presumption results in avoidable uncertainty. There is nothing in the uncertainty point”.

3.226 The *Ministry of Justice Report* stated that it should be noted in particular, that a reversal of the presumption, will not provide certainty on the issue of the extent to which the Crown is criminally liable under a particular enactment. The Crimes Act 1961 contains an express statement that it binds the Crown but as noted in the *Kings Report* this has not resulted in prosecutions of the Crown. Case law in New Zealand has held that a statement that an enactment binds the Crown is not sufficient to impose criminal liability on the Crown (*Southland Acclimatisation Society v Anderson and the Minister of Mines* [1978] 1 NZLR 838). In that case, the court held that the Crown is only to become criminally liable where it is clear that the legislature intended that result. Faced with a simple reversal of the current presumption, it is likely that the courts will conclude that this is an insufficient indication of Parliament’s intention.

3.227 The *Ministry of Justice Report* pointed out that it is highly desirable that each statute should state whether and to what extent it binds the Crown. The Ministry of Justice agreed with the general principle that there should be equality before the law between the Crown and other persons. However, it must also be accepted that there are some circumstances when it will not be appropriate for the Crown to be bound. They considered that it was highly desirable that the issue of whether the Crown is bound by legislation should be considered on a case by case basis, and at an early stage in the development of new legislation. However, they did not think that simply reversing the current presumption was the best way to ensure that this occurs. Instead they considered that there should be a requirement that the issue be dealt with as part of the Cabinet policy approval process for new legislation. They suggested that the New Zealand Cabinet Office *Cabinet and Cabinet Committee Processes - Step by Step Guide 2001* could be amended to require all policy papers that will result in Government Bills to expressly state whether and to what extent the proposed legislation is to bind the Crown.¹³⁵ This would mean that agencies responsible for promoting legislation will have to focus specifically on the issue early in the policy development stage in every case, and should ensure that a more systematic approach was taken to consideration of whether a particular enactment is to bind the Crown. They also considered that this approach would lessen risks for the Crown that may arise if the presumption is simply reversed and inadequate consideration is given to whether the Crown should be bound by a particular piece of legislation. While this approach would mean that the position of existing statutes will not be considered immediately, over time as these acts are consolidated or replaced, the issue will be addressed. In any event, their approach recommended would not preclude a global review of existing legislation taking place as resources permit if that was desired.

3.228 The *Ministry of Justice Report* explained that reversing the presumption in respect of all legislation (including existing legislation) would create fiscal and other risks to the Crown unless a global assessment of all legislation was undertaken prior to the change being made. Without such a prior assessment being made, the Crown may well find itself bound by legislation for which there was good reason for it to be immune.

¹³⁵ The *Guide 2001* requires Ministers to confirm compliance with certain principles, obligations and guidelines in a number of areas when bids are made for inclusion of Bills in the legislation programme and when a Bill is subsequently submitted to the Cabinet Legislation Committee for introduction. Section 3 of the *Step by Step Guide* also requires ministers to provide information on several other matters when submitting policy papers for approval, namely a regulatory impact statement (for policy proposals that result in bills and regulations), a statement on consistency with the Human Rights Act 1993, and a statement relating to gender implications (for certain policy proposals).

Assessing the scope and extent of the risks was likely to be a difficult and resource intensive project. The exercise carried out in relation to the likely cost implications of imposing criminal liability on the Crown under the Building Act 1991 and the Health and Safety in Employment Act 1992 indicated the extensive input required, and the difficulty in obtaining accurate cost assessments. However, they acknowledged that in the Canadian jurisdictions of British Columbia and Prince Edward Island and in South Australia¹³⁶ and the Australian Capital Territory the presumption has been reversed, without, so far as they could ascertain, causing difficulties in practice. In British Columbia the reversal was applied to almost all legislation.¹³⁷ However, in the other jurisdictions, the reversal was prospective (that is, only applies to legislation passed after the coming into force of the relevant provision).

¹³⁶ 20—Rules of construction to be applied in determining whether an Act binds the Crown

(1) Subject to subsection (2), an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown, but not so as to impose any criminal liability on the Crown.

(2) Where an Act passed after 20 June 1990 amends an Act passed before that date, the question whether the amendment binds the Crown will be determined in accordance with principles applicable to the interpretation of Acts passed before 20 June 1990.

(3) Where an Act or a provision of an Act (whether passed before or after 20 June 1990) binds the Crown but not so as to impose any criminal liability on the Crown, the Crown's immunity from criminal liability extends (unless the contrary intention is expressed) to an agent of the Crown in respect of an act within the scope of the agent's obligations.

(4) Where an Act or a provision of an Act (whether passed before or after 20 June 1990) does not bind the Crown, the Crown's immunity extends (unless the contrary intention is expressed) to an agent of the Crown in respect of an act within the scope of the agent's obligations.

(5) For the purposes of this section—

(a) a reference to the Crown extends not only to the Crown in right of this State but also (so far as the legislative power of the State permits) to the Crown in any other capacity;

(b) a reference to an agent of the Crown extends to an instrumentality, officer or employee of the Crown or a contractor or other person who carries out functions on behalf of the Crown;

(c) an agent acts within the scope of the agent's obligations if the act is reasonably required for carrying out of obligations or functions imposed on, or assigned to, the agent.

¹³⁷ 14(1) Unless it specifically provides otherwise, an enactment is binding on the government.

(2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the *Assessment Act*, does not bind or affect the government.

3.229 The *Ministry of Justice Report* noted that an alternative to reversing the presumption for all legislation would be to apply the reversed presumption to future legislation only. Prospective application of the presumption would obviate the need to perform the task of assessing individually all existing statutes thereby removing the risks and resource implications associated with such an exercise. However, it would give rise to the following practical consequences:

- there would be a dual regime for the application of enactments to the Crown that could cause legal confusion and uncertainty;
- special attention would have to be given to amendment Acts.

3.230 The *Ministry of Justice Report* explained that the application of different presumptions depending on the date of enactment of a particular statute could cause legal confusion and uncertainty. However, a regime based on a distinction as to when a particular statute was enacted would simply require a factual inquiry as to the date of the relevant enactment. Over time, potential difficulties would diminish because the two regimes would merge as existing statutes were consolidated or replaced with measures incorporating the new “rule”. If the presumption were reversed in respect of future legislation, the effect of such a reversal on amendment Acts would also need to be addressed. If specific provision were not made for amendment Acts, the effect of a reversed presumption might be to create uncertainty as to whether a new amendment Act that does not specify that it binds the Crown, has the effect of causing the entire parent Act to bind the Crown, whether or not that was intended. South Australia has addressed the issue by providing that the reversed presumption is restricted to Acts passed since the reversal of the presumption, and does not apply to amendments of pre-existing Acts. In Prince Edward Island the position appears more complex as the reversed presumption applies to both new Acts and new amendments to pre-existing statutes with the result that in some circumstances a new amendment may bind the Crown, but older provisions of the same statute may not. These approaches suggest that even where the issue of amendment Acts is addressed, a further layer of complexity is added to legislation.

3.231 The *Ministry of Justice Report* suggested that applying a reversed presumption prospectively would remove the need for all existing legislation to be examined before the reversal was implemented. However, it would result, at least for some time, in dual regimes operating. In addition, the application of the presumption to Acts amending pre-existing legislation would need to be addressed which would add complexity and possibly create uncertainty. Accordingly, their response to the question posed by

section 28(1)(a) of the Interpretation Act was that they did not consider that it was desirable to change the law so that all enactments bind the Crown unless otherwise provided. Instead, the *Step by Step Guide* should be amended to require that all Cabinet papers seeking policy approval for matters that will result in government Bills must address the issue and recommend to Cabinet whether the proposed legislation should bind the Crown, and to the extent that it does not, must provide reasons why.

(c) Australia

3.232 In 2001 the Australian Law Reform Commission Report considered, amongst others, the issue of legislation binding the State.¹³⁸ The Commission noted that the immunity of the executive government from the operation of statute was frequently described in consultations as the most unsatisfactory area of the law of immunity. The Commission heard repeatedly of the resources that were wasted by governments and other entities in seeking advice about the application of Commonwealth, state and territory laws to them. Many with whom the Commission consulted were less concerned about the content of the immunity rule than with the need for a clear statement of what the rule is, so that affairs could be organised within a known legal environment. The Australian Commission shared these concerns and noted that the area is fortunately one in which it is relatively simple to achieve certainty through a clear expression of legislative intention. The Commission explained that their recommendations in relation to immunity from statute have been informed by a number of considerations:

¹³⁸ *Report 92 The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/92> (accessed on 10 August 2006):

The Commission examined four core areas of immunity. The first relates to procedural immunities enjoyed by the Commonwealth, including immunity from being sued, immunity from procedural orders made in the course of litigation, and immunity from coercive civil remedies. A further category of procedural immunity was the immunity from execution of judgments. The second area related to the immunity of the Commonwealth from the substantive common law, and most especially from liability in tort. The third area related to the traditional presumption that executive government is immune from the operation of statutes. In a federation, this immunity arises in a number of situations, such as the application of Commonwealth statutes to the Commonwealth executive; the application of Commonwealth statutes to the executives of the States and Territories; and the application of state and territory statutes to the Commonwealth executive. Each situation requires separate consideration because of the asymmetrical nature of the federal compact. The fourth area of inquiry was the extent to which the immunities apply to a variety of persons or entities, ranging from those at the core of executive government to those at the periphery. The principal question here was not the content of the immunities but how widely they apply.

- First, the Commission considered it desirable to avoid, wherever possible, a case-by-case determination of an entity's immunity by reference to highly fact-sensitive tests. Such tests are apt to lead to an environment of legal uncertainty and to wasteful litigation.
- Second, the Commission considered it axiomatic that the executive branch of government should not be beyond the law but should generally be subject to the same law of the land as applies to citizens.
- Third, the Commission recognised that governments perform functions that have no counterpart among citizens and that it is not possible to subject governments to the same laws as citizens in every case. However, in such circumstances, the Commission believed that any immunity from the operation of the general law ought to be justified through open and accountable democratic processes, as reflected in laws enacted or authorised by Parliament.
- Fourth, the Commission was of the view that due regard must be had to the fact that Australia is a federation. Different constitutional and prudential considerations apply in assessing the immunity that the executive government of one polity enjoys from the laws of another polity than in assessing immunity within a polity.
- Finally, the Commission considered that the reform of immunities applicable to new statutes and existing statutes merits different approaches. New principles of immunity may be readily applied to new Acts. A more cautious approach is warranted for existing statutes, which may have been drafted on the basis of the presumption of immunity from statute as it existed at the time of enactment. For this reason the Commission recommended a program of review of existing legislation, with a sunset clause to ensure that this legislation is brought into line with the new principles in an agreed time frame.

3.233 With these principles in mind, the Commission considered the application of Commonwealth Acts to the Commonwealth executive. The Commission recommended that every new Commonwealth Act should bind the Commonwealth unless the Act states expressly that the Commonwealth is not so bound. Existing Commonwealth Acts should be reviewed and amended if necessary within five years, after which the new rule of immunity should apply. The Commission considered the application of Commonwealth Acts to the executives of the States and Territories. In this context the Commission believed that regard should be had to the nature of Australia's federal compact. The application of a Commonwealth statute to other polities within the federation may have quite different consequences to its application to citizens. Although it may be appropriate, and indeed desirable, for Commonwealth statutes to be applied to the States and Territories as a matter of policy, the Commission believed that a commitment to federal values requires that the Commonwealth Parliament consider that issue expressly and reflect its conclusion in legislation. For this reason, the Commission recommended that every new

Commonwealth Act should not bind the States or Territories unless the Act states expressly that the States or Territories are so bound. Existing Commonwealth Acts should be reviewed and amended if necessary within five years, after which the new rule of immunity should apply.

3.234 The Australian Law Reform Commission considered the application of state and territory Acts to the Commonwealth executive. This question has given rise to considerable uncertainty under s 64 of the *Judiciary Act*, which the Commission believed should be repealed. The Commission recommended that the Commonwealth adopt a rule by which every new state or territory Act binds the Commonwealth, subject to three qualifications. These were that the Commonwealth should be able to exempt itself by regulation from the application of a state or territory Act; the Commonwealth should not be bound by a state or territory Act that does not bind the executive of that State or Territory; and the Commonwealth should not be bound by a state or territory Act that is expressed not to bind the Commonwealth. Existing state and territory Acts should be reviewed and any necessary exemptions should be made by regulation within five years, after which the new rule of immunity should apply.

3.235 The Australian Law Reform Commission pointed out that underlying the consideration of all immunities were important changes to the way in which governments perform their functions and deliver services to citizens. The corporatisation, privatisation and contracting out of governmental functions have exerted considerable pressure on the traditional doctrines of immunity. This has occurred as entities lying progressively further from the core of executive government have sought the advantages of procedural and substantive immunities, which historically attached to the monarch alone. These immunities may not be as easy to justify for diverse entities through which governments operate in contemporary society. The Commission made recommendations in respect of bodies that are established by a Commonwealth Act and owe their existence, powers and functions to that Act. The Commission recommended that new bodies established by a Commonwealth Act should not enjoy the privileges and immunities of the Commonwealth unless that Act states expressly that they are entitled to do so. Additionally, all Acts that establish existing Commonwealth bodies should be reviewed and amended if necessary within five years, after which the new rule of immunity should apply.

3.236 The Australian Law Reform Commission noted that in the absence of an express legislative statement that a statute binds the executive, the presumption of immunity may be removed by implication. Historically, the English courts were

reluctant to find such an implication. The *Bombay* principle, established by the Privy Council in *Province of Bombay v Municipal Corporation of Bombay*,¹³⁹ states that an Act does not bind the Crown unless it does so by express words or by necessary implication. However, a necessary implication would only be found if the intention to bind the Crown was 'manifest from the very terms of the statute'. Under this rule, the presumption of crown immunity prevailed unless the purpose of the statute would be 'wholly frustrated' by the Crown's immunity from it. In *Lord Advocate v Dumbarton District Council*,¹⁴⁰ the House of Lords affirmed the *Bombay* principle, rejecting the notion that the subject matter of an Act might imply that the Crown is bound.

¹³⁹ [1947] AC 58.

¹⁴⁰ [1989] 3 WLR 1346. See also *Mid-Devon District Council, R (on the application of) v First Secretary of State & Ors* [2004] EWHC 814 (Admin) where the court remarked as follows:

11. In the *Dumbarton* case, Lord Keith accepted at p. 598A the correctness of the principle stated by Diplock LJ (as he then was) in *British Broadcasting Corporation v Johns* [1965] Ch 32 p. 79:

'The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.'

Thus, the Crown is immune from the regime of planning control established by the 1990 Act unless there is an express statutory provision removing its immunity, or its immunity should be treated as removed by necessary implication. Since the Crown is immune from planning control, section 294(1) must be regarded as providing an immunity to persons or bodies other than the Crown, but only if the three conditions prescribed by section 294(1) have been satisfied. They are that (1) the development was carried out by or on behalf of the Crown, (2) the development was carried out after 1st July 1948, and (3) the development was on land which was Crown land at the time when the development was carried out.

12. This line of thinking seems to me to be entirely consistent with what Lord Keith said in *Dumbarton* about the effect of section 253(3) of the Town and Country Planning (Scotland) Act 1972, which is, in all material respects, similar to section 294(1) of the 1990 Act. At p. 602E Lord Keith said:

'Subsection (3) is concerned with land which was Crown land at a time when development was carried out on it by or on behalf of the Crown, but which has ceased to be such land. Ex hypothesi the development would have been carried out without planning permission, and but for this provision the Crown's successor in title would be subject to an enforcement notice requiring him to undo the development.'

In other words, the section was intended to immunise from enforcement proceedings only a limited type of development, namely, a development which the Crown carried out on land which was at the time of the development, but subsequently ceased to be, Crown land. Otherwise, the Crown's successor-in-title, as Lord Keith observed, "would be subject to an enforcement notice requiring him to undo the development." What section 294(1) does not do is to confer an immunity from enforcement proceedings upon private persons such as Mr and Mrs Stevens in respect of development carried out, admittedly on behalf of the Crown, but on land which was not Crown land at the time.

3.237 The Australian Law Reform Commission explained that the *Bombay* principle was adopted as a general rule of construction by Australian courts, though it was not applied with the same rigour as in England. In *Commonwealth v Rhind*,¹⁴¹ the High Court held that 'in the construction of statutes ... the Crown is not included in the operation of a statute unless by express words or by necessary implication', but went on to state that 'the implication will be found, if at all, by consideration of the subject matter and of the terms of the particular statute'.

3.238 The Australian Law Reform Commission explained that the *Bombay* principle was recast by the High Court in 1990 in *Bropho v Western Australia*,¹⁴² with the result that it became significantly easier to imply that a statute binds the executive. In *Bropho* the appellant sought an injunction to restrain the State of Western Australia from redeveloping Crown land that was claimed to be an Aboriginal site protected under the *Aboriginal Heritage Act 1972 (WA)*. The respondents resisted the injunction on the ground that the provisions of the Act did not bind the Crown in right of Western Australia. The High Court held that the 'necessary implication' required to bind the Crown might be found in the 'subject matter and disclosed purpose and policy' of the Act and in the overall operation of the Act in relation to its subject matter; it need not be specifically stated in the terms of the Act. In the Court's view, the general rule of statutory construction was still to be applied but 'if ... a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail'. The High Court held that the *Aboriginal Heritage Act 1972 (WA)* did apply to the Western Australian executive. The disclosed policy and purpose of the Act – to preserve traditional Aboriginal places and objects – supported this conclusion. Given that 93% of Western Australian land is Crown land, the Act would be ineffective to preserve Western Australian Aboriginal sites and objects if it applied only to land other than Crown land.

3.239 The Australian Law Reform Commission remarked that although *Bropho* concerned the relationship between a Western Australian statute and the Western Australian executive, the case has since been applied in cases concerning the immunity of other Australian governments, including the Commonwealth, from the operation of their own statutes. In addition to these judicial developments, some Australian jurisdictions have legislated with respect to executive immunity from statute. In South Australia and the Australian Capital Territory the immunity has been removed

¹⁴¹ (1966) 119 CLR 584, 598.

¹⁴² (1990) 171 CLR 1, 21-22.

altogether. The Law Reform Committee of South Australia recommended in 1987 that the presumption of immunity from statute be 'replaced with a presumption in favour of the Crown being bound'. The Committee described the effect of the proposed reform as transferring 'the onus of rebutting the presumption from subject to Crown, the latter being the party best qualified to establish why it should not be affected by the legislation in question'. The South Australian Parliament did not follow the recommendation at the time but in 1990, following the High Court's decision in *Bropho*, s 20 of the *Acts Interpretation Act 1915* (SA) was amended to provide:

20(1) Subject to subsection (2), an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown, but not so as to impose any criminal liability on the Crown.

3.240 The Australian Law Reform Commission commented that in the Australian Capital Territory, the *Crown Proceedings Act 1992* (ACT) states that 'each Act binds the Crown to the extent that it is capable of doing so unless it or another Act provides otherwise'. Reforms to the law relating to executive immunity from statute have been initiated in other Australian jurisdictions, although they have not been brought to fruition. The Law Reform Commission of New South Wales recommended in 1976 that executive immunity from statute be abolished and replaced by a provision that would bind the Crown by statute in most circumstances, but the recommendation was not implemented. In response to the decision in *Bropho*, the Western Australian government introduced a Bill to overturn the decision and strengthen the earlier rule in *Bombay*. The Bill was unsuccessful. Had it been enacted, it would have created a situation similar to that in Queensland, where pre-*Bropho* legislation provides that no Act binds the Crown unless 'express words are included in the Act for that purpose'. Overseas law reform agencies have favoured removal of the executive's immunity from statute. The Canadian provinces of British Columbia and Prince Edward Island have implemented such recommendations by amending interpretation legislation to provide that the Crown is bound by any Act that does not specifically provide otherwise.

3.241 The Australian Law Reform Commission considered that the rule in *Bropho* is inherently uncertain because it requires courts to discern from a statute whether the 'subject matter', 'apparent legislative intent', and 'disclosed purpose and policy' subject the executive to liability when the express words of the statute fail to do so. The application of the test requires a case-by-case analysis. The fact-sensitive nature of this inquiry leaves ample room for difference of opinion and, ultimately, for litigation.

3.242 The Australian Law Reform Commission pointed out that the High Court case of *Commonwealth v Western Australia*¹⁴³ demonstrates the difficulties of using the rule in *Bropho* to determine whether the Commonwealth executive is subject to federal legislation. The justices in *Commonwealth v Western Australia* differed as to whether

¹⁴³ [1999] HCA 5.

31 . . . The question whether the legislation of one polity applies to another is usually framed as a question whether it "binds the Crown in right of a State" or, in the case of State legislation, "whether it binds the Crown in right of the Commonwealth". In the present case, however, the question is not whether the *Mining Act* "binds the Commonwealth", but whether it applies to lands acquired by the Commonwealth for a public purpose.

32. There is a common law rule or presumption that "no statute binds the Crown unless the Crown is expressly named therein or unless there is a necessary implication that it was intended to be bound". And it was held in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* that, within Australia, that presumption applies to "the Crown in all its capacities" and not simply "the Crown in right of the community whose legislation is under consideration", to use expressions which were used in that case.

. . .

37. Speaking of legislation enacted by the Commonwealth Parliament, Gibbs ACJ observed in *Bradken* that legislation "may have a very different effect when applied to the government of a State from that which it has in its application to ordinary citizens." That is also true of State legislation when applied to members of the executive government of the Commonwealth. And it is, perhaps, more obviously so in the case of legislation affecting government property, whether the legislation in question is that of a State or that of the Commonwealth. For that reason, the presumption with respect to government property should be expressed as a presumption with respect to the property of all polities in the federation, not simply that of the enacting polity. Moreover, it would be anomalous if the presumption were not to operate in the same way as the presumption with respect to members of the executive government. . . .

39. Given, however, that the definitions of "Crown land" and "private property" are not exhaustive and given, also, the presumption that a statute does not detract from the property rights of a State or of the Commonwealth, it is necessary to ask whether the Act was intended to apply to Commonwealth land. More precisely, it is necessary to ask whether there is to be discerned a contrary intention so that land acquired by the Commonwealth for a public purpose falls neither within the definition of "Crown land" nor that of "private land".

40. It is not unusual for a State statute to be expressed to bind "the Crown in right of" that State, but for the statute to be silent with respect to its application to the Commonwealth. Nor is it unusual, in that situation, for there to be special provision as to the manner in which the statute is to apply to members of the executive government or to the property of the State. In that situation, it may be taken that the Parliament recognised that it would be inappropriate for the statute to apply to government property or personnel in precisely the same way as it does to individuals.

41. Moreover, if it has been recognised by the legislature that it would be inappropriate for legislation to apply to government property or personnel in the same way as it applies to individuals, it may be inferred from its silence with respect to other polities in the federation that it was not intended that it should apply to their property or personnel. That is because, if the legislature has recognised that a statute will or may have a different impact on government property or personnel, it ought not be assumed that it intended to subject the property and personnel of the other polities in the federation to a regime which it recognised was inappropriate in its own case. (Footnotes omitted)

to apply *Bropho* or a stricter test to determine immunity. Gummow J, with whom Kirby J agreed, held that if it were intended that the Commonwealth be bound by the statute, it would be expected that the legislature would have plainly indicated that intention, rather than relying on implication from the subject matter, purpose or policy of the Act.¹⁴⁴ It has been suggested that Gummow J's view might be seen as a reference to the more stringent pre-*Bropho* test of construction. As a result of the confusion surrounding *Bropho*, legal practitioners were faced with a difficult task when advising clients whether the Commonwealth executive is bound by a federal Act that makes no express provision to that effect. Section 64 makes no mention of rights under statute, and the operation of the section is uncertain in that regard.

3.243 The Australian Law Reform Commission stated that the majority of the Court in *Bropho* held that the new test of immunity from statute should not be applied retrospectively to legislation that was enacted in light of a different and stronger common law presumption. The Court articulated a graduated scale of immunity, depending on the date on which the legislation was enacted. The *Bropho* test could be applied to statutory provisions enacted before the Privy Council's 1946 decision in *Bombay* because the strict test was not then in force in Australia. For legislative provisions enacted between 1946 and 1990, a stronger presumption existed at the time of enactment. They considered that exactly how much account should be taken of the stricter presumption during this period is not clear. Some statutes from this period have been interpreted by courts according to the *Bombay* principle. This puts them in a different category from statutes enacted during the same period whose application to the executive has yet to be considered by the courts. For statutes enacted after 1990, the *Bropho* test applies.

3.244 The Australian Law Reform Commission remarked that different approaches have been taken to this temporal problem in jurisdictions in which the executive's immunity from statute has been removed by legislation, or recommended for removal by law reform bodies. In South Australia, s 20 of the *Acts Interpretation Act 1915* (SA) provides that only Acts passed after a designated date will be binding on the executive government in accordance with the new rule. In the Canadian province of Prince Edward Island, the immunity differs depending on the year of enactment of the statute.

¹⁴⁴ At par 120: ". . . If the legislature of the State had been determined to provide for the taking or resumption of land or interests in land vested in the Commonwealth, then, given the serious constitutional question that would arise, it would be expected that the legislature would have plainly indicated that intention. The failure to do so with respect to the definition of "private land" suggests that Div 3 is concerned with land held by private parties rather than by the federal body politic."

The former presumption of immunity applies for the life of statutes enacted prior to the removal of the immunity in 1981. The presumption is reversed for post-1981 statutes. Concern has been expressed that the co-existence of opposing presumptions, without the prospect of future consolidation of the law, might create confusion. They pointed out that British Columbia took the approach of removing the immunity with immediate effect for all statutes, including existing ones. The Ontario Law Reform Commission preferred the approach of implementing the reversal at the next revision of Ontario statutes. However, the next revision was to be only one year later in 1990 – too soon to achieve the necessary changes. The subsequent review in 2000 was thought to be 'an unnecessarily long wait for a much-needed reform'. The Ontario Law Reform Commission therefore recommended that the immunity be removed in respect of all statutes, with the onus upon the responsible ministries to restore executive immunities by legislation where necessary. A possible problem with this approach is that government may find itself subject to statutes without having had an adequate opportunity to preserve its immunity by amending the legislation.

3.245 In consultations and submissions, the Australian Law Reform Commission was widely advised that the immunity of the Commonwealth executive from the operation of Commonwealth statutes should be removed by the *Judiciary Act* or by the *Acts Interpretation Act 1901* (Cth). The Law Council of Australia recommended that 'the presumption of immunity from statute be reversed by legislation so that the Crown in right of the Commonwealth is *prima facie* presumed to be subject to federal laws'. The *Bropho* principle was seen as difficult to apply as a general rule, and its effect difficult to predict in the circumstances of particular cases. It was noted that s 64 of the *Judiciary Act*¹⁴⁵ removed the immunity in many cases, but the operation of that provision was seen to be unclear. Commentators acknowledged that many Commonwealth statutes ought not bind the Commonwealth, but they considered that exceptions to the general rule of liability should exist only as a result of clear legislative provisions. A number of those with whom the Commission consulted held the view that the Commonwealth's obligation to legislate for such exceptions was the stronger because fulfilling the obligation placed no great burden on the Commonwealth. Many of those who made submissions considered that the ease with which the Commonwealth legislature may exclude the executive from the operation of its own

¹⁴⁵ In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

statutes eliminates any need for immunity at common law. They noted comments stating the following:

- The Commonwealth should be astute enough to consider the effect of legislation on itself before enacting it . . . It is not something which requires a presumption of statutory interpretation . . . The ideal rule . . . would therefore be that the Commonwealth is bound by its own legislation ...
- If government requires to be excluded from the operation of statute law, let that be plain and express on the face of the legislation. The presumption is a first class example of the 'mystery' which enables common lawyers to segregate themselves from the wider community. When a professional bauble becomes as socially dangerous as this one plainly is, the only appropriate course is extirpation.

3.246 Some from whom the Australian Law Reform Commission sought comment noted that removing the Commonwealth's immunity from statute would create difficulties when construing past Acts and applying past judicial decisions regarding their effect on the Commonwealth. One view was that the removal of immunity should apply only to future Acts. For example, the Law Council of Australia said –

an appropriate approach for reversing the presumption of immunity from statute would be that of s 20 of the *Acts Interpretation Act 1915* (SA). On that approach, all Acts passed after a certain date (other than Acts which amend Acts passed before that date) would bind the Crown unless the contrary intention appears (either expressly or by implication).

3.247 The Australian Law Reform Commission there said that there was support for the resolution of this transitional issue by reviewing statutes individually and amending them as appropriate. Greg Taylor and John Williams said 'as far as transitional issues are concerned, the best option would be a review of all existing Commonwealth legislation within a set time frame'. A number of policy arguments favoured the removal of the immunity currently enjoyed by the Commonwealth executive from the operation of Commonwealth statutes. The immunity from statute conflicts with the principle of equality and the premise that government should be subject to law unless Parliament exempts it.¹⁴⁶ Other policy arguments related specifically to immunity from statute. A

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See *ALRC Report 92* Chapter 22: 22.48 The Commission was told repeatedly in submissions and consultations that it is difficult to apply the existing rules on executive immunity in practice, or to predict in a given case whether the application of these rules to the facts will result in the executive being liable. This uncertainty is both costly and time consuming for litigants and courts. It is also unnecessary.

22.49 The Commission considers that any reform in this area should aim to make the law clearer and simpler. For example, in relation to the presumption of immunity from statute, this goal could be achieved by replacing the current fact-sensitive rule with one that subjects the executive to statute unless legislation expressly exempts the executive. Greg Taylor and John Williams expressed it in their submission:

practical argument for removing this immunity derived from the aim of simplifying the law. The rule in *Bropho* is uncertain in scope and difficult to apply, yet it is said that there are an increasing range and number of situations in which the courts have found immunity from statute to be removed. This suggested that a simpler, more effective approach would be to reverse the existing rule of immunity and to specify any exceptions where immunity should apply.

3.248 The Australian Law Reform Commission supported the view that if the legislature intends the executive to benefit from immunities that are not available to citizens, it should clearly indicate its intention. They noted that Peter Hogg and Patrick Monahan have made the point that immunity from statute has prevailed in the law without 'either proper understanding of the old cases or discussion of the reasons behind them', and that no logical basis for the immunity exists. When Parliament enacts legislation, it would be relatively simple to include a provision stating that the legislation does not bind the executive, if this is considered appropriate. If it is accepted that the executive ought generally to be subject to law, the Australian Law Reform Commission considered it logical that Parliament should consider and actively provide for those situations in which the executive is not to be bound. The Ontario Law Reform Commission noted:

the broad and various exceptions and distinctions that have been created with respect to the presumption of Crown immunity have nearly eaten away the rule. By virtue of these developments, most statutes now, in fact, apply to the Crown. To the extent that the change is one of substance, removing Crown immunity, we expect that it will generally be desirable. Crown immunity should be the exception and not the rule. (Footnote omitted)

This would also be a clear rule. The *Bropho* rule may be criticised for allowing too much to depend on judicial impression. Because the presumption that statutes do not bind the Crown has been watered down, a wide variety of factors have to be taken into account in considering whether [the presumption of immunity] is rebutted, and the outcome can therefore be quite uncertain. The application of the *Bropho* standard in inter-polity cases is still quite uncertain ... Uncertainty in such an important area can and should be avoided.

22.50 Under this proposal, the Commonwealth would be required to state expressly in legislation any intention that the Commonwealth executive not be bound by one of its own statutes or a state or territory statute. The Senate Standing Committee on Legal and Constitutional Affairs has noted that 'one important advantage of this approach would be the creation of greater certainty in the application of territory, state and federal laws to Commonwealth and state corporations'.

22.51 The Commission is also concerned to ensure that any change to the law avoids creating new complexities. Legislation implementing a new rule regarding immunity should also clarify the interpretation of existing statutes that were drafted on the basis of the previous rule. Parliament should therefore have ample opportunity to review existing Acts before a new rule is applied to existing legislation. (Footnotes omitted)

3.249 In the Australian Law Reform Commission's view the decision to exclude the Commonwealth executive from the requirements of a Commonwealth statute should be transparent, accountable and open to public scrutiny. The Commission considered that this decision should be made by Parliament. They noted that where a statute was silent as to whether it binds the executive, the common law immunity presumptively frees the executive from any obligations under it, unless the required implication can be found in the subject matter or purpose of the Act, and in the absence of an express statement in the Act, it was difficult to know whether the legislature intended to exempt the executive or simply failed to advert to the issue of executive immunity.

3.250 The Australian Law Reform Commission stated that in 1975, the Law Reform Commission of New South Wales indicated that executive immunity was seldom specifically considered at the time legislation was prepared, as a result of the time pressure under which legislation is drafted and debated; the complexity of the immunity issue; and the low priority of such questions compared with other substantive provisions of the legislation. As a result, that Commission considered that no rational or consistent legislative policy regarding Crown immunity could be discerned in most cases. Drafting practice appeared to have advanced considerably since 1975, at least in the Australian Commonwealth sphere. During consultations, the Office of Parliamentary Counsel advised the Commission that it regularly seeks drafting instructions in respect of executive immunity from the government department sponsoring a Bill. However, it was acknowledged that occasionally such instructions cannot be attained. The Australian Commission considered that if the presumption of immunity were removed, Parliament would be forced to consider the terms of every statute from which it considered the executive should be immune.

3.251 The Australian Law Reform Commission noted that it is widely argued that the expansion of government activity makes it appropriate to subject the executive to most legislation that regulates the marketplace, and that since the Australian colonies were established, government functions have expanded to cover a vast range of commercial and other activities, often in competition with private citizens and corporations. This consideration was a key factor in the High Court's decision in *Bropho*. The Australian Commission concluded that the Commonwealth executive should be bound by Commonwealth Acts, except for those that contain an express provision to the contrary. The Commonwealth's immunity from its own legislation should be removed by amendment to the *Judiciary Act*. In reaching this conclusion, the Commission recognised the need to avoid creating new complications in place of old

ones. For this reason, the Commission did not favour adopting the South Australian approach of removing immunity 'unless the contrary intention appears (either expressly or by implication)'. They considered that much of the confusion in the existing law stems from the principle that the executive may be bound by an Act by implication in the absence of express words to that effect. The Commission considered that any exceptions to the proposed new rule that the executive be bound by statute should be provided for expressly and not by implication. The Commission left open the question of whether the requirement that immunity be provided for 'expressly' leaves any room for judicial discretion in those circumstances in which the statute does not make provision 'in terms'.

3.252 In relation to the temporal application of the proposed new rule, the Australian Law Reform Commission recommended that the rule apply to all new statutes enacted after a specified date (other than those that amend existing legislation).¹⁴⁷ They also recommended that the new rule should be applied to existing Acts after sufficient time has passed to enable the Commonwealth to review all statutes, decide whether or not they should bind the Commonwealth, and make any necessary amendments.¹⁴⁸ The Commission considered that five years was a reasonable period of review and that this approach would ensure that account was taken of the fact that existing statutes may have been enacted in light of a different common law presumption of immunity.

(d) Canada

3.253 The question of the extent of Canadian legislation binding the Crown was considered in the *Friends of the Oldman River Society v Canada (Minister of*

¹⁴⁷ *New Commonwealth legislation:* The rule of statutory construction that the Commonwealth is presumed to be immune from the operation of Commonwealth legislation should be abolished. The *Judiciary Act* should be amended to provide that the Commonwealth is bound by every Commonwealth Act that is enacted after the date on which this amendment comes into force unless that Act states expressly that the Commonwealth is not bound by the Act in whole or part.

Existing Commonwealth legislation: The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, every Commonwealth Act existing at the date on which these amendments come into force shall bind the Commonwealth unless the Act states expressly that the Commonwealth is not bound by the Act in whole or part.

¹⁴⁸ The Attorney-General should order a review of all existing Commonwealth legislation for the purpose of determining whether, and to what extent, each Act should bind the Commonwealth. Following such a review, each Act should be amended, as necessary, to state expressly whether it does not bind the Commonwealth in whole or part. The review should be completed and any amendments to legislation enacted within five years.

Transport).¹⁴⁹ The respondent Society, an Alberta environmental group, brought applications to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta – a project which affected several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under the *Navigable Waters Protection Act*. The Act provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 per cent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under the *Navigable Waters Protection Act*, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This case raised the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability:

. . . The starting point on this issue is s. 17 of the *Interpretation Act* which codifies the presumption that the Crown is not bound by statute:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

It is agreed by all concerned that there are no express words in the *Navigable Waters Protection Act* binding the Crown, and it therefore remains to be decided whether the Crown is bound by necessary implication.

It is helpful to turn first to the common law. The leading case is the Privy Council decision in *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58.

. . . Professor Hogg in his text *Liability of the Crown* (2nd ed. 1989), argues that the necessary implication exception set out at the beginning of *Bombay* refers to a contextual analysis of the statute whereby one may discern an intention to bind the

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[1992] 1 S.C.R. 3.

Crown by logical implication, and is thus a different species of necessary implication from that which arises when the purpose of the statute is wholly frustrated. He states, at p. 210:

What is contemplated in this passage is that a statute, while lacking an express statement that the Crown is bound, may contain references to the Crown or to governmental activity which make no sense unless the Crown is bound. If these textual indications are sufficiently clear, the courts will hold that the presumption is rebutted and the Crown is bound.

However, any uncertainty in the law on these points was put to rest by this Court's recent decision in *Alberta Government Telephones, supra*. After reviewing the authorities, Dickson C.J. concluded, at p. 281:

In my view, . . . the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay, supra*, are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette, supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

That analysis however cannot be made in a vacuum. Accordingly, the relevant "context" should not be too narrowly construed. Rather the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed. This view is consistent with the reasoning in *Bombay* as is evident from the passages quoted above where the test for necessary implication is expressed in terms of the time of enactment. In fact the approach taken by the High Court of Bombay in that case was criticized by the Privy Council for that very reason, at p. 62:

Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the legislature, in the year 1888.

I begin then by examining the circumstances that existed when the legislation was first enacted, bearing in mind that the general subject matter of the statute concerns navigation. . . .

In my view, the circumstances surrounding the passage of the legislation, informing as they must the context of the statute, do lead to the logical inference that the Crown in right of a province is bound by the Act by necessary implication. Neither the Crown nor a grantee of the Crown may interfere with the public right of navigation without legislative authorization. The proprietary right the Crown in right of Alberta may have in the bed of the Oldman River is subject to that right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Parliament has entered the field principally through the passage of the *Navigable Waters Protection Act* which

delegated to the Governor General in Council, and now the Minister of Transport, authority to permit construction of what would otherwise be a public nuisance in navigable waters. The Crown in right of Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. It follows that the Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval.

(e) South Africa

3.254 The presumption against the State being bound by legislation was confirmed by the South African Supreme Court of Appeal¹⁵⁰ in *Administrator, Cape v Raats Röntgen & Vermeulen (Pty) Ltd.*¹⁵¹

. . . The question whether the Act is binding on the Administration falls into two parts, namely (a) whether it binds the Executive branch of the State; and (b) whether it does not in any event bind a provincial administration. . . .

The learned Judge a quo (at 846I-847H) found that the object of the Act was 'to protect the population of the country against the evils of the uncontrolled dissemination of potentially harmful medicinal substances'. He then took into account that it would result in no prejudice to the State if it were to be bound by the Act; and that it would be absurd if 'the State should be at liberty to do the very mischief that the Act was intended to suppress in the national interest. . . .' The identification by the learned Judge of the object of the Act cannot be faulted; not so, however, the perceived absence of prejudice and the perceived absurdity if the Act were not to bind the Executive. There may well be prejudice to the State if it were, in one or other of its multifarious governmental activities, to be subjected to the constraints of the Act. Examples spring readily to mind, for example, the urgent manufacture in bulk of a particular medicine by or for a department of State to combat an epidemic or the procurement of medical supplies by the military authorities at a time of crisis. The present circumstances, of course, present a vivid example - a saving of R20 million per annum - of sorely needed public funds which could be blocked by a regulation which was aimed at protecting the very class of person for whom the Administration's scheme caters.

But that is really beside the point. The question to be asked is not whether the State would be prejudiced if a particular Act were to apply to it, but whether the attainment of the objectives of this particular enactment would be frustrated if it did not. Posed thus, the answer is self-evident. Tight control of the quality, manufacture and dissemination of medicines is what the Act envisages. Such objective would not be jeopardised if the State, the very watch-dog which exercises such control, were itself not subjected to control.

. . . Therefore, if the Act applies to the State, unless the penal provisions are severed from the balance of the Act's provisions, the ludicrous situation could arise that a Minister (or a Director-General) is prosecuted on the instructions of one underling for a transgression by another. And there is no logical or interpretational justification for severing the penal provisions from the rest of the Act. The conclusion is clear. . . .

Since Union, the establishment, maintenance and management of hospitals had been an important function of provincial government . . . In each of the provinces extensive hospital services had been established (many antedating Union). Consequently cogent evidence would be required before one could conclude that the Legislature intended

¹⁵⁰ The Appellate Division as it then was.

¹⁵¹ 1992 (1) SA 245 (A) 261 – 265.

such an elaborate and important component of the State's public health establishment to be dealt with on a basis differing from that applicable to the central Executive. There is no such evidence to be found in the language of the Act nor in its objects, structure or pattern. The Act must therefore be held not to apply to the Administration.

3.255 It could be argued that the presumption sanctions unbridled lawlessness by government agencies. In principle, however, the presumption does not give the state unfettered power, but it is rather aimed at ensuring that the state is not hampered in its government functions. According to Du Plessis¹⁵² –

[t]he presumption is first and foremost a functional means to the end of ensuring that the execution of the typical functions of government - in as far as they are aimed at enhancing the public good and welfare - is not unduly hampered. Proper care should therefore also be exercised in order to ensure that the presumption is invoked in such a way that it serves the purpose of maintaining a public order of law, in contradistinction to personal whims and fancies or sectional interests.

3.256 Wiechers¹⁵³ points out that if the state is bound by its own legislation only in exceptional circumstances, there would be no question of state liability. The principle of legality on which the organisation and conduct of the state administration are based would therefore fall away. He maintains the view that the state should always be bound by its own legislation except in those instances where it would be hindered in the performance of its government functions. In *S v De Bruin*¹⁵⁴ however, the court rejected this viewpoint in the light of previous precedents.

3.257 Since section 39(2) of the Constitution clearly stipulates that rules of common law have to be developed in the light of the fundamental rights in the Constitution, the question arises whether this presumption should continue to apply under the new

¹⁵² Du Plessis 79.

¹⁵³ Wiechers *Administrative Law* (1985) 332.

¹⁵⁴ 1975 (3) SA 56 (T). At issue in the case was whether a civil servant was bound by regulations which prescribed a speed limit since the State was not bound by them. The court noted at 58H *Province of Bombay v Municipal Corporation of the City of Bombay*. The court also pointed out Wiechers' criticism of the rule that the State is not bound unless the converse is apparent (at 59A). The court noted, amongst others, *S v Reed* 1972 2 SA 34 (R AD) where the following was stated:

Where the State is expressly or impliedly exempted from liability under statutory provisions, the exemption is enjoyed by the State and not servants of the state. Servants of the state are not a privileged class of persons as, for example, are members of the diplomatic corps. An agent or servant of the State committing an act prohibited by a statutory provision, not binding on the state, only escapes criminal liability if the act in question was expressly or impliedly authorised by the State and as such an act of the State itself. . . .

See also the headnote to *S v Ohlenschlager* 1992 (1) SACR 695 (T) where it was said that nobody is above the law: this principle applies to members of the police force, traps and police spies and that it is a basic principle of our common law that rules of law apply to everybody, including the State and servants of the State.

constitutional order. Section 8(1) of the Constitution expressly provides that government organs at all levels are bound by the Bill of Rights. The Constitution is the supreme law of the Republic, and all law and government conduct must be tested against the spirit, purport and objects of the fundamental rights entrenched in the Bill of Rights. After all, would it be illogical if government organs were bound by the Constitution (as the supreme law), but if it were at the same time presumed that those organs were not bound by their own legislation, which in any event is always subordinate to the supreme Constitution.¹⁵⁵

¹⁵⁵ See the recent remarks made by Nicholson J in *Treatment Action Campaign v the Government of the Republic of South Africa* in the Durban and Coast Local Division Case No 4576\06 available at http://www.legalbrief.co.za/filemgmt_data/files/TAC%20v%20State.pdf (accessed on 9 September 2006):

“29. The respondents are in contempt of the order of Pillay J. Unfortunately there is at present precious little that can be done about that given the dicta in a number of judgments, including *Jayiya v Member of Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 SCA, *York Timbers v Minister of Water Affairs* 2003 (4) SA (T) p 499 et seq and *Kate v Member of Executive Council for Welfare, Eastern Cape* 2005 1 SA 141 (EC) at 155 E.

30. In the last mentioned case Froneman J said the following in the context of the State not paying old persons their pensions:

‘[21] Section 165(5) of the Constitution [provides that an order or decision issued by a court binds all persons to whom and all organs of State to which it applies. The State and its organs have no powers outside that granted to it by the Constitution or by legislation complying with the Constitution. The courts are bound to apply the Constitution and the law impartially and without fear, favour or prejudice under s 165(2) of the Constitution. So on what possible legal basis may any State organ refuse to implement a court order and expect the courts to recognise its legal right to do so? There seems to be none, except the provisions of s 3 of the State Liability Act. But such a provision (which places the State effectively above the law) would on the face of it be unconstitutional. It is this conundrum that cases such as *Mjeni and East London Transitional Local Council* sought to address. This they sought to do by interpreting s 3 of the State Liability Act and the common law in its new Constitutional context, as required by the Constitution. It is, by now, settled law that legislation must be interpreted, if it can reasonably be so done, to comply with the Constitution. If that is not possible the legislation in question must be remedied by reading words into the legislation to make it constitutional, if that can properly be done, or it must be declared constitutionally invalid under the provisions of s 172 of the Constitution.’

31. In *Schierhout v Minister of Justice* 1926 AD 99 Innes CJ considered the provisions of the Crown Liabilities Act 1 of 1910 and the enforcement of orders made pursuant to that Act. He said (at 110 - 11):

‘The second question must now be considered namely, whether there is anything to prevent this Court or the magistrate’s court from awarding to the plaintiff the salary claimed in his summons. The Minister of Justice represents the Crown, so that regard must be had to the provisions of the Crown Liabilities Act, 1910. It enacts (s 2) that claims against the Crown, whether arising out of the contracts or the torts of its servants, shall be cognisable in any competent Court, just as they would have been had they arisen against a subject. But it is stipulated (s 4) that no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or

3.258 The Constitution refers to values and principles such as accountability and openness (the preamble and s 1(d)); supremacy of the Constitution (s 1(a) and 2); the values underlying an open and democratic society based on freedom, equality and human dignity (s 7(1) and 39(2)). Furthermore, the state is bound by the Constitution (s 2 and 8(1); as well as respecting, protecting, promoting and fulfilling the Constitution and the Bill of Rights (s 7(2) and the official oath of judicial officers (item 6 of Schedule 2)). All of these merely strengthen the argument that this presumption can no longer be invoked.

3.259 In conclusion, to quote Du Plessis¹⁵⁶ -

Constitutionalism is all about bridling state power by binding organs of the state, at every level and in every sphere of government to, first, the supreme constitution and, secondly, to the law in general. This basic democratic value of legality is inherently incompatible with an interpretive presumption that the state is not bound by its laws. Legality is as much part of the implicit terms of the Constitution as is the horizontal division of powers. . . . In short, a state defined by its own constitution as a “democratic state founded on . . . the values” of “[s]upremacy of the Constitution and the rule of law” most certainly is a constitutional state (*Rechtstaat*) heedful of the principle of legality. This observation is confirmed by the demand for the

proceedings; the nominal defendant may, however, pay any sum of money awarded to the plaintiff out of the Consolidated Revenue Fund, or out of the Railway & Harbour Fund, as the case may be. Now, the effect of those provisions was considered by this Court in *Minister of Finance v Barberton Municipality* 1914 AD 335 where it was held that a claim for a declaration of rights, or for an interdict against His Majesty in the Government of the Union, is cognisable in any competent Court of the Union. The policy of the Act, it was pointed out, was to allow the jurisdiction of the Courts to be exercised against the Crown, not only in respect of claims of sounding in money, but also in cases where relief was sought by way of declaration or mandatory order. *But the Legislature was content to rely upon the moral obligation which the decree of a Court was bound to exert. No process of any kind was to be exercised as against Crown representatives or Crown property.*’ (Emphasis added).

32. The effect of the above highlighted passage is that unless and until section 3 of the State Liability Act is declared unconstitutional, there is no legal mechanism such as incarceration to enforce the court decrees. Should that situation continue then the effect of a court order would be what the law calls a *brutum fulmen*, in other words – a useless thunderbolt. Perhaps this is what Sophocles had in mind more than two thousand years ago when he warned in his play *Antigone* that his heroine had gone ‘to the uttermost limit of daring, and stumbled against Law enthroned. Authority cannot afford to connive at disobedience.’

33. If the refusal to comply does not result from instructions from the first respondent, the Government of the Republic of South Africa, then the remaining respondents must be disciplined, either administratively or in an employment context, for their delinquency. If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.”

¹⁵⁶

Re-Interpretation of Statutes at 176 – 177.

accountability of the public administration. The moment for what Wiechers foresaw more than a decade and a half ago, has probably come. (footnotes omitted)

(f) Proposal

3.260 It is proposed that a distinction should be made between old order legislation and legislation enacted after 28 April 1994. Old order legislation should not bind the state except to the extent that the legislation expressly or by implication indicates that the state is bound. It is considered that legislation enacted after 28 April 1994 should bind the state except to the extent – that it cannot be applied to the state or its application to the state is clearly inappropriate; its application to the state may impede the state in the exercise of its statutory functions; or the legislation expressly or by implication indicates that the state is not bound. Assigned or subordinate legislation should not bind the state unless the enabling legislation in terms of which that assigned or subordinate legislation was enacted – binds the state; or indicates that that assigned or subordinate legislation binds the state. It is proposed further that state be defined to include – organs of state; and persons in the service of organs of state acting in their official capacity.

3.261 It was noted above that the Australian Law Reform Commission did not favour adopting the South Australian approach of removing immunity ‘unless the contrary intention appears (either expressly or by implication)’, that the Australian Commission considered that much of the confusion in their existing law stems from the principle that the executive may be bound by an Act by implication in the absence of express words to that effect, and that they considered that any exceptions to their proposed new rule that the executive be bound by statute should be provided for expressly and not by implication. The Australian Commission left open the question of whether the requirement that immunity be provided for ‘expressly’ leaves any room for judicial discretion in those circumstances in which the statute does not make provision ‘in terms’. The Commission invites comment in particular on its proposed provision below in view of these comments made in other jurisdictions.

3.262 We also noted above that there is a need for careful considering the application of the proposed of the Interpretation of Legislation Bill to existing legislation. It was noted that in some instances the question will arise whether the provisions of the Interpretation of Legislation Bill should apply with qualifications. Existing definitions might have a narrower application than the proposed definitions included in the Bill. They might, for example, have the effect of binding the State whereas under present definitions it might not be the case. The Interpretation Act defines *person* as follows:

'person' includes – (a) any divisional council, municipal council, village management board, or like authority; (b) any company incorporated or registered as such under any law; (c) any body of persons corporate or unincorporated. The proposed definition of *person* in clause 25 of the Interpretation of Legislation Bill is as follows:

“**person**” or any other word denoting a person, such as “**someone**”, “**anyone**”, “**no-one**”, “**nobody**”, “**one**”, “**another**” or “**whoever**”, means a natural or juristic person, and includes –

- (a) a company, close corporation or co-operative incorporated or registered in terms of legislation whether in the Republic or elsewhere;
- (b) a body of persons corporate or unincorporated;
- (c) an estate of a deceased or insolvent person; or
- (d) a partnership, trust or trust fund,

but excludes an organ of state unless section 27 applies;

3.263 The following existing legislation which define *person* therefore need to be carefully considered: (See the proposed amendments to these Acts set out in the Schedule to the Bill on page 493.)

- * Broadcasting Act, 1999 (Act No. 4 of 1999) 'person' has the meaning assigned to it in section 2 of the Interpretation Act, 1957 (Act 33 of 1957) and includes any department of state or administration in the national, provincial or local spheres of government;
- * National Conventional Arms Control Act, 2002 (Act No. 41 of 2002) 'person' has the meaning assigned to it in the Interpretation Act, 1957 (Act 33 of 1957), and includes an organ of state as defined in the Constitution;
- * Anti-Personnel Mines Prohibition Act, 2003 (Act No. 36 of 2003) 'person' has the meaning assigned to it in the Interpretation Act, 1957 (Act 33 of 1957), and, except in section 30,¹⁵⁷ includes an organ of state;
- * Liquor Act Act (Act No. 59 of 2003) “'person' includes a trust, and any other entity mentioned in the definition of 'person' set out in the Interpretation Act, 1957 (Act 33 of 1957).

3.264 The following provision is proposed on the extent to which legislation should bind the State:

Extent to which legislation binds the state

57. (1) Old order legislation does not bind the state except to the extent that the legislation expressly or by implication indicates that the state is bound.

(2) Legislation enacted after 28 April 1994 binds the state except to the extent that –

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Section 30 deals with offences and penalties in respect of provision of information.

- (a) it cannot be applied to the state or its application to the state is clearly inappropriate;
 - (b) its application to the state may impede the state in the exercise of its statutory functions; or
 - (c) the legislation expressly or by implication indicates that the state is not bound.
- (3) Assigned or subordinate legislation does not bind the state unless the enabling legislation in terms of which that assigned or subordinate legislation was enacted –
- (a) binds the state; or
 - (b) indicates that that assigned or subordinate legislation binds the state.
- (4) In this section “state” includes –
- (a) organs of state; and
 - (b) persons in the service of organs of state acting in their official capacity.¹⁵⁸

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See section 1 of the State Liability Act 20 of 1957:

Claims against the State cognizable in any competent court

Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

CHAPTER 4

STATUTORY POWERS AND FUNCTIONS

A. INTRODUCTION

4.1 A number of questions come to mind in the context of the exercise of statutory powers and functions, such as — what is currently covered by our Interpretation Act, 1957 how do the interpretation statutes of foreign jurisdictions deal with this aspect, what should be covered in the new legislation, and how should the new provisions be structured? A further question to be considered is whether there is still a need for provisions dealing with the exercise of statutory powers and functions after the enactment in 2000 of the Promotion of Administrative Justice Act (“PAJA”).¹ This chapter will also discuss the question whether administrative decision-makers may vary or revoke a decision they have made, an important issue that has generally received little judicial and academic attention in this country or in other jurisdictions. The chapter deals mainly with sections 10(1) and (3) of the Interpretation Act and the various other aspects covered by interpretation statutes in other jurisdictions will be considered in Chapter 5.

B. SECTION 10 OF THE INTERPRETATION ACT

4.2 Section 10(1) of our Interpretation Act provides that when a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires. Section 10(2) is in similar terms. It provides that where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder. Section 10(3) deals specifically with rule-making. It provides that where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws.² Subsection (4) was deleted in 1981.³

¹ Act 3 of 2000.

² See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) par 58: “It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” See also *Minister of Home Affairs v*

C. STATUTORY POWERS AND ADMINISTRATIVE DECISIONS

4.3 Professor LM du Plessis observes that section 10 of the Interpretation Act “is consistent with a general authorization to enact delegated legislation, though it also alludes to administrative acts other than legislative acts”, that it “has not been amended substantially since the advent of constitutionalism and qualifies to be a general (albeit oblique and restrained) directive for the enactment of delegated legislation both prior to and since 27 April 1994”.⁴

4.4 Mr DM Pretorius notes that section 10(3) of our Interpretation Act is concerned with the repeated exercise of statutory power to make rules, regulations or by-laws, and as such it deals with statutory powers that enable public bodies to perform legislative administrative action.⁵ By contrast, section 10(1) is not restricted in its scope of application, referring in general terms to powers conferred and duties imposed by law. The question of the effect of these two provisions and, in particular, of their implications for the *functus officio* doctrine arises because, in general terms, the effect of the doctrine is that statutory powers are exhausted by their initial exercise and thus cannot be exercised more than once. This doctrine prevents administrative agencies from re-exercising their statutory powers after the initial exercise of those powers, or at least circumscribes their competence to do so. Certain provisions of section 10 of the Interpretation Act appear to permit the continual and repeated exercise of statutory powers. In view of this apparent discrepancy between the common law and the statutory position, the question how the *functus officio* doctrine is to be reconciled with sections 10(1) and 10(3) of the Interpretation Act needs to be explored.

4.5 It is important to take note of the concept of *administrative action* and the effect of the PAJA and case law in this respect. In the pre-constitutional era there was no concept of “administrative action” at common law and the scope of judicial review on particular grounds was very often restrictive especially insofar as

Watchenuka 2004 (2) BCLR 120 (SCA) par 20.

³ It provided as follows: “Where any provision in any law confers a power or imposes a duty or entrusts a function to any Minister of State, that power may be exercised and that duty shall and that function may be performed by any other Minister of State to whom the administration of that provision may be assigned by the State President, either specifically or by way of a general assignment of the administration of any law or of all laws conferring powers, imposing duties or entrusting functions to such first-mentioned Minister, or by any other Minister of State acting on behalf of any such Minister.”

⁴ *Re-interpretation of Statutes* at 14.

⁵ Pretorius *The Functus Officio Doctrine* PhD Thesis. The Commission is indebted to Mr Pretorius for having made his thesis available when this discussion paper was being drafted.

procedural fairness is concerned, although the courts became increasingly willing to subject to review not only the conduct of public authorities but also the actions of bodies that might reasonably be regarded as private.⁶ The scope of “administrative action” under the Constitution is, however, much narrower than in the pre-constitutional period. Although many other constitutional safeguards exist there is an even greater need for the administrative justice to have the breadth that it enjoyed prior to the constitutional era.

4.6 The Interpretation Act and any amended Interpretation Act must therefore be seen in the context of section 33 of the Constitution and the provisions of the PAJA. Section 33 makes provision for just administrative action and particularly procedurally fair administrative action. Questions arise such as when procedural fairness applies, and what sorts of decisions attract it.⁷ Section 33(1) of the Constitution is unqualified, since all administrative action must be lawful, reasonable and procedurally fair. This is not the case under the PAJA, however. The PAJA has not only given detailed content to section 33 of the Constitution but has also qualified it considerably. In addition to specifically excluding certain action from the definition of “administrative action”, the PAJA defines administrative action as decisions of an administrative nature made by organs of state under an empowering provision, and which adversely affect rights and have a direct, external legal effect. Section 3 of the PAJA sets out fairness in general and applies only where rights or legitimate expectations are materially and adversely affected. Section 4 of the PAJA deals with fairness in cases affecting the public and applies only where rights are materially and adversely affected.

4.7 Currie and De Waal usefully summarise the building-blocks of administrative action.⁸ Administrative action is, at its broadest and simplest, the exercise of public power by all organs of state *except* the following: the legislatures (national, provincial, local) when exercising their legislative functions; the judiciary when exercising judicial functions; the President when exercising the constitutional powers of the head of state (and similarly, the Premiers of provinces when exercising their constitutionally enumerated powers); and the Cabinet and provincial Cabinets when making political decisions. The reason for the head of state and Cabinet exceptions is that the President and the Cabinet are authorized by the Constitution to make political or

⁶ See Hoexter & Lyster *The New Constitutional and Administrative Law Vol II* 92 et seq and De Ville *Judicial Review of Administrative Action in South Africa* 6-9 and 35-37.

⁷ Hoexter & Lyster *Administrative Law* 212 et seq.

⁸ *The Bill of Rights Handbook* 5th edition (2004).

policy decisions rather than administrative ones. These authors explain that, for example, the President's decision to sign a Bill, appoint an ambassador, confer an honour or appoint a commission of enquiry⁹ is a political and not an administrative decision. The same goes for Cabinet decisions. If, however, the President or a Cabinet Minister acts in terms of powers delegated by legislation, then he or she acts as delegate of Parliament and as an administrative official. All of the above would also apply to the exercise of the political executive powers of a provincial Premier and Executive Council as adumbrated in the Constitution.

4.8 In *President of the Republic of South Africa v South African Rugby Football Union*¹⁰ the Constitutional Court stated that what matters is not so much the functionary as the function; the question is whether the task itself is administrative. The court explained that the focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant action belongs, but on the nature of the power he or she is exercising.

D. THE *FUNCTUS OFFICIO* DOCTRINE AND REVOCATION OF ADMINISTRATIVE DECISIONS GENERALLY

4.9 Baxter¹¹ explains that an administrative act may have a temporary or permanent legal effect. Licenses, permits and passports are granted for a limited period and are examples of administrative acts which have a temporary legal effect, whereas expropriation of property will usually have a permanent legal effect. The issue of the legal effect of administrative acts is relevant when considering the ability of functionaries to revoke decisions which seem to have a permanent effect or where the period of their validity has not expired. The ability of public authorities to revoke their previous administrative decisions is heavily qualified. A distinction can be made between unfavourable decisions, favourable decisions, decisions based on error or fraud and where variation or revocation is expressly authorised.

4.10 Generally speaking, a person to whom a statutory power is entrusted is *functus officio* once he or she has exercised it, and he or she cannot himself or

⁹ See *President of the Republic Of South Africa v South African Rugby Football Union And Others* 2000 (1) SA 1 (CC) 71 par 148. The President's conduct in exercising the power conferred upon him by s 84(2)(f) is constrained by the principle of legality, these powers have to be exercised personally, such exercise must be recorded in writing and signed; must not infringe any provision of the Bill of Rights; and the President must act in good faith and must not misconstrue the powers.

¹⁰ 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 par 141.

¹¹ Lawrence Baxter *Administrative Law* (1984) 371 et seq.

herself call his or her own decision in question.¹² It has been held inadvisable to allow an officer to exercise his or her discretion and make a grant and then, after having done so, to ask a court that what he or she has done should be set aside on the ground of his or her own carelessness or ill-use of his discretion.¹³ A grantee would, in such circumstances, never be sure of his or her title. Whether the *functus officio* rule operates in a particular case must depend upon the legislation involved and the nature of the functions of the particular body.¹⁴ Although an administrative body may be neither equipped nor competent to investigate the validity of its own prior acts, it may by the nature of its functions be entitled and obliged to call upon a court to pronounce upon such acts. A valid beneficial disposition may be revoked or repealed by its author only if there is express or necessarily implied statutory authorisation for revocation or if the revocation would be to the greater advantage of the beneficiary.¹⁵

4.11 Judge Navsa noted in *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service*:¹⁶ that it is said that it might be necessary for effective daily administration that there be continuous exercise and re-exercise of statutory powers, there might be a necessity of reversing earlier decisions, where a power to amend or vary a decision has expressly been granted the enabling legislation will usually prescribe the procedure to be followed and where the change will affect the interests of an individual the public authority must have regard to the rules of natural justice and must give due notice to the individual concerned and afford him/her an opportunity to make representations. Judge Navsa found that the applicant's reliance on the *functus officio* principle was misconceived since the statute in question expressly permits, within a time frame, the revisiting of an assessment post an objection by a taxpayer. He noted that the general principle is that finality of administrative decisions is to be favoured. Our law and comparable legal systems recognise, however, that statutes may provide how and when a decision is to be finalised and may provide for a revisiting of a particular administrative decision in the public interest and in the interests of justice.

4.12 Section 12 of the Interpretation Act of 1978 of England and Wales provides similarly to section 10(1) of the South African Interpretation Act, 1957:

Continuity of powers and duties

¹² *Afdelingsraad van Swartland v Administrateur Kaap* 1983 (3) SA 469 (C).

¹³ *Mining Commissioner of Johannesburg v Getz* 1915 TPD C 323.

¹⁴ *Transair (Pty) Ltd v National Transport Commission* 1977 (3) SA 784 (A).

¹⁵ *Wiechers Administrative Law* 169 and *Nkosi v Khanyile* 2003 (2) SA 63 (N).

¹⁶ 2001 (3) SA 210 (W) at 533.

(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires

(2) Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office.

4.13 Our Interpretation Act does not at present contain a provision dealing with the correcting of administrative errors and omissions. By contrast, the Western Samoa Acts Interpretations Act of 1974 provides that in every Act, unless the context requires otherwise, power given to do any act or thing, or to make any appointment, is capable of being exercised as often as is necessary to correct any error or omission in any previous exercise of the power, notwithstanding that the power is not in general capable of being exercised from time to time. Professor Crabbe's draft Bill for an Interpretation Act contains a similarly worded provision. His draft Bill continues, however, with a subclause which provides that the substantive rights of, or the procedures for redress by, a person who has suffered loss or damage or is otherwise aggrieved as a result of an omission or error corrected shall not be affected as a result of the correction of that omission or error and an investigation, a legal proceeding or a remedy in respect of a right, privilege, obligation or liability shall continue as if the omission or error had not been corrected.

4.14 Section 33(1) of the Australian Acts Interpretation Act of 1901 ("AIA") provides that, subject to an apparent contrary intention, where an Act confers a power or imposes a duty then the power may be exercised and the duty shall be performed from time to time as occasion requires. As Christopher Enright¹⁷ suggests, this seems to be a power to remake the decision and to remake it as the decision-maker thinks fit, so that the second decision may be made "to add to or reverse the result of the previous exercise". The second decision then nullifies the first. When section 33(1) applies a decision-maker does not become *functus officio*. Section 33(1) is a vague provision but it seems sensible for it to apply generally to unilateral decisions, and there are few problems where justice requires the remaking of a unilateral decision. As he says, if George and Judy miss out on their unemployment benefits, what harm is done if the decision is remade? Here the harm is done to George and

¹⁷ *Introduction to Administrative Law* see <http://www.gtcentre.unsw.edu.au/introduction-to-administrative-law.asp> (accessed on 24 June 2004).

Judy if the decision is not remade, thus suggesting for unilateral decisions a wide power to re-exercise the power on any occasion when justice requires it.

4.15 Section 33(3) of the AIA provides that where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Enright explains that it applies where legislation confers power to make, grant or issue any instrument, and subject to an apparent contrary intention, this power includes two sets of powers, a power to unmake the instrument, ie to repeal, revoke or rescind it, and a power to remake the instrument, ie to amend or vary it.

4.16 Orr and Briese note that whether section 33(3) of the AIA gives makers of administrative instruments the power to revoke or vary a decision has been the subject of some controversy.¹⁸ They suggest that the subsection extends beyond legislative instruments and that section 33(3) provides a general statutory presumption in favour of a power to revoke or vary administrative instruments. A restrictive view of section 33(1) is that its only role is to clarify that a general power to do something, such as grant a social security benefit or citizenship, can be exercised each time an application is made, rather than only once. A broader view has, however, been taken of section 33(1) in *Kurtovic*¹⁹ where it was held that section 33(1) gave administrative decision-makers the power to reconsider, revoke or remake a decision unless, upon a proper construction, the statute indicated that the power was not to be exercised from time to time, but was spent by its first exercise.

4.17 Orr and Briese remark that the courts have looked at common factors in deciding whether there is an implied power to vary or revoke and when determining whether there is a contrary intention for the purposes of section 33 of the AIA.:

- Slips: one situation in which the courts have uncontroversially found a power to vary is where a decision-maker wishes to correct a clerical error that does not change the form or substance of the decision.
- Clear statutory intention: some statutes provide a clear indication that

¹⁸ Robert Orr and Robyn Briese "Don't Think Twice – Can Administrative Decision Makers Change Their Mind?" available at <http://law.anu.edu.au/aial/Publications/webdocuments/Forums/Forum35.pdf> (accessed on 18 May 2004).

¹⁹ *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 [92 ALR 93] (FC) and also in *Minister for Immigration and Multicultural Affairs v Bhardwaj*. [2002] HCA 11 (14 March 2002).

the power granted is spent once exercised such as where a statute provides that certain decisions are “final” or “final and conclusive”. In a few cases the legislation makes clear that there is no power to vary or revoke.

- Nature of the function: an important factor is the nature of the function exercised, which may indicate that the power is continuing or that it is to be used only once. The effect of variation or revocation on third parties will be an important aspect of the nature of the power.
- Consequences: what is the consequence of a power of amendment or revocation, or lack of power, in light of the statutory scheme.
- Procedure: the procedure for, and manner of, making the decision. In *Bhardwaj* Kirby J held in his dissenting judgment that the Migration Act procedures evinced a contrary intention for the purposes of section 33(1) of the AIA.
- Merits review: the courts have recognised the availability of merits review as indicating a statutory intention contrary to the existence of a power to vary or revoke.
- Opportunity to reapply: the existence of an opportunity to make a further primary application where some benefit has been denied means generally that an ability to make a new application tells against any general power of reconsideration.
- Nature of any error: The nature of any error made by the decision-maker, is likely to be less relevant after the decision in *Bhardwaj*, where it was held that a jurisdictional error generally results in an invalid decision, which can be ignored and made again without the need for a power to revoke.
- Any variation or revocation needs to be timely. There is unlikely to be found an implied power to vary or revoke at any time after a decision has been made. There may be other similar factual considerations which in particular circumstances tell against a power to vary or revoke.
- Agreement: the fact that the decision-maker and the party or parties affected agree to the variation or revocation is relevant. If there is agreement there is unlikely to be a legal challenge. Where the decision-maker wishes to make a new decision more favourable to the applicant,

this will often be with the explicit or implicit agreement of the latter.

4.18 The New Zealand Interpretation Act deals in section 13 with the power to correct errors. It provides that the power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once. The purpose of section 13 is to allow minor technical corrections to be made in order to prevent the exercise of a power from being technically invalid. Section 13 does not appear to be intended to allow the re-exercise of a power on the basis that the people exercising the power have changed their minds, but is directed more at allowing corrections that are clerical or technical in nature to be made. Section 13 was considered in *Neil Construction Ltd v North Shore City Council*.²⁰ The issue in that case was whether unsold subdivided land that had been valued in a single assessment rating by the respective local councils could be revalued as individual lots. The court found that the original rating could not be regarded as an error that fell within section 13. Here the express and detailed provisions of the Rating Valuations Act 1998 and the Rating Valuations Rules 2000 prevented the more general provisions of section 13 from applying.

E. WHEN ARE ADMINISTRATIVE DECISIONS FINAL AND IRREVOCABLE?

4.19 An administrative agency does not necessarily become *functus officio* as soon as it has come to a conclusion in relation to a matter subject to its decision-making powers.²¹ Something more is required in order for the decision to acquire legal force and for it to become irrevocable. Provided that a decision is not expressed in provisional or tentative terms (or is not of a provisional or conditional nature in terms of the applicable legislation), it should be regarded as final and unalterable as soon as the decision-maker has officially pronounced it in a manner that gives outward manifestation to the decision. It should not be required that the decision actually came to the affected person's attention, less still that he or she relied on it. It would suffice if the decision has, through a deliberate act of the decision-maker, passed into the public domain.²² Such publication could take place in a variety of ways: the decision could be announced orally, or notice of the decision could be

²⁰ [2001] 3 NZLR 533.

²¹ Pretorius *The Functus Officio Doctrine* PhD Thesis. See *Lek v Estate Agents Board* 1978 (3) SA 160 (C). A corporate body is not bound by its resolution until it has been communicated to the person affected. The relevant Act in this case contemplated that the Board would inform an applicant in writing of its decision. The written communication thus constituted the decision.

²² *Semunigus v Minister for Immigration & Multicultural Affairs* [2000] FCA 240 par 103.

given in the *Government Gazette* or in a newspaper, or the decision could be made available on the internet, or it could be dispatched to the affected person by telefax, by post or by e-mail.

4.20 The applicable statute might depart from these general principles. The statute might require that the decision be published in a particular manner. The statute might also provide that the decision will acquire finality upon satisfaction of specified procedural requirements. If so, and if such requirements are expressed in mandatory terms, the decision might not be irrevocable until the decision-maker has complied with those requirements. On the other hand, if the prescribed formalities are not mandatory, there is no reason why informal notification of the decision should not be conclusive.²³

4.21 The question which arose in the Canadian case of *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*²⁴ was whether the Minister, having once authorised the granting of fishing licences, had the power to revoke that authorisation. The court noted that section 31(3) of the Canadian Interpretation Act provides that where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires. The forerunner of this provision was section 32(1) of the Interpretation Act of 1889 of the United Kingdom, which abolished the common-law rule that a power conferred by statute was exhausted by a single exercise of the power.²⁵ The classic definition of the meaning of the phrase "from time to time" was enunciated in England:²⁶

[T]he words 'from time to time' are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. The meaning of the words 'from time to time' is that after he has made one order he may make a fresh order to add something to it, or take something from it, or reverse it altogether . . .

4.22 However, as the court noted, Wade²⁷ argues that in applying this interpretive rule one must distinguish between continuing powers and powers once exercised finally expended:

In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, 'the power may be exercised and the duty shall be performed from time to time as occasion requires' (Interpretation Act 1978, s. 12). But this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the courts are strongly inclined to hold

²³ Wade & Forsyth at 237 and 916.

²⁴ [1997] 1 SCR 12.

²⁵ *Halsbury's Statutes* 4th ed (1995) Reissue vol 41 "Statutes" 991.

²⁶ In the decision of the House of Lords in *Lawrie v Lees* (1881) 7 App Cas 19 at 29.

²⁷ *Administrative Law* 7th ed (1994) 261-2.

that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.

For this purpose a distinction has to be drawn between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case. An authority which has a duty to maintain highways or a power to take land by compulsory purchase may clearly act 'from time to time as occasion requires'. But if in a particular case it has to determine the amount of compensation or to fix the pension of an employee, there are equally clear reasons for imposing finality. Citizens whose legal rights are determined administratively are entitled to know where they stand.

There is a third class of cases where there is power to decide questions affecting private rights but where there is also an inherent power to vary an order or power to entertain fresh proceedings and make a different decision. Decisions on licensing applications and other decisions of policy will usually fall into this class, since policy is essentially variable.

4.23 The court said in *Comeau's Sea Foods* that the power to authorise the licence was a continuing power within the meaning of section 31(3) of the Interpretation Act but it did not confer upon the appellant an irrevocable legal right to a licence. Unless and until the licence was actually issued, the Minister could in furtherance of government policy re-evaluate or reconsider his initial decision to authorise the licence. Until the Minister actually issued the licence, he possessed a continuing power to reconsider his earlier decision to authorise and/or issue the licence. Where a Minister is required by statute to exercise his or her discretion in reaction to immediate and pressing policy concerns, the legislature can usually be taken to have intended that he or she be ultimately responsible to political authority. In most instances the issuing of the licence would be expected to follow its authorisation in short order. Nonetheless, the time between the two does permit the Minister to reassess his authorisation in light of government policy or a change in circumstances.

4.24 In 2001 the Canadian Supreme Court held that the case of *Comeau's Sea Foods* was readily distinguishable from *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*.²⁸ The Mount Sinai Hospital Center was originally established in Quebec, as a long-term treatment facility dealing primarily with patients suffering from tuberculosis. During the 1950s, the Center began to introduce new programs and services and developed a general respiratory expertise in a setting with both long-term and short-term care facilities. This change in services was known to the government which throughout funded all of the Center's activities. In 1984, negotiations between the Center and the Ministry of Health and Social Services to move the Center to Montreal began. At that time, the Center was

²⁸ [2001] 2 SCR 281 par 112 *et seq.*

operating under its original permit for 107 long-term care beds even though it had for 10 years been providing 57 long-term care beds and 50 intermediary or short-term care beds. The Center wanted its permit altered to reflect the reality of the services it offered. The Minister promised the Center that it would formally alter the permit once the Center moved to Montreal. The promise to issue the correct permit was reaffirmed on various occasions. Once the Center had moved to Montreal, in January 1991, it made a formal request to the Minister for a regularization of the permit. Without giving the Center an opportunity to make submissions on the issue, in October 1991, the Minister informed the Center that it would not receive the promised permit and would have to operate under the old unaltered permit. This was despite the fact that the services being offered still included short-term services funded by the government. The Center brought an action in mandamus before the Superior Court, requesting that the court order the Minister to issue the promised permit.

4.25 The court explained in *Mount Sinai Hospital Center* that the *Fisheries Act* used a two-stage process of authorizing and issuing licences and that in *Comeau's Sea Foods* the Ministry had telexed to the applicant a copy of the decision to authorize the licences. However, on the facts of that case, the applicant did not request that the actual licences be issued and the evidence was that they would have been had the request been made prior to a change in Department policy after which, given political pressures surrounding lobster fishing, specific clearance from the Assistant Deputy Minister was required. The court noted that Major J put it *Comeau's Sea Foods* as follows: "In most instances the issuance of the licence would be expected to follow its authorization in short order. Nonetheless, the time between the two does permit the Minister to assess his authorization in light of government policy or a change in circumstances." In *Comeau's Sea Foods*, there was a legitimate change in government policy that led the Minister to reconsider issuance of the licences, thereby exercising his discretion within the period of time given to him under the statute to do so. The court noted in *Mount Sinai Hospital Center* that the former law was not set up this way, and that it was recognized in *Comeau's Sea Foods* whether the power can be exercised once or more than once is a matter of interpretation.

4.26 The legislation applicable in *Mount Sinai Hospital Center* did not, however, use the authorizing/issuing steps. Hence, the Minister was not provided, as the Minister was provided under the *Fisheries Act*, with a period of time in which to change his or her mind. Moreover, even if such a power were to be imputed to the

Minister on the basis of general discretionary powers, the refusal in this case was not a valid exercise of the Minister's discretion. The policy concern invoked in the October 3, 1991 refusal was not a fair or appropriate one given a situation in which the Minister continued to fund the short-term care services the Center provided and considered it in his dealings with the rest of the world as a provider of both long-term and short-term care services. A policy concern invoked in such circumstances had to be legitimate. At the very least, it had to correspond to the reality of the situation. The Minister could not promise the Center to issue the modified permit when the move to Montreal was made, refused to issue that permit, and then continued to treat the Center as if the permit had in fact been issued. Having decided that it was in the public interest for the Center to operate as a long-term and short-term care facility and having continued to see things this way even after the move, the Minister had to issue the 1991-1993 permit.

4.27 Pretorius comments that in the absence of a specific statutory power of revocation, neither policy exigencies nor an actual change in policy should provide justification for the withdrawal of a licence already granted.²⁹ Thus a decision that is final in terms of the statute under which it is made cannot be revoked by having recourse to provisions such as section 10(1) of the South African Interpretation Act.

4.28 The New Zealand case *James Maurice Goulding v Chief Executive Ministry of Fisheries*³⁰ (*Goulding*) raised the question whether a decision-maker can lawfully revoke an administrative decision and substitute one which is unfavourable or less favourable to an affected person, particularly when a decision has not been communicated to that person. The court explained that in fixing the point during an administrative decision-making process when a decision made in the exercise of a statutory power becomes a final decision, the law must accommodate two conflicting policy considerations. First, it is in the interests of sound administration that there be some latitude during internal processes to allow reconsideration of an initial decision, whether the need to do so arises from earlier mistakes as to the facts or the applicable law, the availability of fresh information relevant to the decision, the desirability of correction of an error, or simply further reflection by the decision-maker. At a time when the value of consultation is increasingly recognised as a means of better informing decision-makers of relevant considerations, a flexible approach also accommodates the difficulty of obtaining timely input from those able to give it.

²⁹ Pretorius *The Functus Officio Doctrine* PhD Thesis.

³⁰ [2003] NZCA 244 (24 October 2003).

4.29 In *Goulding* the court summarised the applicable common-law principle in the following way. A valid administrative decision in the exercise of a statutory power which is the outcome of a completed process, but which has not been formally communicated to interested parties, has not been perfected. It may be revoked and a fresh decision substituted at any time prior to its communication to affected persons in a manner which indicates intended finality. Once such a decision is so communicated to the persons to whom it relates, in a way that makes it clear the decision is not of a preliminary or provisional kind, it is final. A final decision that is made in the exercise of a power which affects legal rights, including those arising from the grant of a licence, is irrevocable. So is any other decision made under a statutory power where the Act explicitly or implicitly provides that once finally exercised the power of decision is spent.

4.30 Dealing with the question in terms of English law whether an administrative authority has the power to revoke or modify a decision it has made, Foulkes³¹ notes that a statutory scheme may expressly grant or withhold the power to revoke or change a decision, and that in practice a number of tribunals are given the express power to review their decisions. He goes on to discuss what happens if there is no governing statutory rule. In *Re 56 Denton Road Twickenham*³² the plaintiff's house has been damaged by enemy action. The War Damage Commission told her that the house had been preliminarily classified as a "total loss". In 1945 she was informed that the decision had been reviewed, and was invited to agree to a classification of "not a total loss" which entitled her to more compensation. In 1946 she was informed that it had been decided to revert to the initial classification. The court held that where a body has the duty to make a determination that affects the rights of subjects, a determination made and communicated in terms that are not preliminary or provisional is final and conclusive and cannot, in the absence of express statutory power or the consent of the person affected, be altered or withdrawn by the body. The initial 1945 determination was therefore binding. Foulkes suggests that the communication of a decision is not always necessary in order to render a decision non-revocable. He notes that in terms of *R v Criminal Injuries Compensation Board, ex p Tong*³³ an award made by the Board becomes vested in the applicant as soon as the decision to give it is made, so that it is payable to his estate even if he dies before the decision is communicated to him.

³¹ David Foulkes *Administrative Law* 8th ed (1995) 229.

³² [1953] CH 51, [1952] 2 ALL ER 799.

³³ [1977] 1 All ER 171, [1976] 1 WLR 1237 CA.

4.31 Before the court in *Ex Parte Robinson v Parole Board*³⁴ was a challenge to the decision of a Discretionary Lifer Panel (hereafter the second panel) refusing to direct the applicant's release under the Crime (Sentences) Act of 1997. The second panel decided that it had no power to give such a direction because it was not "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined" - the pre-condition for a s.28(5) direction imposed by s.28(6). More particularly under challenge was the second panel's entitlement to reopen the all important question of risk which had been decided two months earlier by another Discretionary Lifer Panel (hereafter the first panel), on that occasion in favour of the applicant. The first panel concluded that there was "no evidence of significant risk to life or limb", and that such risk as did exist ("a risk of committing minor sexual offences under the influence of alcohol indulged in as a result of stress") "should be susceptible to management within a structured release plan not necessarily involving hostel accommodation and preferably within range of your work placement." The second panel, ostensibly convened for the formulation of an appropriate structured release plan, revisited the question of risk and on essentially the same evidence as that before the first panel reached the opposite conclusion, namely that if the applicant "were to be released without the support and supervision of the Probation Service, you would present a more than minimal risk of committing sexual offences involving danger to life and limb." Were they entitled to address this question afresh? That was the critical issue.

24. The critical question, therefore, is whether the first panel's decision was irrevocable - whether, in short, the panel had at that point discharged its function to determine the risk and was to that extent *functus officio*. The ruling authority on this area of the law has long been recognised to be *Re 56 Denton Road, Twickenham* [1953] Ch 51 . . . :

"... the plaintiff's counsel offered for my acceptance the following proposition: that where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affected be altered or withdrawn by that body. I accept that proposition as well-founded, and applicable to the present case. . . .

I think that the contrary view would introduce a lamentable measure of uncertainty and so much disturbance in the minds of those unfortunate persons who have suffered war damage that the Act cannot have contemplated the possibility of such vacillations as are claimed to be permissible in such a case as the present.

How does the evidence of the defendants affect the position? If it were discovered within a reasonable time . . . that there had been some mistake or

³⁴ [1999] EWHC Admin 764.

misconception upon which I could find that the document did not accord with the facts which it purports to record, the position might have been different."

...

32. The second of the respondents' further arguments is that, even assuming the first panel had reached a valid decision on risk, the Board were nevertheless not *functus officio* but rather were entitled to come to a fresh decision on the point. In this regard Mr McManus relies upon s.12(1) of the Interpretation Act 1978 and the House of Lords' decision in *Re Wilson* [1985] 1 AC 750. S. 12(1) provides:

"Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

It was held in *Re Wilson* that this section applies to enable justices to make further orders under s.77(2) of the Magistrates Courts Act 1980 - orders fixing a term of imprisonment and postponing the issue of a committal warrant on conditions - when it is just to do so. Mr McManus submit that s.12(1) should apply in the present context too. So far from any contrary intention appearing in s.28 of the 1997 Act, he argues, the important public safety considerations here make it appropriate to revisit the issue of risk whenever the opportunity arises, as it did in this case upon the adjourned hearing.

33. This argument too I would reject. It seems to me that the self-same considerations which underlie the *functus* principle apply in at least equal measure here. As already observed, the first panel (as part of the Parole Board) were deciding a question which vitally affected the applicant's fundamental rights. They were doing so, moreover, as an independent statutory body whose functions are designed to satisfy the requirements of Article 5 of the European Convention on Human Rights. They heard evidence and reached their conclusion, a conclusion which expressly rejected the respondent's case for continued detention. To my mind a no less "lamentable measure of uncertainty" would be created here by allowing the Parole Board to change its mind, than would have been created on the Commission's argument in *Re 56 Denton Road*. Justice to fine defaulters requires the s.77(2) power to be exercisable from time to time (although even then Lord Roskill suggested that magistrates' courts should be "alert to see that the existence of the power further to postpone is not abused but is only exercised as the occasion requires"). Justice to discretionary life prisoners in the post-tariff period in my judgment requires that once a prisoner succeeds in the face of opposition in satisfying a panel that he can safely be released, that decision must be regarded as final and conclusive, subject only to the Secretary of State demonstrating that it was fundamentally flawed or pointing to a supervening material change of circumstances. All that then remains is the making of detailed arrangements for the implementation of the decision within a comparatively short time.

34. It is not for the Secretary of State or others opposing release (like the APS here) to question or seek to reopen the issue when the decision on risk is made against them. Nor are they to obstruct the implementation of the decision by reiterating their concerns or seeking to impose impossible conditions. Although the statutory regimes are, of course, different, a broad parallel exists between the position here and that arising once a conditional discharge has been ordered by a Mental Health Review Tribunal - see *R v Ealing District Health Authority ex parte Fox* [1993] 1 WLR 373 and *R v Mental Health Review Tribunal ex parte Hall* [1999] 1 AER 132. Once, as here, a panel has decided that a prisoner can safely be released irrespective of whether a particular form of release plan is feasible, then the prison service and the probation service must faithfully accept that determination and do their best to achieve its successful implementation.

4.32 According to Australian law when a decision is characterised as conduct leading to a decision, it is still open to the decision-maker to reconsider the issue –

whether or not a power to revoke or vary an actual decision exists.³⁵ This is because in such circumstances the decision is unperfected and not yet operational. What is required to perfect a decision will depend on the terms of the relevant statute. Generally a decision will be perfected once it is communicated to the affected person, either orally or in writing, in a manner that indicates that the decision is not merely provisional.

4.33 In German administrative law, the Administrative Procedure Act (“APA”) deals quite extensively with issues concerning the validity and invalidity of administrative acts and has codified the conditions under which unlawful – and even lawful – administrative acts may be revoked, withdrawn or simply corrected. Although the *functus officio* doctrine as such is not known in German administrative law, the principles underlying this doctrine are equally relevant in the context of German administrative acts. If an administrator takes a decision which he or she later discovers is wrong, the question arises whether the administrator should be able to rectify the problem of its own accord (thereby promoting lawfulness and the rule of law); or whether the decision can only be challenged before and reversed by a court of law and otherwise remains effective and final, thereby promoting legal certainty and predictability for the parties involved in the decision. Adding to this are situations where the administrative act suffers from minor technical errors or omissions which need to be rectified; and cases when the initial administrative act was lawful and only subsequent developments render the decision unlawful. How these situations are dealt with under German law is described below. The starting point for discussion is the recognition of the stabilising effect (Bestandskraft) of the administrative act which itself comes into effect vis-à-vis the person for whom it is intended or who is affected thereby at the moment the person is notified of it.³⁶ The relevant provision reads as

³⁵ Orr and Briese “Don’t Think Twice – Can Administrative Decision Makers Change Their Mind?”

³⁶ The notification of an administrative act is also dealt with in the APA, which provides as follows:

Section 41

- (1) An administrative act shall be made known to the person for whom it is intended or who is affected thereby. Where an authorised representative is appointed, the notification may be addressed to him.
- (2) An administrative act in writing which is sent by post within the territorial application of this Act shall be deemed to have been delivered on the third day after posting, except where it is not received or is received at a later date; in the case of doubt the authority must prove receipt of the administrative act and the time of receipt.
- (3) An administrative act may be publicly promulgated where this is permitted by law. A general order may also be publicly promulgated when notification of those concerned is impractical.

follows:

Section 43 German Administrative Procedure Act: Validity of an administrative act

- (1) An administrative act shall become effective vis-a-vis the person for whom it is intended or who is affected thereby at the moment he is notified thereof. The administrative act shall apply in accordance with its tenor as notified.
- (2) An administrative act shall remain effective for as long as it is not withdrawn, annulled, otherwise cancelled or expires for reasons of time or for any other reason.
- (3) An administrative act which is invalid shall be ineffective.

4.34 This provision says that except for cases when the act is invalid, the administrative act remains effective – irrespective of its lawfulness – as long as it is not challenged through regular remedies of complaint or objection before the administrative authority (internal appeal procedures) or in court (judicial review). This principle is justified with reference to the interest of legal certainty which becomes relevant when the time-limits for legal remedies have expired or remedies have been exhausted or the person concerned has waived his or her rights to remedies. Once an administrative decision becomes unreviewable in the sense just described, the parties affected by the decision should be able to rely on the finality of the decision and to base their future actions on the further existence of the act. Therefore, the invalidity as well the withdrawal and revocation of administrative acts outside legal proceedings (internal appeal and judicial review) are considered to be exceptions to this rule and are allowed only under certain qualifying conditions, the details of which are explained below. In this context, it is interesting to note that the degree to which reliance on the continued existence of an administrative act is protected by law varies depending on whether reliance on it is considered to be justified.

F. THE *FUNCTUS OFFICIO* DOCTRINE AND THE COMMON LAW

4.35 The exact origins of, and the rationale for, the application of the *functus officio* doctrine in South African and English administrative law are somewhat obscure.³⁷ Subsequent to the establishment of the Union of South Africa, the Supreme Court recognised that the question whether a public body or official has become *functus officio* cannot be answered with reference to some general principle but, rather, must

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- (4) The public promulgation of an administrative act in writing shall be effected by advertising the operative part in the manner normal in the district. Promulgation shall state where the administrative act and its statement of grounds may be inspected. The administrative act shall be deemed to have been promulgated two weeks after the date of advertising by the means customary in the district. A general order may fix a different date for this purpose but in no case may this be earlier than the date following advertisement.
 - (5) Provisions governing the promulgation of an administrative act by service shall remain unaffected.

³⁷

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be answered with reference to the language of the relevant statute.³⁸ It was stated that, as a matter of public policy, considerations of certainty precluded an official from calling his own decisions into question. The Appellate Division took cognisance of the common-law rule that statutory powers are exhausted by their initial exercise, but indicated that there was some uncertainty about the exact parameters of this rule.³⁹

4.36 In *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co*⁴⁰ the court noted that once a judicial or quasi-judicial decision has been given the court or officer giving it is in respect of that matter *functus officio*. The court said that the only exceptions to this general rule recognised by the old writers were where the decision was a nullity arising out of lack of jurisdiction, or of summons or of an attorney's mandate. The court also said that the tendency of our law is rather to restrict than to extend the scope of the exceptions to the general rule,⁴¹ although circumstances may well arise where a court is entitled to disregard its own judgment and deal *de novo* with a matter (eg where it had been under the mistaken belief that summons had been served whereas it had in fact not been served at all).

4.37 The common law recognizes that an administrative decision obtained by fraudulent means may be revoked by its author.⁴² There are cases that indicate that the fraud of the holder of a certificate would provide grounds for it being set aside, that only the court (and not the body that issued the certificate) would have the power to set it aside. The language of the applicable statute might preserve the finality and validity of the certificate even though it might have been obtained by fraud.⁴³ Statements made in a number of cases are somewhat tentative in their recognition that the *functus officio* doctrine does not preclude an administrative body from revoking its own decision if it was persuaded in a fraudulent manner to give that decision.

4.38 The general rule is that, in the absence of a statutory provision to the contrary, an administrative body is *functus officio* once it has given a decision, its

³⁸ *Blankfield v Mining Commissioner of Barberton* 1912 TPD 553 and *Getz & Getz v Minister of Mines* 1916 TPD 66.

³⁹ See *Durban Corporation v Estate Whittaker* 1919 AD 195.

⁴⁰ 1961 (4) SA 415 (T).

⁴¹ See *Thompson, Trading as Maharaj & Sons v Chief Constable, Durban* 1965 (4) SA 662 (D) 668D-E: "The general rule is that, in the absence of special statutory provision, once a judicial or quasi-judicial decision has been given, the Court or officer giving it is *functus officio* in respect of the matter to which it relates. There are rare exceptions to this rule, but the tendency to-day is to restrict rather than to extend the scope of the exceptions."

⁴² See Baxter *Administrative Law* 376.

⁴³ See *Principal Immigration Officer v Bhula* 1931 AD 323.

decision cannot be retracted or varied only because it was arrived at as a result of an error of fact or of law, although such retraction or variation may be permissible where the error comes to the decision-maker's notice immediately upon the decision being announced and if the matter is reconsidered immediately. An administrative body may usually (but subject to its enabling legislation) institute review proceedings in respect of its own decision made as a result of a material mistake of fact or law. In the case of errors of fact, however, there would be no power to do so unless the error, if not corrected, will cause prejudice to the administrative body concerned.

G. THE VARIATION OR REVOCATION OF VALID UNFAVOURABLE OR ONEROUS ADMINISTRATIVE DECISIONS

4.39 It is sometimes said that a person who has been affected adversely by an administrative decision would not have any objection to, or complaint about, the variation or revocation of that decision, and might not even have locus standi to challenge such variation or revocation⁴⁴ and that such a person would welcome the retraction of the decision concerned. Many decisions have a dual character: a decision which is unfavourable to, or which imposes burdens upon, one person might well be favourable or beneficial for another person. A person might have a legitimate interest in preventing the revocation of a decision which has affected his rights unfavourably if the purpose of such revocation is the imposition of an even more burdensome decision. While it would be in the interests of an unsuccessful applicant for a licence or some other privilege if he were able to submit a further application, public bodies cannot be expected to receive continual applications for reconsideration, and it would be unreasonable to require interested third parties to return continually to state their cases. The fact that it might be convenient or desirable for a person affected by an adverse decision if that decision were withdrawn or changed cannot somehow confer power upon the author of that decision to withdraw or change it if the author does not otherwise possess any such power.

4.40 There is case law (limited though it may be) that provides some support for the idea that unfavourable or burdensome administrative decisions may be revoked.⁴⁵ There is also some academic and judicial support for the notion that the *functus officio* doctrine does not preclude an administrative agency from revoking a

⁴⁴ Pretorius *The Functus Officio Doctrine* PhD Thesis notes Michael Akehurst 'Revocation of administrative decision [1982] *Public Law* 613 at 616; Baxter *Administrative Law* 373 and Wiechers *Administrative Law* 168.

⁴⁵ Pretorius *The Functus Officio Doctrine* PhD Thesis.

decision which has adverse consequences for the affected individual. The South African academic writings that support the idea that unfavourable decisions are freely revocable do not withstand scrutiny, and the case law cited as authority for that idea is, at best, ambiguous, and the preponderance of judicial opinion in South Africa appears to favour the contrary view.⁴⁶ Baxter suggests that the most acceptable approach to situations where a person who has been unsuccessful in his or her application, would be if a public authority were to be obliged to reconsider its decision when requested to do so, however, only when a reasonable time has elapsed or if it is shown that circumstances have changed to such an extent that it is likely to have reached a different conclusion. De Ville supports this in general but remarks that the interpretation of the provisions of the authorising legislation will ultimately determine when and whether a person may re-apply or apply for a variation of the decision.⁴⁷

H. THE VARIATION OR REVOCATION OF VALID FAVOURABLE OR BENEFICIAL ADMINISTRATIVE DECISIONS

4.41 There is remarkably little early South African case law dealing specifically with the question whether favourable decisions are final and irrevocable.⁴⁸ *Seneque's* case⁴⁹ indicates that the revocability or otherwise of a favourable decision is a matter of statutory interpretation, while *Sachs' case*⁵⁰ indicates that the revocability of a privilege depends on the terms of the grant. In holding that decisions which confer benefits are irrevocable, the courts have relied not so much on the favourable nature of such decisions as on the absence of power to revoke such decisions, because statutory powers are exhausted by their initial exercise, or on the fact that such decisions vested rights (which could not be interfered with) in the beneficiaries of those decisions.⁵¹ Academic commentators nevertheless construed these cases as establishing a principle that favourable decisions cannot be revoked, and eventually the courts came to accept the existence of such a principle.⁵²

4.42 The German APA deals, inter alia, with obvious errors in administrative acts which are apparent to the parties concerned. The relevant provision in the APA reads as follows:

⁴⁶ Pretorius *The Functus Officio Doctrine* PhD Thesis.

⁴⁷ De Ville *Judicial Review of Administrative Action* at 73-4.

⁴⁸ Pretorius *The Functus Officio Doctrine* PhD Thesis.

⁴⁹ *Seneque v Natal Provincial Administration* 1940 AD 149.

⁵⁰ *Sachs v Dönges NO* 1950 (2) SA 265 (A) and *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T).

⁵¹ *Holden v Minister of the Interior* 1952 (1) SA 98 (T).

⁵² *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C).and *Nkosi v Khanyile* 2003 (2) SA 63 (N).

Section 42: Obvious Errors in an administrative act

The authority may at any time correct clerical mistakes and errors in calculation and similar obvious inaccuracies in an administrative act. When the person concerned has a justifiable interest, correction must be undertaken. The authority shall be entitled to request presentation of the document for correction.

4.43 This provision covers apparent inconsistencies between what the authority intended and what has appeared in the act, such as typing and counting errors or other erroneous omissions. As long as the error does not lead to the illegality of the administrative act, the authority is empowered to correct it because no reliance can be placed on the further existence of the act with this (unintended) deficiency. Examples from the case law include administrative acts where the name of the person concerned is spelled wrongly and there is no doubt about the identity of this person, or where the street number of a house to which the administrative action relates is given wrongly in the act and it is clear which house is actually intended. Similarly to section 48, section 49 distinguishes between regulatory and beneficial administrative acts:

Section 49 German Administrative Procedure Act: Revocation of a legal administrative act

(1) A legal, non-beneficial administrative act may, even after it has become non-appealable, be revoked in whole or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not allowable for other reasons.

(2) A legal, beneficial administrative act may, even when it has become non-appealable, be revoked in whole or in part with effect for the future only when:

1. the revocation is permitted by law or the right of revocation is reserved in the administrative act itself;
2. the administrative act is combined with an imposition which the beneficiary has not complied with either at all or not within the time limit set;⁵³
3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would jeopardise the public interest;
4. the authority would be entitled, on the ground of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not availed himself of the benefit or has not received any contributions attributable to the administrative act and when the failure to revoke would be contrary to the public interest; or
5. in order to prevent or eliminate harm to common goods.

(3) A legal administrative act which provides for a one-off or a continuing payment of money or the making of a divisible material contribution, or which is a prerequisite for these, may be revoked either wholly or in part and with retrospective effect,

⁵³

De Ville *Judicial Review of Administrative Action* 78 notes this provision as follows: "where the granting of the disposition is subject to the fulfilment of a (legitimate) condition which the beneficiary has failed to comply with at all or within the specified period".

1. if, once the payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act;
2. if the administrative act had an imposition attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period.

Section 48 paragraph 4 applies *mutatis mutandis*.

(4) The revoked administrative act shall become null and void with the coming into force of the revocation, except where the authority fixes some other date.

(5) Once the administrative act has become non-appealable, decisions as to revocation shall be taken by the authority competent under section 3. This shall also apply when the administrative act to be revoked has been issued by another authority.

(6) In the event of a beneficial administrative act being revoked in cases covered by paragraph 2, Nos. 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the continued existence of the act to the extent that his reliance merits protection. Section 48, paragraph 3, third to fifth sentences shall apply as appropriate. Disputes concerning compensation shall be settled by the ordinary court.

4.44 Regarding the regulatory administrative act, the authority may – according to subsection (1) – revoke the act only with prospective effect and only if the authority does not intend to issue a new act with the same content. In respect of lawful beneficial administrative acts, the administrative act may be revoked with prospective effect if one of the three following conditions in subsection (2) is met:

- reliance on the act does not deserve protection because of prior warning (right to revocation has been included in the act, see No 1) or non-compliance with legal duties (No 2);
- a change of the factual or legal situation⁵⁴ would not allow for the issuing of the act (Nos 3 and 4); or
- the protection of the common good requires it (No 5).

4.45 In both cases (subsections (1) and (2)), a revocation is only possible with prospective effect, which is different from cases dealt with under subsection (3). As a result of a fairly recent amendment of section 49(3) of the APA, the public authority may revoke an administrative act which provides for a payment or a divisible material contribution with retrospective effect if the money has either not (yet) been used for the purpose envisaged or the person concerned failed to satisfy conditions attached to the act. Again, compensation for any loss suffered as a result of the revocation has to be paid if the person concerned was entitled to rely on the act, namely if section 49(2) Nos 3-5 are applicable. Lastly, section 50 of the APA plays an important role with respect to the abrogation of administrative acts. It reads as follows:

⁵⁴ What is important to note in the context of section 49(2) No 4 is the fact that any changes in jurisdiction, changes in internal manuals or guidelines or changes in administrative practice do not fall under this section and therefore do not justify the revocation of the administrative act.

Section 50 German Administrative Procedure Act: Withdrawal and revocation in proceedings for a legal remedy

Section 48, paragraph 1, second sentence, paragraphs 2 to 4 and paragraph 6 and section 49, paragraphs 2 to 4 and 6 shall not apply when a beneficial administrative act which has been contested by a third party is quashed during a preliminary procedure, or during proceedings before the administrative court, and the quashing operates in favour of the third party.

4.46 Whereas those cases which involve a non-reviewable beneficial decision do require a weighing up of competing interests (reliance on the act vis-à-vis the public interest to withdraw or revoke the act), acts that are challenged in proceedings for legal remedies may be withdrawn or revoked without further consideration of the interests of the person concerned. This is quite understandable considering the fact that the person concerned knows that he or she can only rely on the further existence of the act if it is not challenged in terms of the legal remedies available.

4.47 Although many questions of interpretation of the terms “obvious errors”, “void administrative decisions” and the possibility to withdraw or revoke an act can only be answered with reference to the relevant case law in Germany, the codification of the guiding principles for dealing with these issues in the APA has contributed towards greater clarity on how to strike the right balance between lawful administrative acts and legal certainty.

I. THE REVOCATION OF INVALID DECISIONS

4.48 In the absence of a statutory provision to the contrary, the general rule is that the initial exercise of a statutory power renders the repository of that power *functus officio*.⁵⁵ This rule should apply equally to valid decisions and to decisions which appear to be invalid due to some or other irregularity. There is, however, considerable authority for the view that the *functus officio* rule does not apply to invalid decisions. A decision which is prima facie invalid (regardless of the cause of such suspected invalidity) cannot be revoked (and still less may it simply be ignored) unless the applicable legislation provides otherwise. This rule is, however, not to be applied without qualification. In the first place, it does not apply to incomplete administrative proceedings, eg where formal notice of the decision emanating from those proceedings has not been given; prior to such notification, the decision may be withdrawn. Secondly, this rule may be relaxed in instances where the administrative agency had no jurisdiction or authority to perform the act concerned, where a complete failure of natural justice has occurred, or where there was a lack of authority on the part of an attorney purporting to represent a party to the proceedings

⁵⁵ Pretorius *The Functus Officio Doctrine* PhD Thesis.

concerned. At common law, these instances are recognised as exceptions to the *functus officio* rule in the context of judicial decisions.

4.49 Another solution to the issue of the finality of invalid decisions has been suggested by De Ville. According to his 'contextual approach', the question whether a favourable invalid decision may be revoked should be answered with reference to a variety of factors, including the nature of the expectation of the affected person, the nature of reliance placed on the decision, the way in which third parties would be affected if the decision remained in place, the gravity of the illegality, and the period of time for which the decision has been in place.⁵⁶ This approach has much to commend it, as it avoids the formalism and classification inherent in the approach contended for by me above, but on the other hand, it is more open-ended than his suggested approach and, consequently, less likely to promote certainty.⁵⁷

4.50 The Supreme Court of Appeal recently dealt in *Oudekraal* with the issue of an unlawful and invalid decision when the Administrator granted approval for township development on a piece of land on which there were graves and *kramats*, (religious and cultural sites).⁵⁸ The court found that the Administrator's permission was clearly unlawful and invalid at the outset. Was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid – provided that its belief was correct?

4.51 Until the Administrator's approval (and thus also the consequences of the approval) came to be set aside by a court in proceedings for judicial review, it existed in fact and it had legal consequences that could not simply be overlooked. The court pointed out in *Oudekraal* that proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject took of the validity of the act in question. It is no doubt for this reason, the court said, that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

4.52 The court in *Oudekraal* pointed out that while the legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid.

⁵⁶ De Ville *Judicial Review of Administrative Action* 80-81.

⁵⁷ Pretorius *The Functus Officio Doctrine* PhD Thesis

⁵⁸ *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA).

The case at hand illustrated a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it. The court remarked that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for this reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.

4.53 In *Union of Teachers' Associations v Minister of Education*⁵⁹ it was submitted that where the interests of private individuals are affected one is entitled to rely upon decisions of public authorities, that intolerable uncertainty would result if they could be reversed at any moment, and that although the same authority which introduces something may withdraw it, it cannot thereby affect or abolish the rights which its previous act has already created. The court held that the authorities do bear out in general the proposition contended for, subject however to the qualification that the decision is complete or final. The Minister's decision to cancel the cost-savings measures was conditional and not final, and did not confer rights on the persons concerned. It merely retracted a previous decision and restored the position which had existed before the imposition of the cost-saving measures.

4.54 In *Pepcor Retirement Fund and Another v Financial Services Board*⁶⁰ the court noted that if an administrative act has been performed irregularly - be it as a result of an administrative error, fraud or other circumstance - then, depending upon the legislation involved and the nature and functions of the public body, it may not only be entitled but also bound to raise the matter in a court of law, if prejudiced.

4.55 The Australian case of *Minister for Immigration and Multicultural Affairs v Bhardwaj*⁶¹ deals with an administrative tribunal's capacity to correct its own error when, in consequence of that error, it has failed to discharge its statutory function. The majority judges held that the Migration Act permitted the tribunal to reconsider its earlier decision, holding that the tribunal had failed to discharge its statutory function in making the initial decision, such that the tribunal's review function remained

⁵⁹ 1993 (2) SA 828 (C) 841.

⁶⁰ 2003 (6) SA 38 (SCA) 48 par 10.

⁶¹ [2002] HCA 11 (14 March 2002).

unperformed. The court held that nothing in the Migration Act or the principles of administrative law required that a purported decision involving such an error should be treated as valid unless and until set aside by a court. Thus it was open to the tribunal to reconsider the matter and make the later decision.

4.56 As Orr and Briese⁶² note, the court rejected in *Bhardwaj* any general principle of *functus officio* for administrative decisions analogous to that for courts. The court decided that there was no need to rely upon section 33(1) of the AIA to support the tribunal's action because, prior to the earlier decision, there had been no relevant exercise of power by the tribunal. The court said that where, however, there has been an exercise of power, it is necessary to go on and address the question whether a decision-maker may vary or revoke a decision. Orr and Briese explain that in many statutes, decision-makers are given an express power to vary or revoke a decision, exercisable either on the motion of the decision-maker or of the person affected by the decision or of both parties. A decision taken on the basis of such provisions will, like any administrative decision made pursuant to an enactment, generally be subject to judicial review, and that principles of administrative law, such as the duty to observe procedural fairness, will apply. Where an express statutory power is given to vary or revoke an administrative decision of a particular kind and on certain grounds, it is likely to be interpreted as excluding by implication the power to vary or revoke on other grounds, and also to exclude variation or revocation of other related decisions taken pursuant to the statute.

4.57 Justice Garry Downes states that there may be a reasonable basis in *Bhardwaj* for declining to reconsider an application except in the case of the most manifest of errors and asks whether it would be appropriate for a matter to be considered even then.⁶³ The problem is that a tribunal will not make a final decision unless it is at least implicitly satisfied that the decision was without jurisdictional error. Any reconsideration would involve the tribunal determining that error existed even though there has already been an implied determination that there was no error. The problem was highlighted by the reasoning of Hayne J in *Bhardwaj* that the question on appeal was when the tribunal exercised its jurisdiction. If the first decision amounted to a proper exercise of jurisdiction then it was the second decision which would have been "no decision at all". It is not competent for a Tribunal to make a binding, or any, ruling as to whether it has made an error of law. It was at least

⁶² "Don't Think Twice – Can Administrative Decision Makers Change Their Mind?".

⁶³ "Finality of Administrative Decisions" The Ramifications of *Minister for Immigration and Multicultural Affairs and Bhardwaj* (2002) 209 CLR 597.

theoretically possible that the Federal Court or the High Court might have ruled in *Bhardwaj* that it was not a denial of natural justice to proceed with the first hearing because, for example, the adjournment application was not supported by evidence or was the latest of many similar applications. In that event the second decision of the Immigration Review Tribunal would only have created needless doubt. Justice Downes remarks that it follows that, except in the clearest case, the making of a second decision by a tribunal will only lead to uncertainty of result. This was, at the least, a further reason for a tribunal to act with extreme caution before reconsidering a matter which has already been decided.

4.58 Justice Downes considers that there remains a problem as to how, in any event, a tribunal can go about the task. Nothing in the judgments in the Australian High Court suggests any qualification to the principle that a tribunal cannot revisit its own decision; that the decision-making power is spent once it is exercised. Indeed this principle of *functus officio* was endorsed in *Bhardwaj*.⁶⁴ If the making of a decision is an implicit assertion that the decision-making power has been properly exercised how can a Tribunal consider it again? If there was no jurisdictional error then the decision cannot be reconsidered. However, it is only by reconsideration that a determination can be made as to whether there has been jurisdictional error. Again, he noted, these are questions as much for the philosopher as for the lawyer. Philosophical or not, however, they have practical ramifications. What is a tribunal to do when it is asked to reconsider one of its decisions for jurisdictional error? The matter is closed. The file has been put away. However, if there is jurisdictional error those are meaningless acts. The only basis for reconsideration could be the possibility of jurisdictional error. Any response must be to examine the concluded matter to see if there is any basis for such a claim. There is no occasion for a fresh application. The first application removed the matter for review by the tribunal. There is nothing to remove a second time.

4.59 The appropriate course, Justice Downes says, would seem to be for any reconsideration to be performed by the tribunal as originally constituted. That is consistent with the legal position, if the claim is correct, that there has been no decision. It may also provide an in-built control because the tribunal as previously constituted will be reluctant to reconsider arguments already rejected. He asks whether any guidance be given to a tribunal asked to re-examine a matter for jurisdictional error. One such guide is to confine the reconsideration to cases of manifest error. However, a further potential guide finds support in the reasons of

⁶⁴ By Gleeson CJ at 603; Gaudron and Gummow JJ at 610.

some of the justices in *Bhardwaj*. Gleeson CJ characterised the error in *Bhardwaj* on four occasions as "administrative oversight" or "administrative error". Kirby J, in dissent, used the phrase "administrative error" three times. The justices were referring to the fact that the underlying cause of the error was a matter of administration internal to the Registry of the Immigration Review Tribunal and not something associated with the actual conduct of the hearing or the process of decision-making following it. Justice Downes points out that the nature of such an error was discussed in the decision of the Full Federal Court in *Clements v Independent Indigenous Advisory Committee*⁶⁵ where it was held that there had been an appealable denial of natural justice by the Administrative Appeals Tribunal when it failed successfully to notify a hearing date to one of 131 applicants seeking enrolment for the 2002 ATSIC elections in Tasmania. Justice Downes considers what conclusions seem appropriate:

1. The principle that tribunals cannot revisit their own decisions has been endorsed by the High Court. The obvious public policy against repeated applications to a tribunal to reconsider its own decisions is still in place.
2. However, where a tribunal does not exercise its jurisdiction, although it purports to do so, there is no bar to the tribunal considering the matter again.
3. This power may arise in all cases involving jurisdictional error.
4. None of these propositions address the question of whether it is wise for a tribunal to reconsider a decision.
5. There are significant legal and practical reasons why it will usually be unwise for a tribunal to reconsider a decision.
6. A tribunal which has purported to complete its consideration of a matter and make a final decision has no obligation to reconsider the matter. If it has not exercised its jurisdiction that matter can be declared on appeal and the matter remitted.
7. The conclusion seems to be that tribunals should act with extreme caution before ever giving consideration to the question whether a matter once determined should be revisited. Such reconsideration should be confined to the simplest and most obvious cases of manifest error. One circumstance which finds some support in the judgments in *Bhardwaj* is where there has been administrative error or oversight. Another circumstance, which finds a parallel in subs 42A(10) of the *Administrative Appeals Tribunal Act* is where the matter has been dismissed in error for default without any hearing.

4.60 One category under the German Administrative Procedure Act relates to invalid administrative acts:

Section 44 German Administrative Procedure Act: Invalidity of an administrative act

(1) An administrative act shall be invalid where it is very gravely erroneous and this is obvious when all relevant circumstances are duly considered.

⁶⁵ (2003) 131 FCR 28.

(2) Regardless of the conditions laid down in paragraph 1, an administrative act shall be invalid if:

1. it is issued in written form but fails to show the issuing authority;
2. by law it can be issued only by means of the delivery of a document, and this method is not followed;
3. it has been issued by an authority acting beyond its powers as defined in section 3, paragraph 1, No 1⁶⁶ and without further authorisation,
4. it cannot be implemented by anyone for material reasons;
5. it requires an action in contravention of the law incurring a sanction in the form of a fine or imprisonment;
6. it offends against morality.

(3) An administrative act shall not be invalid merely because:

1. provisions regarding local competence have not been observed, except where a case covered by paragraph 2, No. 3 occurs;
2. a person excluded under section 20, paragraph 1, first sentence, Nos. 2 to 6⁶⁷ is involved;
3. a committee required by law to play a part in the issuing of the administrative act did not take or did not have a quorum to take the necessary decision;
4. the collaboration of another authority required by law did not take place.

(4) If the invalidity only applies to part of the administrative act it shall be entirely invalid where the invalid part is so substantial that the authority would not have issued the administrative act without the invalid portion.

(5) The authority may ascertain invalidity any time *ex officio*; it must be ascertained upon application when the person making such an application has a justified interest in doing so.

4.61 Contrary to the common-law situation, where the “voidness” of an action is relative and always requires the right remedy by the right person through the right

⁶⁶ Section 3(1) No 1 APA reads as follows:

Local Competence

(1) The following shall be the provisions as regards local competence:

1. in matters relating to immovable assets or to a right or legal relationship linked to a certain place: the authority in whose districts the assets or the place is situated;

⁶⁷ Section 20(1) APA reads as follows:

Persons excluded

(1) The following persons may not act on behalf of an authority:

1. a person who is himself a participant;
2. a relative of a participant;
3. a person representing a participant by virtue of the law or of a general authorisation or in the specific administrative proceedings;
4. a relative of a person who is representing a participant in the proceedings;
5. a person employed by the participant and receiving remuneration from him, or one active on his board of management, supervisory board or similar body; this shall not apply to a person whose employing body is a participant;
6. a person who, outside his official capacity, has furnished an opinion or otherwise been active in the matter.

proceedings within the applicable time-limits, German administrative law recognises – albeit to a very limited extent and subject to certain conditions – specific cases of administrative acts which are “non-acts” and which never come into effect, being a complete nullity. The person affected can obviously request the authority or a competent court to make a declaration of nullity in respect of the administrative act in order to avoid the risk of a wrong assumption of nullity. There are, however, no time-limits laid down for the declaration of nullity of an administrative act. Since this has a direct bearing on the issue of legal clarity, the conditions to be met for an act to be ignored or to be “declared void” (either by the administration or by a court of law) should be narrowly interpreted, allowing only in exceptional cases the conclusion that the administrative act can be ignored completely.

4.62 Subsection (1) of section 44 includes general criteria for the nullity of an administrative act which are supplemented by the cases stated in subsection (2) and which are limited by the cases stated in subsection (3). German courts usually approach this provision by determining firstly whether the case falls under section 44(2). If not, they check whether section 44(3) is applicable and nullity is specifically excluded. Only if neither of the subsections is applicable will the courts resort to section 44(1) and check whether the administrative act suffers from a serious defect which is obvious, taking into account the surrounding circumstances. Whether the gravity of the defect and its obviousness are “sufficient” to justify a declaration of nullity will also be measured against the grounds for nullity laid down in subsection (2). Examples from the case law include violations of statutory prohibitions, completely incomprehensible or vague administrative acts, and decisions that lack any factual basis and which have obviously been taken to favour a specific person.

4.63 Another category of cases relevant in terms of the common-law rule of *functus officio* relates to withdrawal and revocation of administrative acts that have already become unable to be challenged in terms of legal remedies. In the terminology of German administrative law, withdrawal applies always to unlawful administrative acts whereas revocation refers to lawful administrative acts.⁶⁸ The law on withdrawals and revocation has been developed by the courts and in academic writing, and is codified in the German APA in sections 48 and 49 respectively.⁶⁹

⁶⁸ The decision as to whether an act is lawful or unlawful is based on an assessment of the act at the time when it becomes effective. Both the withdrawal and the revocation of an administrative act are themselves administrative acts and can be challenged by internal appeal or judicial review.

⁶⁹ Both sections 48 and 49 APA apply only in so far as the withdrawal or the revocation of an administrative act is not dealt with specifically in another particular piece of

Section 48 German Administrative Procedure Act: Withdrawal of an unlawful administrative act

(1) An unlawful administrative act may, even after it has become non-appealable, be withdrawn in whole or in part retrospectively or with effect for the future. An administrative act which gives rise to a right or an advantage relevant in legal proceedings or confirms such a right or advantage (beneficial administrative act) may only be withdrawn subject to the restrictions of paragraphs 2 to 4.

(2) An unlawful administrative act which provides for a once-and-for-all or continuing payment of money or the making of a divisible material contribution, or which is a prerequisite for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance is, having regard to the public interest in the withdrawal, deserving of protection. Reliance is in general deserving of protection when the beneficiary has utilised the contributions made or has made financial arrangements which he can no longer cancel, or can cancel only by suffering a disadvantage which cannot be reasonably be asked of him. The beneficiary cannot claim reliance when:

1. he obtained the administrative act by false pretences, threat or bribery;
2. he obtained the administrative act by giving information which was substantially incorrect or incomplete;
3. he was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.

In the cases provided for in No. 3, the administrative act shall in general be withdrawn with retrospective effect.

(3) If an unlawful administrative act not covered by paragraph 2 is withdrawn, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the existence of the act to the extent that his reliance merits protection having regard to the public interest. Paragraph 2, third sentence shall apply. However, the disadvantage in financial terms shall be made good to an amount not to exceed the interest which the person affected has in the continuance of the administrative act. The financial disadvantage to be made good shall be determined by the authority. A claim may only be made within a year, which period shall commence as soon as the authority has informed the person affected thereof.

(4) If the authority learns of facts which justify the withdrawal of an unlawful administrative act, the withdrawal may only be made within one year from the date of gaining such knowledge. This shall not apply in the case of paragraph 2, third sentence, No. 1.

(5) Once the administrative act has become non-appealable, the decision concerning withdrawal shall be taken by the authority competent under section 3. This shall also apply when the administrative act to be withdrawn has been issued by another authority.

4.64 Section 48 of the APA tries to strike a balance between the constitutionally required legality of administrative action⁷⁰ on one hand and legal certainty on the other. The provision distinguishes between beneficial administrative acts and regulatory acts. Whereas the withdrawal of the latter only favours the person

legislation (particular administrative law). In the latter case, the provisions in the APA can, however, still supplement the specific empowering provision or even modify it if the reliance on the act is not sufficiently protected by the specific legislation.

⁷⁰ Article 20 (3) of the German Basic Law provides as follows:

Basic institutional principles; defence of the constitutional order

(3) The legislature is bound by the constitutional order, the executive and the judiciary by law and justice.

concerned and is therefore not subject to any qualifying conditions but is merely left to the discretion of the administrator, the withdrawal of the former disadvantages the person concerned. The withdrawal of beneficial acts is therefore subject to certain conditions laid down in subsections (2) and (3), which again distinguish between the granting of payments and other beneficial acts. In principle, a beneficial administrative act granting a payment cannot be withdrawn if the person concerned has relied upon the act and his or her reliance deserves protection when balanced against the public interest. When weighing up the interests, the administrator needs to consider —

- the consequences of the withdrawal to the beneficiary;
- the consequences of non-withdrawal in general and vis-à-vis third parties;
- the nature and form of the act;
- the severity of the illegality;
- the duration of the act;
- the extent to which and the time from which the act has to be withdrawn.

4.65 In general, if the beneficiary has already consumed⁷¹ the granted benefit or has made financial arrangements that are difficult to cancel, his or her reliance will be protected. If, however, the person concerned obtained the administrative act by bribery or fraud or by submitting wrong information or if the person knew or ought to have known the illegality of the act, the reliance on the act will not be protected and the person concerned may even be asked to refund the payments. With respect to other beneficial administrative acts, the administrative act may be withdrawn. If, however, the persons' reliance on the act deserves protection, the loss to property suffered by the beneficiary is to be made up by the administrative authority. In this regard the same principles as described with respect to subsection (2) apply.

J. FUNCTUS OFFICIO AND CHANGED CIRCUMSTANCES OR NEW EVIDENCE

4.66 Does an administrative decision once given stand in all perpetuity, or may the author of that decision reopen the matter should circumstances change?⁷² An administrative agency might form the view some time after a decision was made that the circumstances that gave rise to the decision have changed to the extent that the decision is no longer appropriate. Would the agency then be precluded from reconsidering the matter? New information relevant to a decision might become

⁷¹ The term “consumption” does not include cases where the beneficiary has merely spent the money by paying off debts or buying items that remain in his or her possession.

⁷² Pretorius *The Functus Officio Doctrine* PhD Thesis.

available shortly after that decision was made. Would the decision-making authority's hands be tied in such a case, with the result that its decision remains inviolable even though the authority itself might believe that justification exists for reconsidering the matter?

4.67 The decision-making body's enabling legislation might empower it to reopen the proceedings. The question then arises whether, in the absence of statutory authorisation, administrative bodies and functionaries may reopen their own proceedings should they consider it necessary to do so on account of changed circumstances or new information. There is a scarcity of case law pertinent to this question. Those that there are do not deal systematically with the question whether an administrative body may reopen its proceedings if the circumstances that gave rise to its decision have changed or if new evidence relevant to that decision has become available. These cases do not enunciate any clear principles on the matter, although by process of inference, it seems possible to derive the following basic principles from them:

- (i) Once an administrative agency has made a final decision on a matter before it, it is generally speaking *functus officio* and, in the absence of a statutory provision to the contrary, not even a court of law may permit it to reopen its proceedings.⁷³ This would be the case even if, subsequent to the decision having been made, new facts have emerged that indicate that the agency was under a misapprehension⁷⁴ or relied on perjured evidence.⁷⁵
- (ii) An administrative body which has come to a definite decision may not of its own accord reopen its proceedings and vary that decision, even if it failed to consider relevant information in coming to that decision.⁷⁶
- (iii) If information relevant to the decision were to be placed before the administrative body immediately after it pronounced its decision and before it adjourned and dispersed, it would be entitled to revisit the decision of its own accord and without any judicial intervention.⁷⁷

⁷³ Pretorius *The Functus Officio Doctrine* PhD Thesis. *Pinkey v Race Classification Board* 1967 (2) SA 303 (E) and *Majofis v Sutherland Municipality* 1920 CPD 3.

⁷⁴ *Stewart v Witwatersrand Licensing Court* 1914 WLD 130.

⁷⁵ *Smythe & Smythe v Johannesburg Liquor Licensing Court* 1918 TPD 290

⁷⁶ *Freehold Properties of South Africa Ltd v Rent Control Board* 1946 TPD 50.

⁷⁷ *Jacobson v George Licensing Court* 1934 CPD 452.

- (iv) An administrative body may revisit its decision after it was announced but before it takes effect or acquires finality, especially in emergency situations or if information of a kind which would warrant a reconsideration of the matter were to come to its notice.⁷⁸

4.68 The Canadian case of *Chandler v Alberta Association of Architects*⁷⁹ was concerned with the failure of the Practice Review Board of the Alberta Association of Architects to dispose of the matter before it in a manner permitted by the Architects Act. The Board had intended to make a final disposition but that disposition was a nullity, and in law it amounted to no disposition at all. Traditionally, where a tribunal makes a determination that is a nullity, it has been permitted to reconsider the matter afresh and make a valid decision. Mr Justice Sopinka noted in that there is a sound policy reason for recognising the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect of the matter before it in accordance with its enabling statute that decision cannot be revisited merely because the tribunal has changed its mind or made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorised by statute or if there has been a slip or error. The application of the principle of *functus officio* must be more flexible and less formalistic in relation to decisions of administrative tribunals which are subject to appeal only on a point of law. Justice, he said, might require the reopening of administrative proceedings in order to provide relief that would otherwise be available on appeal.

4.69 Sopinka J felt that the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it. If the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and which it is empowered to deal with, it ought to be allowed to complete its statutory task. However, if the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute.

4.70 Madam Justice L'Heureux-Dubé dissented from her colleagues. In her view the effect of the *functus officio* doctrine was that an adjudicator (be it an arbitrator, an administrative tribunal or a court), once it has reached its decision, cannot afterwards

⁷⁸ *Brown v Leyds; Theron v Springs Town Council* 1945 TPD 55.

⁷⁹ [1989] 2 SCR 848.

alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. She remarked that once a board acts ultra vires, it should not be allowed to rectify the infirmities of its disposition according to its own predilections, and that standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada.

4.71 It was pointed out in *Nouranidoust v Canada (Minister of Citizenship and Immigration) (TD)*⁸⁰ that it was clear that immigration officers and visa officers, as a matter of practice, often reconsider their decisions on the basis of new evidence. The need to find express or implied authority to reopen a decision in the relevant statute is directly related to the nature of the decision and the decision-making authority in question. Silence in a statute with respect to the reopening of a decision that has been made on an adjudicative basis, consequent on a formal hearing and after proof of the relevant facts, may indicate that no reopening is intended. Silence in a statute with respect to the reopening of a decision that is at the other end of the scale, a decision made by an official pursuant to a highly informal procedure, on whom no time limits are imposed, must be assessed in light of the statute as a whole. Silence in such cases might not indicate that Parliament intended that no reconsideration of the decision by the relevant official should be allowed; it might mean merely that discretion to do so, or to refuse to do so, was left with the official. Parliament's silence in the case of applications for landing, when the individual had been found eligible for such because he or she fell under certain regulations, was not intended to restrict the immigration officer from reopening a file if he or she considered it in the interests of justice to do so.

4.72 In *Francis & Another, R (on the application of) v Secretary of State for the Home Department & Another*⁸¹ the issue was whether a prisoner who has been recalled after having been released on licence has only one opportunity under section 39 of the Criminal Justice Act 1991 to make written representations with respect to his recall or whether he can subsequently make further written representations about his recall. The claimants submitted that there is nothing in section 39 to restrict a recalled prisoner to one opportunity of making written representations with respect to his recall. He can therefore make more than one set of written representations and the Secretary of State is under a duty each time to refer those written representations to the Parole Board under section 39(4). The primary argument on behalf of the Secretary of State, on the other hand, is that he

⁸⁰ [2000] 1 FC 123.

⁸¹ [2004] EWHC 2143 (Admin).

can only refer a case to the Parole Board once under section 39(4) and that, after the Parole Board has adjudicated on it, it is *functus officio* in relation to it. In other words, there is only an opportunity for one set of written representations and, once the Parole Board has adjudicated on them, that is it. The alternative submission on behalf of the Secretary of State was that if, contrary to his primary submission, the recalled prisoner can make more than one set of representations with respect to his recall, the Secretary of State is only under a duty to refer them to the Parole Board if they demonstrate a material change in circumstances and that it would be for the Secretary of State to decide whether or not that was so. Otherwise, there would be no way of preventing the Parole Board from being burdened with repeated and unmeritorious representations which the Secretary of State would be under a duty to refer to the Board. So far as the Secretary of State's primary submission was concerned, Miss Grey, who appeared on behalf of the Secretary of State and the Parole Board, submitted that after the Parole Board had decided a case referred to it under section 39(4), it was *functus officio*:

37. Turning to the alternative submission of the Secretary of State relating to a duty to refer when there was a material change of circumstances, Miss Grey drew attention firstly to the passage I have just quoted from the judgment of Simon Brown LJ in the Robinson case, submitting that, even if the panel is *functus*, there may be scope for re-opening its decision if there were a material change of circumstances. Secondly, she drew attention to section 12 of the Interpretation Act 1978 which states:

"Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

38. In the case of *R v Ealing LBC, ex parte McBain* (1985), 1 WLR 1351, which was a homelessness case, the Court of Appeal placed reliance on section 12 of the Interpretation Act in concluding that it could properly be inferred that the housing authority's obligation was revived by a material change in the applicant's circumstances so that the occasion required the duty to be performed again.

39. Reference was also made to the Court of Appeal decision in *R v Secretary of State for the Home Department, ex parte Onibyo* (1996) 2 WLR 496, an asylum case, where it was held that there could be a fresh in-country asylum claim in circumstances where the new claim was sufficiently different from the earlier claim to admit a realistic prospect that a favourable view could be taken, despite the unfavourable conclusion reached on the earlier claim.

40. Miss Grey submitted that if, contrary to the Secretary of State's primary submission, there were a power or duty to re-refer cases to the Parole Board under section 39 "from time to time as occasion requires", then there had to be a material change of circumstances to justify such a re-referral and that the further written representations had to relate to the recall decision rather than to the circumstances of the prisoner's continuing detention, otherwise they would not be representations "with respect to his recall" as required by section 39(3)(a).

41. In those circumstances, it was submitted by Miss Grey that it would be for the Secretary of State to decide whether the threshold of a material change of circumstances had been shown to be satisfied by the further written representations. It was suggested that that would be consistent with the structure of the Act by which

the Secretary of State refers and the Parole Board considers. Under section 32(2) of the Act, the Parole Board's duty is to advise the Secretary of State with respect to any matter referred to it by him in connection with the early release or recall of prisoners. Under section 39(4) it was the duty of the Secretary of State to refer a prisoner's case to the Board which, if the Interpretation Act applies, he had to do from time to time as occasion required. It was accepted by Miss Grey that any decision by the Secretary of State as to whether the further written representations gave rise to a material change of circumstances requiring a re-referral could be subject to the scrutiny of the Court by way of judicial review.

42. . . .

43. I start by considering section 39 itself. The section is directed to protection of the public against risk. Recall of the prisoner is effected either following a recommendation of the Parole Board (section 39(1)) or on the Secretary of State's own initiative without such a recommendation if it is expedient in the public interest to do so and it is impracticable to obtain such a recommendation (section 39(2)). In either case, the prisoner has the right to make written representations with respect to his recall, (section 39(3)(a)). In the case of a section 39(1) prisoner, the Secretary of State has a duty to refer his case to the Board if he has made written representations. In the case of a section 39(2) prisoner, the Secretary of State's duty to refer his case to the Board does not depend on written representations having been made. His case has to be referred to the Board whether he makes representations or not. That no doubt reflects the fact that his case has not previously been considered by the Board, unlike the case of a section 39(1) prisoner. If the Board then directs the immediate release of the prisoner on licence, whether he be a section 39(1) or a section 39(2) prisoner, the Secretary of State must give effect to that direction.

44. It seems to me to be important to bear in mind that section 39 is dealing with the recall of prisoners, in these cases short term prisoners. Any written representations made pursuant to section 39 have to relate to the issue of the prisoner's recall, not to the ongoing appropriateness or otherwise of his continuing detention, except insofar as it is incidental to the decision relating to his recall. It follows that the need to make any further written representations relating to the recall decision should be very limited.

45. I entirely reject the claimants' case that the prisoner should have the right to make repeated representations giving rise in each case to a duty on the Secretary of State to refer them to the Parole Board. That would give rise to a significantly different regime from that which I consider was contemplated by section 39. It would concentrate more on the on-going justification for the prisoner's continuing detention rather than the appropriateness of the prisoner's recall which is what section 39 is dealing with. Furthermore, it would mean that the prisoner would be able to make repeated representations, however unmeritorious or vexatious they may be, and in each case the Board would be under a duty to consider them. That would involve a wholly unacceptable burden on the Board which goes beyond the contemplated scope of section 39. I therefore have no difficulty in rejecting the claimants' case.

46. I do, however, have more difficulty in deciding which of the two alternative cases put forward by the Secretary of State is correct. I have already remarked on the limited nature of the scope of section 39 involving written representations dealing solely with the issue of the prisoner's recall. I also recognise the force of the *functus officio* argument. Indeed, I prefer the Secretary of State's argument on that aspect because it seems to me that the claimants' contrary argument is predicated on their case of repeated representations being permitted.

47. I am though, concerned with the potential unfairness of the guillotine coming down after the first written representations when there could subsequently be a material change in circumstances showing that the Parole Board's decision relating to the recall decision may be wrong. The Secretary of State's primary case would not cater for that situation. . . . the potential unfairness of a prisoner having to choose the best time to make their once and for all written representations also seems to me to have some force. These two cases are examples of that dilemma in that the solicitors

in both cases chose, perhaps understandably, to make their written representations after the Parole Board's decision but before their client's subsequent acquittal on the charge which had featured in the decision to recall them. I suppose the solicitors could have asked to be able to make their once and for all representations after their clients' trial or to ask the Secretary of State to delay a decision on referral until after the trial, but there could be no certainty that such a request would have been granted. It is just an example of the difficulty and potential for unfairness which could arise if there were subsequently a change of circumstances which could have a material bearing on the correctness of the decision to recall.

48. . . . I take some comfort in . . . the judgment of Simon Brown LJ in the *Robinson* case, . . . where he instanced a supervening material change of circumstance as a potential exception to the rule that a decision must otherwise be regarded as final and conclusive. The Interpretation Act enables it to be implied that a statutory duty can be performed from time to time as occasion requires unless the contrary intention appears from the statutory provision. I do not consider that there is anything in section 39 which can be said to have intended to exclude the duty to refer further written representations in circumstances where the recall decision could be shown to be unfair due to a material change in circumstances relevant to that decision. In those circumstances, it can, in my judgment, properly be said that the occasion requires that the duty should be performed.

K. PROPOSALS FOR REFORM OF SECTION 10(1)

4.73 In May 2003 Professor Julien Hofman commented on the overlap between the common law on interpreting legislation and the constitutional principle of legality. He considered that revising the Interpretation Act would be an opportunity to clarify the difference between legislation and administration and the way to approach each of these. He also pointed out that subsections (1) and (3) of section 10 are extremely important and need to be clarified in view of the approach the Constitutional Court has been taking to administrative powers. Further, he noted the comments of Ackermann J in *Union of Teachers' Associations v Minister of Education*.⁸²

4.74 Pretorius notes that although the exact parameters of the doctrine's scope of application in contemporary administrative law are not altogether clear, *functus officio* remains a useful mechanism for regulating the exercise of public power. In particular, it enhances finality, certainty and predictability by restricting the ability of administrative agencies to go back on their own earlier decisions.⁸³ By doing so the doctrine discourages arbitrary and capricious conduct on the part of administrative agencies. Pretorius deals particularly with three facets of the *functus officio* doctrine that appear to be particularly problematic and that would consequently benefit considerably from judicial clarification or legislative reform.

4.75 As far as section 10(1) of the South African Interpretation Act is concerned, Pretorius remarks that this provision replicates identical or very similar provisions in the interpretation laws of many other Commonwealth jurisdictions in which extensive

⁸² 1993 (2) SA 828 (C) 840.

⁸³ *The Functus Officio Doctrine* PhD Thesis.

administrative powers are routinely conferred on public bodies. Given the potential impact of such powers and duties, it is obviously important that members of the public, as well as the bodies and functionaries themselves, should know when and in what circumstances the powers may be exercised and the duties must be performed. Yet, as Pretorius notes, the formulation of section 10(1) is ambiguous. He explains that to the best of his knowledge, this provision has never been subjected to exacting scrutiny by either the judiciary or the authors of textbooks on the interpretation of statutes. Consequently, he notes that there is some confusion (and, indeed, some contradictory judicial dicta) about the effect of this provision.

4.76 Pretorius suggests that because of the deficiencies in the current formulation of section 10(1), the Commission would be well advised to recommend its reformulation. He also notes that the essential problem with provisions such as section 10(1) has been alluded to by the New Zealand Law Commission in the following terms:

The present provision is broadly drafted and appears to allow . . . the re-exercise of a power (or the revocation of an earlier exercise) in reliance on grounds that are, at the least, uncertain and discretionary – for example that the people exercising the power “had changed their minds”. It is unlikely that this was ever intended.⁸⁴

4.77 Pretorius also considers the rectification of erroneous decisions and the revocation of invalid decisions. In his view there can be no objection to an administrative agency’s rectifying clerical errors in its own decisions as rectification is merely intended to ensure that the instrument which embodies a decision reflects that decision accurately. The courts should accordingly have little hesitation in recognising the power of administrative agencies to rectify such clerical errors. He proposes that for the avoidance of doubt, the Commission might even wish to recommend that the Interpretation Act be amended to make it clear that administrative agencies have such power of rectification.

4.78 Likewise, and subject to appropriate procedural safeguards, there does not seem to be any reason why an administrative agency should not be permitted to revoke its own act or decision procured by fraudulent or other dishonest means. Pretorius considers that judges should not be reluctant to permit administrative agencies to do so, provided that such revocation is always preceded by a fair hearing of all interested parties. He proposes that the Commission recommend amendments to the Interpretation Act in order to capture in legislation the power of administrative agencies to revoke acts or decisions procured by dishonest means. Such a statutory

⁸⁴ The New Zealand Law Commission *A New Interpretation Act* (NZLC R17 1990) 123, quoted in *Goulding v Chief Executive: Ministry of Fisheries* [2003] NZCA 244 par 48.

provision would make it unnecessary for the courts to address the difficult question whether a decision procured by fraudulent or other dishonest means is in law ipso facto a nullity or is merely voidable. If it is the former, there would, strictly speaking, be no need to revoke it; if the latter, the question would arise as to why it should be competent for the author of that decision to revoke it without having statutory power to do so.

4.79 Pretorius observes that there may be cogent arguments in favour of permitting administrative agencies to revoke their own invalid acts or decisions and their own acts or decisions characterised by errors of fact or law. However, this might not be possible doctrinally or desirable in terms of policy. Whether an administrative act or decision is invalid, or is fatally flawed owing to a material mistake of fact or law, is often not an easy question to answer, and may be best left to the courts. There may be instances, though, in which an act or decision is so patently invalid that it would be unduly dogmatic to insist on judicial intervention in having it set aside. Pretorius considers that in such instances, there might be scope for arguing that an administrative agency should be allowed to revoke its own act or decision. The principle of legality would be an obstacle here: because administrative agencies only have the powers conferred on them by statute, to recognise such a power of revocation would arguably be incompatible with the rule of law and consequently in breach of the Constitution. He notes that for this reason, legislative intervention would be required in order to permit administrative agencies to revoke their own invalid acts.

4.80 If administrative agencies are to be given the power to revoke their own invalid acts or decisions, the question arises whether such power should extend to all instances of invalidity or be limited to specified instances of invalidity. In this regard, Pretorius says, it has been suggested that an administrative agency should be permitted to revoke its own decision if it is invalid (1) because the agency had no jurisdiction or authority to perform the act concerned or give the decision concerned, or (2) because a complete failure of natural justice has occurred, or (3) because there was a lack of authority on the part of an attorney purporting to represent a party to the proceedings concerned. In his view the power of an administrative agency to revoke its own decisions on account of invalidity should be restricted (at least for the time being) to these three instances, since recognition of a broader power of revocation might give rise to too much uncertainty. Pretorius believes that in order to avoid abuse of the proposed restricted power of revocation, this power should only be exercisable upon application by an interested party (and not mero motu by the

agency itself), and then only pursuant to a fair hearing. He suggests that such a restricted power of revocation could be included in a reformulated section 10 of the Interpretation Act.

4.81 Pretorius also deals with the issue of the revocation of decisions with the consent of interested parties. He notes that at common law, an administrative agency cannot revoke its own act or decision if it is not authorised by its enabling legislation to do so. The fact that the person affected by the relevant act or decision has consented to its revocation is immaterial, and the reason is not hard to find: the consent of the affected party cannot confer authority to revoke where none exists in terms of the relevant enabling legislation. There are, however, arguments in favour of permitting administrative agencies to revoke their own decisions where the affected person requests, or consents to, such revocation.⁸⁵ Indeed, Pretorius notes, the idea that a favourable decision may be revoked with the consent of the beneficiary of that decision, even if the decision-maker has no statutory power to revoke it, enjoys significant judicial and academic support. He considers that if a favourable decision has been abandoned by its beneficiary, and the decision-maker (or a third party) does not seek to enforce it, the decision-maker should perhaps, for pragmatic reasons, be permitted to revoke the decision concerned, provided that the beneficiary has given clear and informed consent to such revocation. He suggests that the same considerations would apply a fortiori to unfavourable decisions. The approach that

⁸⁵ In *Narjee v Commissioner of Northern Territory Police* [2005] NTMC 071, Mr Narjee, “the Appellant” applied for and was refused a Shooter’s Licence. The primary decision maker, a delegate of the Commissioner of Northern Territory Police “the Respondent” communicated the decision with reasons in a letter to the Appellant dated 27 June 2005. The Appellant lodged an appeal to the Firearms Review Tribunal “the Tribunal” under the Firearms Act. The appeal was listed for hearing on 13 October 2005. On that day the Tribunal was informed that the Respondent had revoked the decision of 27 June 2005. The Tribunal was invited by the Respondent to discontinue the appeal or not proceed to hear the appeal as, it was argued, there was no longer a decision in existence capable of forming the basis of the appeal. The Appellant, who was unrepresented on 13 October 2005 did not consent to the appeal being discontinued. The Appellant advised the Tribunal he did not want to withdraw the appeal but wanted the appeal to be heard in relation to the decision to refuse him a shooter’s licence. The question which had to be determined as a preliminary point was whether there was an appeal to be determined. That question in turn could only be answered by determining whether the purported revocation was valid within the context of the Firearms Act. The Firearms Appeal Tribunal held as follows:

29. We have alluded to the exception of consent or agreement between the parties throughout these reasons. We note that although there are some debates on the finer points of whether the decision-maker and an affected person can agree to a revocation or re-opening of a decision, generally the authorities permit such action if there is consent and the rights of a third party who may have relied on the decision are not infringed. The overriding policy consideration is that the law will encourage dispute resolution by allowing the parties to attempt to resolve their differences. By this decision the Tribunal is not intending to discourage the parties from attempting to resolve the matter themselves.

unfavourable decisions are irrevocable might be unduly dogmatic and legalistic, especially if the revocation of the relevant decision would not jeopardise the interests of any third parties, and if the decision-maker and the affected individual agree that the decision should be revoked. He considers that judicial recognition of a power to revoke decisions with the consent of the affected parties would, however, in the absence of statutory authorisation for such revocation, be constitutionally untenable. Accordingly, if administrative agencies are to have the power to revoke decisions if the affected parties consent to such revocation, he suggests that it could be done by means of amendments to section 10(1) of the Interpretation Act.

4.82 Pretorius suggests the following formulation for section 10(1):

'10. Construction of provisions as to exercise of statutory powers and performance of statutory duties. –

(1) When an enactment confers a power or imposes a duty upon an organ of state, or otherwise authorises or requires an organ of state to perform a function, and that organ of state makes a decision or performs an act in the exercise of such power or in the discharge of such duty or function, then –

- (a) unless the relevant enactment provides otherwise, that decision or act shall become final as soon as the organ of state concerned has pronounced that decision or has announced the performance of that act, as the case may be;
- (b) that decision or act shall not be susceptible of revocation, rescission, variation or amendment by that organ of state except:
 - (i) by means of the rectification of manifest clerical errors appearing on the face of the instrument recording that act or decision;
 - (ii) to the extent and in the circumstances permitted by the common law or by the enactment under which that decision was made or that act was performed;
 - (iii) with the prior written and informed consent of all persons affected by or having an interest in that act or decision;
 - (iv) where that act or decision was procured by fraudulent or dishonest means, provided that the organ of state shall afford all persons affected by or having an interest in that act or decision a fair hearing before revoking, rescinding, varying or amending it on account of suspected fraud or dishonesty; or
 - (v) where that decision or act is invalid due to lack of jurisdiction on the part of the organ of state to make that decision or to perform that act, or due to a failure of natural justice, or due to lack of authority on the part of an attorney who purported to represent a party to the proceedings which gave rise to that act or decision, and then only on written application by an interested party and after all persons affected by or having an interest in that act or decision will have been afforded a fair hearing;
- (c) subject to paragraphs (a) and (b), that organ of state shall be entitled to make further decisions or to perform further acts from time to time in the exercise of such power or in the discharge of such duty or function.'

4.83 It was noted in the draft discussion paper considered at the expert meetings in August 2004 that although the Promotion of Administrative Justice Act (“PAJA”) deals extensively with the exercise of administrative powers, it essentially regulates the manner in which certain powers are to be exercised and provides the remedies should these powers not be exercised in accordance with the dictates of just administrative action as set out in the Act. It was said that the Commission’s view is therefore that there is still a need to address the exercise of statutory powers and duties in the revised Interpretation Act.

4.84 The expert meetings gave rise to divergent views: The general view of the participants at the meetings in Pretoria and Durban was that it would be preferable to include a provision dealing with the exercise of statutory powers and duties in the PAJA rather than to duplicate them in the Interpretation Act. A comment made at the meeting in Pretoria was that by including these provisions in the Interpretation Act would seem like an attempt to make up for the deficiencies of the PAJA and that this would have a skewing effect on the Interpretation Act. Some participants at the meeting in Cape Town were of the view that the exercise of statutory duties and powers should be dealt with in the PAJA, others considered that it should be addressed in the Interpretation Act, whereas others considered that it should be addressed in the PAJA as well as the Interpretation Act. It was also acknowledged that this kind of provision would serve different purposes in the two Acts. Participants in the meetings generally doubted the viability of amending the PAJA and therefore considered that amendments should rather be effected to the Interpretation Act. Prof De Ville who submitted further written comment after having attended the meeting in Cape Town remarked that he generally agrees that the provision as proposed by Mr Pretorius should be included in the Interpretation Act.

4.85 The Commission provisionally proposes that the provisions governing the exercise of statutory powers and duties should be included in the Interpretation Act. The Commission acknowledges that this would be pragmatically the sensible option although the preferable option would be to deal with this issue in the PAJA and the Interpretation Act. It is considered that gaps might be created if the current Interpretation Act were to be repealed in the expectation that the PAJA will be amended.

4.86 The Commission’s preliminary view is that Pretorius’s justification for amending section 10(1) of the Interpretation Act is cogent. The Commission’s view is that section 10(1) is vague and should be clarified. Undoubtedly the bodies and functionaries in whom these powers and duties are vested should know when and in

what circumstances these powers may be exercised and these duties must be performed. The Commission agrees that there is a need to provide clearly when a decision or act is final and under which circumstances such a decision or act may be revoked. The Commission considers further that there is a need to address the rectification of erroneous decisions and the revocation of invalid decisions; and that there can be no objection to an administrative agency's rectifying clerical errors in its own decisions as rectification is merely intended to ensure that the instrument that embodies a decision reflects that decision accurately.

4.87 Prof De Ville suggested that the present section 10(1)(a) needs to be drafted more carefully. He noted that at present where an action involves the issuing of a document, the action is not regarded as being final before this document has been issued⁸⁶ and that the proposed provision appears to override the common law in this respect.

4.88 It was noted above that provided that a decision is not expressed in provisional or tentative terms (or is not of a provisional or conditional nature in terms of the applicable legislation), it should be regarded as final and unalterable as soon as the decision-maker has officially pronounced it in a manner that gives outward manifestation to the decision. When this has occurred, the decision-making body or official will have exhausted its or her decision-making powers and would be *functus officio*, it should not be required that the decision actually came to the affected person's attention, less still that he or she relied on it and it would suffice if the decision has, through a deliberate act of the decision-maker, passed into the public domain. We also noted that the applicable statute might depart from these general principles: The statute might require that the decision be published in a particular manner, it might also provide that the decision will acquire finality upon satisfaction of specified procedural requirements. If so, and if such requirements are expressed in mandatory terms, the decision might not be irrevocable until the decision-maker has complied with those requirements. On the other hand, if the prescribed formalities are not mandatory, there is no reason why informal notification of the decision should not be conclusive. The Commission does therefore not agree with Prof De Ville's proposal that the words "and where an action or decision involves the issuing of a document, when such document has been issued" should be inserted in the proposed clause.

⁸⁶ See De Ville *Judicial Review of Administrative Action* 69-70.

4.89 It was suggested at the meeting in Cape Town that the relevant clause should be expanded to reflect what the circumstances are when the common law permit revocation. Prof De Ville shares this view and said that the provision will otherwise not succeed in bringing about certainty.

4.90 The Commission agrees with Prof De Ville that the new Interpretation Act should effect certainty. As is noted in a number of instances above, the parameters of the *functus officio* doctrine and its exceptions are not sure. The question therefore arises whether it would be viable to capture the parameters and the exceptions in a few legislative words without distorting things and giving administrators far too much power (or far too little) to revoke their own decisions. **The Commission requests comment in particular whether it is considered possible, in fact, to codify the common law in this regard, beyond the basics such as a simple reference to clerical errors, fraud, manifest lack of jurisdiction, etc.**

4.91 The requirement of obtaining the prior written *informed* consent of all persons affected by or having an interest in the revoked or rescinded act or decision in question was questioned at the meetings. The question was posed how *informed* consent will be determined. There was also general agreement that consent cannot be required from all interested parties where the decision or action in question relates to *legislative* administrative action.

4.92 Prof De Ville comments that he does not understand or see the need for the proposal concerning the need to revoke “because there was a lack of authority on the part of an attorney purporting to represent a party to the proceedings concerned”. He suggests that it be rephrased as follows: “due to a manifest lack of jurisdiction on the part of the organ of state to make the decision or to perform that act, or due to a manifest failure to comply with the requirements of procedural fairness (specifically impartiality, notice, fair hearing)”. He says as the provision is phrased at present it gives too wide a power to a public authority to revoke its own invalid legislation.

4.93 Prof De Ville also notes that a public authority in Germany is empowered to withdraw an unlawful administrative decision within one year after having become aware of the circumstances which justify withdrawal, although this limitation does not apply where the decision was procured by bribery, threats or deception.⁸⁷ He suggests that a similar approach warrants consideration in South Africa in cases of unlawful beneficial decisions. Prof De Ville proposes that there also has to be a time

⁸⁷ See also De Ville *Judicial Review of Administrative Action* 80 -81.

limitation eg within one year after the decision was made (except in the case of fraud).

4.94 Prof De Ville further suggests that the legislation has to provide about the authority concerned being able to still approach the court, if it has locus standi, to set aside its own decision; and has to make it clear whether the power can be exercised prospectively only or also retrospectively. Other participants in the meetings also suggested that it should be made clear whether invalidation would be retrospective.

4.95 The application of the proposed provision was also questioned in the case where someone has a vested interest in the decision being revoked such as where there has been town-planning. It was suggested that provision should be made for compensation. The Commission notes that Professor Crabbe's draft Bill for an Interpretation Act contains a subclause which provides that the substantive rights of, or the procedures for redress by, a person who has suffered loss or damage or is otherwise aggrieved as a result of an omission or error corrected shall not be affected as a result of the correction of that omission or error and an investigation, a legal proceeding or a remedy in respect of a right, privilege, obligation or liability shall continue as if the omission or error had not been corrected.

4.96 A proposal was also made at the meeting of experts in Durban that another ground for revoking acts or decisions should be when new information comes to light. We noted above that in South Africa there is very limited scope for the reopening of a complete administrative decision-making process. An administrative agency that has made a final decision cannot, in the absence of a statutory provision to the contrary, reopen the relevant decision-making process even if, subsequent to the decision having been made, new evidence relevant to that decision were to emerge. However, if information relevant to the decision were to be placed before the administrative body immediately after it pronounced its decision and before it adjourned, it would be entitled to revisit the decision, presumably, because, in these circumstances, the decision-making process would not have been completed. The Commission is of the view that it is not necessary to include a provision to address this aspect.

4.97 A provision is included in the Bill which would change the common law position in regard to repeal (revocation) or amendment of a decision. As will be noted below, this provision has been questioned. In terms of this proposal, where legislation confers a power or imposes a duty, that legislation must be read as implying that any decision taken in the exercise of the power or the performance of the duty may, be reconsidered and either be confirmed, altered or repealed by the

person on whom the power is conferred or the duty is imposed; or either by that person or the person who took the decision, if the decision was taken by another person in terms of a power or duty delegated to that other person. It is proposed further that a decision may be altered or repealed with effect from a date determined by the person altering or repealing the decision, which may be a date before, on or after the decision to alter or repeal was taken. If the person to whom a decision relates has been notified, the decision may not be altered or repealed if the alteration or repeal will detract from any rights that have accrued or any legitimate expectations that have arisen as a result of the decision, but this should not apply if the affected person agrees in writing to the alteration or repeal of the decision; the decision was procured by fraudulent, dishonest or any other illegal means; or the decision is for other reason invalid. Finally, the following decisions may not be altered or repealed, namely a decision which is the subject of internal or administrative appeal proceedings, alternative dispute resolution proceedings, judicial proceedings or a decision taken to decide an internal or administrative appeal.

4.98 The following clause is included in the Bill on the exercise of statutory powers and performance of duties and their revocation for purposes of eliciting comment:

Amendment or repeal of decisions

50. (1) If legislation confers a power or imposes a duty, that legislation must be read as implying that any decision taken in the exercise of the power or the performance of the duty may, subject to subsections (2) and (3), be reconsidered and either be confirmed, altered or repealed –

- (a) by the person on whom the power is conferred or the duty is imposed; or
- (b) either by that person or the person who took the decision, if the decision was taken by another person in terms of a power or duty delegated to that other person.

(2) A decision may be altered or repealed in terms of subsection (1) with effect from a date determined by the person altering or repealing the decision, which may be a date before, on or after the decision to alter or repeal was taken.

(3) If the person to whom a decision relates has been notified, the decision may not be altered or repealed if the alteration or repeal will detract from any rights that have accrued or any legitimate expectations that have arisen as a result of the decision, but this subsection does not apply if –

- (a) the affected person agrees in writing to the alteration or repeal of the decision;
- (b) the decision was procured by fraudulent, dishonest or any other illegal means; or
- (c) the decision is for other reason invalid.

(4) The following decisions may not be altered or repealed in terms of this section:

- (a) a decision which is the subject of –
 - (i) internal or administrative appeal proceedings;

- (ii) alternative dispute resolution proceedings; or
 - (iii) judicial proceedings; or
- (b) a decision taken to decide an internal or administrative appeal.

4.99 Prof Cora Hoexter is of the view that the proposed clause has not captured the spirit of s 10 (now clause 50) as well as Daniel Pretorius' did, mainly because the proposed formulation gives the impression that the 'default setting' is alteration or repeal, and that a decision-maker can do this freely except on the occasions mentioned in subsec (4). She still thinks it is the other way around: alteration or repeal is the exception, not the rule. She comments that Daniel Pretorius' draft is better overall from a substantive point of view, as it sets out the position very accurately and quite clearly or helpfully. She asks for instance, what about mere slips? The way she reads the proposed formulation one has to infer that it's fine to correct them. Another example is where Daniel Pretorius spells out absence of jurisdiction, etc, and the proposed formulation just says 'for any other reason invalid'. She suggests it should be 'amendment or revocation' of decisions, as 'repeal' suggests legislation instead of decisions. The language of 50(3) is a bit odd -- one should say 'notified of that decision, it may not be altered ...' She is not sure she understands these 'retrospective' clauses, eg in 49 and 50? She poses the question what about the rule of law?

4.100 Daniel Pretorius agrees with Professor Cora Hoexter's comments on the draft section 50. In particular, he thinks it would be very problematic to enact a provision which would confer a general power (albeit subject to the limitations set out in the draft provision) on administrative bodies or functionaries to revoke or amend their decisions. Such a provision would arguably be contrary to the principles of finality and certainty, which are important elements of the rule of law doctrine and the principle of legality (see, generally, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102; *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 39; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 44). A general power to revoke or amend administrative decisions would not only give rise to uncertainty about the reliability and longevity of such decisions but might even be unconstitutional on account of inconsistency with the rule of law doctrine and the principle of legality. Consequently, he strongly believes that the point of departure and general principle should be that, subject to the specific exceptions listed in his proposed draft of the provision, administrative decisions are irrevocable and cannot

be varied unless the relevant enabling legislation permits revocation or variation. (Of course, he is not referring here to subordinate legislation, which is governed by the draft section 49.)

4.101 At a general level, it is not clear to him why the draft section 50 refers to “decisions” but not also “acts”. He thinks that administrative bodies sometimes perform acts that cannot be classified as decisions, in the sense that such acts do not necessarily involve the exercise of discretion or choosing between various available courses of action. Also, such acts do not always involve the exercise of adjudicative powers or the determination of parties’ rights. (To use the terminology of PAJA, such acts would not always adversely affect a person’s rights or have a direct, external legal effect.) He asks whether it is intended that such acts should not be covered by section 50. If so, he says, it could give rise to the potentially anomalous position in which “decisions” (which often have more far-reaching consequences than mere “acts”) would, in principle, be revocable under section 50, while mere “acts” might (depending on the circumstances of the case) be irrevocable in terms of the *functus officio* doctrine.

4.102 Daniel Pretorius comments that if the present formulation of section 50(1) is to be retained as the point of departure, he thinks that its scope of application should be restricted. First, he thinks it would be necessary to define the nature of the “power” or “duty” referred to in that provision, perhaps by identifying the repository of the power and the holder of the duty (the decision-maker). In its present formulation, he comments that the provision seems to be intended to extend beyond the scope of administrative law and to cover each and every instance where legislation confers a power or imposes a duty, even where the decision-maker is a private person or body, and even where the exercise of the power or the performance of the duty would not constitute the exercise of public power or the performance of a public function (or, to use PAJA’s terminology, the performance of “administrative action”).

4.103 Secondly, he thinks that the provision should set out a time limit after which the exercise of the power or the performance of the duty may not be revoked or altered. He notes, to use an extreme example, it should not be possible to revoke a licence many years after it was granted, even if it subsequently appears that the decision to award the licence was invalid for some or other reason.

4.104 Thirdly, he thinks that the provision should specify the procedure to be adopted by the decision-maker prior to revoking or altering its own earlier decision or act.

4.105 With reference to the draft section 50(3), Daniel Pretorius thinks that (apart from the concerns expressed by Professor Cora Hoexter) it might be problematic to restrict its scope to decisions that have been “notified” to the person to whom the decision relates. He does not think that the revocability or otherwise of a decision should be made dependent on whether the decision came to the attention of the affected person. He considers that the question should rather be whether the decision-maker has formally pronounced or published its decision (regardless of whether it actually came to the affected person’s notice).

4.106 Daniel Pretorius comments that judicial intervention should also be required to determine whether a decision was procured by “illegal means” or was for some other reason invalid. He suggests that the decision-maker itself should not be allowed to decide on the validity or otherwise of its own decision, or on the question whether the decision was procured by illegal means.

CHAPTER 5

A. STRUCTURE OF FOREIGN INTERPRETATION STATUTES ON STATUTORY POWERS AND FUNCTIONS

5.1 At the start of Chapter 4 we raised the question how other jurisdictions deal with statutory powers and functions. The South African Interpretation Act deals with the repeated exercise of power, holders of office, power to make rules, regulations or by-laws, the assignment of powers and delegation in a few subsections of section 10, whereas certain other jurisdictions deal with this matter extensively in a number of elaborate provisions. Can we perhaps learn from these jurisdictions and ought we to follow their example?

5.2 The Australian Capital Territory Legislation Act of 2001 (“ACTLA”) addresses statutory powers and functions in chapter 19 of the Act (under the heading “administrative and machinery provisions”), using the following structure:

- functions in part 19.2;
- appointments in part 19.3;
 - appointments in general in division 19.3.1;
 - acting appointments in division 19.3.2;
 - standing acting arrangements in division 19.3.2A;
 - consultation on appointment with appropriate assembly committee in division 19.3.3;
- delegations in part 19.4;
- service of documents in part 19.5;
- the functions of executive and ministers in part 19.6;
- other matters such as forms and production of records in part 19.7.

5.3 The Interpretation Act of New Zealand deals with the exercise of statutory powers under the heading *exercise of powers in legislation generally*. (The Act deals in a preceding heading and section with the exercise of powers between passing and commencement of legislation.) The Act deals under the heading of *exercise of powers in legislation generally* with the power to appoint to an office, the power to correct errors, the exercise of powers by deputies, the power to amend or revoke, and the exercise of powers and duties more than once.

5.4 Using the heading *powers conferred and duties imposed by Acts* the Australian Commonwealth Acts Interpretation Act is set out in the following structure:

PART VII--POWERS CONFERRED AND DUTIES IMPOSED BY ACTS

- 33. Exercise of powers and duties;
- 33A. Acting appointments;
- 33B. Participation in meetings by telephone etc.;
- 34. Power to determine includes authority to administer oath;
- 34AA. Delegations;
- 34AB. Effect of delegation;
- 34A. Exercise of certain powers and functions by a delegate;
- 34B. Presentation of papers to the Parliament;
- 34C. Periodic reports.

5.5 Appointment, retirement and powers of officers are dealt with in the Canadian federal Interpretation Act under the heading rules of construction.

B. NOTIFICATION IN GAZETTE OF OFFICIAL ACTS IN TERMS OF LEGISLATION

5.6 Section 15 of the Interpretation Act provides presently as follows:

15 Notification in Gazette of official acts under authority of law

When any act, matter or thing is by any law directed or authorized to be done by the President or the Premier of a province, or by any Minister, or by any public officer, the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette.

5.7 It is considered that a similar but reworded provision should be included in the Bill, and since this aspect deals with duties, powers and functions it be included in this Chapter of the Bill. The Commission proposes the following clause:

Notification in Gazette of official acts in terms of legislation

46. Notification of anything done or to be done in terms of legislation may be given in the Gazette.

C. WORDS INDICATING WHETHER LEGISLATION DIRECTORY OR PEREMPTORY

5.8 The word "may" in a provision in legislation usually indicates a permissive and enabling provision, giving the person who exercises it a discretion. It is usually interpreted to be merely directory. However, in all cases the meaning will depend

upon the context of the provision and the intention embodied in the enactment.¹ If the legislation is examined as a whole the word “may” may have to be construed as revealing an intention to confer that power with a duty to exercise it in certain circumstances.

5.9 The word “shall” has an affirmative or imperative character and indicates that the legislature intends the provision to be peremptory.² However, in certain circumstances the courts have interpreted the word “shall” to be merely directory and not peremptory. The law relating to the question whether a provision in a statute is peremptory or directory was reviewed in the case of *Mathope and Others v Soweto Council*.³

The cases are legion in our Courts where the peremptory words "moet" or "shall", in certain circumstances, and subject to well defined rules, have been interpreted as being merely directory and not peremptory.

5.10 In the case of *Commercial Union Assurance Company of South Africa Ltd v Clarke*⁴ the court stated as follows:

The basic test, in deciding as to the imperative nature of a provision, is whether the Legislature expressly or impliedly visits non-compliance with nullity. . . In applying that test, ‘each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other’ – (per SCHREINER JA in *Charlestown Town Board and Another v Vilakazi* 1951 (3) SA 361 (A) at 370).

5.11 In *Weenen Transitional Local Council v van Dyk*⁵ the court considered whether a provision in provincial legislation was peremptory or directory. The provision read as follows:

[t]he council shall publish in a newspaper a notice once a week for two consecutive weeks at intervals of not less than five days specifying the amounts at which such rates had been assessed and the final date in such financial year for the payment thereof.

5.12 The court found the language used in the provision to be manifestly mandatory as the local authority was instructed that it “shall” publish the two prescribed notices. However, although the use of the word shall” by the lawmaker in prescribing the steps to be taken by a local authority was a strong indication that the injunction was peremptory, there are many instances in our case law in which that verb has, “in the light of other exegetic considerations, been assigned a directory import.” It remained a matter of construction whether the lawmaker intended the verb

1 Kellaway *Principles of Legal Interpretation* 78.

2 Devenish *Interpretation of Statutes* 230.

3 1983 (4) SA 287 (W).

4 1972 (3) SA 508 (A).

5 2000 (4) BCLR 445 (N).

“shall” to be read as “a categorical imperative” or a “mere directory verb”. The Court considered the object and importance of the provision and concluded that it was very important that the notices be published as specified in the provision. Without publication of the notices, all the ratepayers, residents and properties within the borough would be affected without due notice. The requirement formed part of a larger legislative scheme aimed at establishing a system of checks and balances necessary for democratic government. The court found that the notice provisions were peremptory and that it was accordingly necessary that there be proper and strict compliance with the provision.

5.13 In the case of *Ridgway v Janse van Rensburg*⁶ the court considered whether the provisions of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 were directory or peremptory. The subsection read as follows:

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. (underlining inserted for emphasis).

5.14 Notice had not been given to the relevant municipality having jurisdiction in this instance, as required by section 4(2). The respondent argued that the use of the word “must” meant that this was a peremptory requirement and that non-observance resulted in a fatal irregularity. The court considered whether the requirement of notice to the municipality was peremptory or not. It found that even where statutory provisions are framed in ostensibly peremptory terms, the courts have often interpreted such provisions to be directory. The crucial issue remains the intention of the legislature, having regard to the provisions of the enactment as a whole. The court referred to the case of *Maharaj and Others v Rampersad*⁷ in which it was held that a particular provision can be in part directory and in part peremptory. The court considered the purpose in giving notice to the municipality and concluded that the requirement of 'written and effective notice' was peremptory in so far as the unlawful occupier was concerned, but directory as far as notice to the municipality was concerned.⁸

6 2002 (4) SA 186 (C).

7 1964 (4) SA 638 (A).

⁸ See also *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308 (SCA) where Brand JA remarked as follows on the power of a functionary to condone an applicant's failure to comply with peremptory procedural requirements:

[32] Once it is appreciated that the key to the question lies in the general notice as a whole, the obvious starting point is to construe the special provisions of the invitation

5.15 Devenish⁹ states that when permissive words like “may” are used, which reflect an element of discretion, they should be prima facie construed as directory, unless the intention of the legislature indicates otherwise.

5.16 Section 11 of the Canadian Federal Interpretation Act states:

11. The expression “shall” is to be construed as imperative and the expression “may” as permissive.

5.17 Subsection 33(2A) of the Australian Acts Interpretation Act 1901 (which was inserted into the Act in 1987) provides as follows:

Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word may is used, the act or thing may be done at the discretion of the person, court or body.

5.18 The Australian Discussion Paper¹⁰ refers to the above section as being one of the provisions having a role in maintaining consistency in law and administration. It addresses the problem of distinguishing between “mandatory” and “directory” provisions. The question whether a word such as “shall” should be regarded as

and the instructions that Pepper Bay and Smith had failed to comply with. In the performance of this exercise it is to be borne in mind that both the invitation and the instructions are drafted in what is described in *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* (supra at 240A - B) as 'narrative form' in contrast with 'familiar statutory language'. The obvious purpose is to render it easier to understand. Unfortunately this method of drafting has, as it often does, the exact opposite result. Time-honoured canons of construction applicable to 'familiar statutory language' are to be applied with circumspection. Nevertheless, it cannot be ignored that the provisions of the invitation pertinent to the *Pepper Bay* case, on their plain wording, clearly state that the application fee must be paid at the time that the application is lodged. Paragraphs 15 and 16 of the instructions are similarly couched in peremptory terms. An applicant 'must pay' the application fee and 'must pay the application fee promptly and timeously'. The general principle is, of course, that language of a predominantly imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see eg *Sutter v Scheepers* 1932 AD 165 at 173 - 4). Even though the provisions under consideration are drafted in narrative form, common sense dictates that this principle be afforded some weight. An even more significant indication that timeous payment of the application fee is peremptory is that the invitation contains an explicit sanction for non-compliance with the provision - an application submitted without proof of proper and timeous payment will not be considered (cf *Sutter v Scheepers* (supra at 174)). There is also the more general consideration that where, as in the present case, a statute provides for the acquisition of a right or privilege - as opposed to the infringement of an existing right or privilege - compliance with formalities that are prescribed for such acquisition, should be regarded as imperative. (See eg *R v Noorbhai* 1945 AD 58 at 64; *South African Citrus Exchange Ltd v Director-General: Trade and Industry and Another* (supra at 241E - I).) In the end, these considerations leave no room for any construction of the specific provisions that Pepper Bay had failed to comply with, which allows for a discretion on the part of the Chief Director to condone such non-compliance.

9 *Interpretation of Statutes* 230.

10 Australian Government *Review of the Commonwealth Acts Interpretation Act 1901* 1998 para 3.78.

imposing an obligation or giving a discretion was also discussed. Subsection 33(2A) provides that where the word “may” is used, the act or thing may be done at the discretion of the person, court or body. The section does not deal with words that might be read as imposing obligations.

5.19 The Interpretation of Legislation Act 1984 of Victoria provides an example of a recently updated provision intended to overcome the problems in this area. The Interpretation of Legislation Act 1984 of Victoria provides in section 45 that, for all Acts (including amending Acts) passed after the commencement date of that Act (1 July 1984), when the word “may” is used it confers a discretionary power and when the word “shall” is used it confers a power that must be exercised.¹¹

5.20 Section 9 of the New South Wales Interpretation Act of 1987 states:

9. Meaning of may and shall

(1) In any Act or instrument, the word “may”, if used to confer a power, indicates that the power may be exercised or not, at discretion.

(2) In any Act or instrument, the word “shall”, if used to impose a duty, indicates that the duty must be performed.

5.21 Thornton¹² states that it is preferable to use “must” instead of “shall” to impose an obligation as this is more in line with ordinary speech and avoids the confusion that the use of “shall” may introduce.

5.22 The question whether a provision in regard to interpretation of words as peremptory or directory should be included in the Interpretation Act was discussed at the expert meetings. There were conflicting views about the usefulness of the proposed provision. At the Pretoria meeting, the view was expressed that it should not be included as the Act was not a drafting manual. However, the view was expressed at the Durban meeting that the provision should be included subject to the proviso “unless the context indicates otherwise”. In Cape Town the view was that the provision should be included but certain reservations were expressed. It was felt that the judges would have to still look at all the circumstances to ascertain whether a provision was meant to be peremptory or directory. Strict application of the rule would also lead to litigants being penalised unfairly due to the drafter’s use of the incorrect word.

5.23 The provisional conclusion is that there is a need for a provision dealing with the interpretation of words as peremptory or directory. If legislation states that a person may do, or is entitled to do, or has or shall have the power, authority or right

11 Australian Discussion Paper, para. 3.81.

12 GC Thornton *Legislative Drafting* 103.

to do a particular thing, that legislation must be read as implying that that person has the freedom of choice whether or when or how to do that thing. If legislation states that a person must or shall do, or has or shall have the duty, obligation or responsibility to do a particular thing, that legislation must be read as implying that that person has no freedom of choice whether to do that thing and that that thing must be done. It is proposed that since duties, powers and functions are here at issue, this clause should be included in Chapter 7 of the Bill which deals with statutory duties, powers and functions.

Words indicating whether legislation directory or peremptory

47. (1) If legislation states that a person may do, or is entitled to do, or has or shall have the power, authority or right to do a particular thing, that legislation must be read as implying that that person has the freedom of choice whether or when or how to do that thing.

(2) If legislation states that a person must or shall do, or has or shall have the duty, obligation or responsibility to do a particular thing, that legislation must be read as implying that that person has no freedom of choice whether to do that thing and that that thing must be done.

D. IMPLIED POWERS

5.24 Section 196(1) of the Australian Capital Territory Legislation Act provides that a provision of a law that gives a function to an entity also gives the entity the powers necessary and convenient to exercise the function. It provides further in subsection (2) that the powers given to the entity under subsection (1) are in addition to any other powers of the entity under the law. Section 32(1) of the Interpretation Act of Manitoba provides on the exercising powers under an Act or regulation that the power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers.

5.25 In *Moleah v University of Transkei*¹³ Van Zyl J explained that it must be established in each instance whether an implied power is a reasonably necessary consequence or is reasonably incidental or reasonably ancillary to the conferred power. Although ancillary or incidental powers are broader concepts than necessary or essential powers the adjective 'reasonably' implies necessity. This was confirmed in *Lekhari v Johannesburg City Council*:¹⁴

'It should be emphasised, I think, that in order that such a power may be implied, it is not sufficient that its existence would be reasonably ancillary or incidental to the exercise of in express power in the sense that it would be useful in giving effect to that power. It must be reasonably necessary for that purpose. The test is not mere usefulness or convenience, but necessity. There must be a need of sufficient cogency to rebut the presumption that the Legislature, in conferring the power relied upon,

¹³ 1998 (2) SA 522 (TkH).

¹⁴ 1956 (1) SA 552 (A) at 567.

intended to authorise legislation effecting the subjects of the State and not the State itself in its judicial organs. Nor must the implied power be extended beyond the requirement of the occasion. What can be dispensed with without defeating the object of the express power or preventing its exercise in a reasonably effective way, is not to be implied.'

5.26 The court stated in the case of *Moleah* that unless an implied power is a logical consequence or is logically necessary for the exercise of a power conferred upon an administrative body such implied power must be reasonably necessary or incidental and must not extend beyond the requirement of the occasion nor should it interfere with the rights of third parties more than is required by the circumstances of each particular case. The court pointed out that the power in this case to conduct a preliminary investigation for the purpose of making a report to the Minister clearly did not carry with it the logical consequence or logical necessity to suspend the principal of the University from his duties. The question therefore was whether the power to suspend can be said to be reasonably necessary or ancillary to the power to investigate. It was clear, having regard to the provisions of the Act¹⁵ and the statute, that the principal held an important position within the structural make-up of the University and that his suspension would be a drastic step which clearly has a far-reaching and onerous effect on his rights and privileges. The implied power to suspend must have been shown to be necessary to properly conduct an investigation and not that it was merely useful or convenient. On the facts placed before the court Van Zyl J held that he was unable to find that it was essential for the council to suspend the applicant.

5.27 It is considered on implied powers that a power conferred in terms of legislation to perform an act must be read as implying to confer all powers that are necessary for the performance of that act or incidental to the performance that act. The following clause dealing with implied powers is proposed:

Implied powers

48. A power conferred in terms of legislation to perform an act must be read as implying to confer all powers that are –¹⁶

- (a) necessary for the performance of that act; or
- (b) incidental to the performance that act.

E. AMENDMENT OR REPEAL OF SUBORDINATE LEGISLATION

5.28 Section 10(3) of the South African Interpretation Act provides that where a law confers a power to make rules, regulations or by-laws, the power shall, unless

¹⁵ The University of Transkei Act of 1976 as amended by Decree 9 of 1993.

¹⁶ Prof Cora Hoexter suggests that the wording 'implying to confer' could be changed to 'must be read as impliedly conferring', or better still 'must be read as including'.

the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws. Section 31(4) of the Canadian Federal Interpretation Act provides similarly that where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.¹⁷

5.29 It is proposed that a similar provision dealing with amendment or repeal of subordinate legislation be included in the Bill. Legislation which provides for subordinate legislation to be issued, must be read as including a power to amend or repeal that subordinate legislation. If the issuing of subordinate legislation is subject to compliance with specific conditions, that subordinate legislation may only be amended or repealed subject to the same conditions. Subordinate legislation may be amended or repealed with effect from a date before, on which or after the decision to amend or repeal the legislation was taken. The following clause is proposed:

Amendment or repeal of subordinate legislation¹⁸

49. (1) Legislation which provides for subordinate legislation to be issued, must be read as including a power to amend or repeal that subordinate legislation.

(2) If the issuing of subordinate legislation is subject to compliance with specific conditions, that subordinate legislation may only be amended or repealed subject to the same conditions.

(3) Subordinate legislation may be amended or repealed in terms of subsection (1) with effect from a date before, on which or after the decision to amend or repeal the legislation was taken.

F. EXERCISE OF POWERS AND PERFORMANCE OF DUTIES

5.30 The heading to section 196 of the Australian Capital Territory Legislation Act (ACTLA) indicates that the section deals with provisions allocating functions and giving power to exercise functions. It provides in subsection (1) that a provision of a

¹⁷ The New Zealand Interpretation Act provides as follows:

15 Power to amend or revoke

The power to make or issue a regulation, Order in Council, Proclamation, notice, rule, bylaw, Warrant, or other instrument includes the power to-

- (a) amend or revoke it:
- (b) revoke it and replace it with another.

The Australian Commonwealth Interpretation Act provides similarly in section 33(3) that where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

¹⁸ Prof Cora Hoexter says she is not sure she understands these 'retrospective' clauses, eg in 49 and 50? She poses the question what about the rule of law? Does one 'issue' subordinate legislation? She would say 'make'.

law that gives a function to an entity also gives the entity the powers necessary and convenient to exercise the function. It provides further in subsection (2) that the powers given to the entity under subsection (1) are in addition to any other powers of the entity under the law. Section 197 provides that if a law gives a function to an entity, the function may be exercised from time to time. Section 199 deals with the functions of bodies:

- (1) If a law authorises or requires a body to exercise a function, it may do so by resolution.
- (2) To remove any doubt, subsection (1) applies in relation to a function even though a law authorises or requires the function to be exercised in writing.
- (3) If a law authorises or requires a signature by a person and the person is a body, the signature of a person authorised by the body for the purpose is taken to be the signature of the body.
- (4) If a law gives a function to a body, the function may be exercised by the body as constituted for the time being.¹⁹
- (5) The exercise of the function is not affected only because of vacancies in the body's membership.
- (6) Subsections (4) and (5) do not affect any quorum requirement applying to the body.²⁰
- (7) If a body as constituted for the time being does something in exercise of a function given to the body under a law, the effect of the thing done by the body does not end only because the membership of the body changes.
- (8) Subsection (7) does not prevent the thing done by the body being ended or changed by the body as subsequently constituted for the time being.

5.31 Section 200 of the ACTLA deals with the functions of occupants of positions as follows:

- (1) If a law gives a function to the occupant of a position, the function may be exercised by the person for the time being occupying the position.²¹

¹⁹ The Act illustrates this provision with the following example:

The ACT Conference Organisers Registration Board is a statutory body consisting of five members. At a meeting of the board it is agreed to exempt a conference organiser from registration on certain conditions. On the day after the meeting, one of the members of the board (X) resigns and another person (Y) is appointed to the board in X's place. At the next meeting of the board, it considers additional information submitted by the conference organiser and agrees to amend the conditions of exemption. Because of subsection (4), the board's ability to use its power of exemption is not affected by a change in the membership of the board. (It is also explained that an example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears.)

²⁰ The Act illustrates this provision with the following example: The Act establishing the board mentioned in the example to subsection (4) provides that the quorum for a meeting of the board is the chairperson or deputy chairperson and two other members. If the quorum requirement was complied with at each meeting mentioned in the example, the result mentioned in the example would be the same whether or not X attended the first meeting and whether or not Y attended the second meeting.

²¹ A note to this provision draws attention to section 185, which contains references to an occupant of a position and to part 1 of the dictionary which defines *occupy* and

(2) If the person for the time being occupying a position does something in exercise of a function given to the occupant of the position under a law, the thing done by the person does not end only because the person ceases to be the occupant of the position.²²

(3) Subsection (2) does not prevent the thing done by the person being ended or changed by any person subsequently occupying the position for the time being.

5.32 Section 48 of the New South Wales Interpretation Act deals as follows with exercise of statutory functions:

(1) If an Act or instrument confers or imposes a function on any person or body, the function may be exercised (or, in the case of a duty, shall be performed) from time to time as occasion requires.

(2) If an Act or instrument confers or imposes a function on a particular officer or the holder of a particular office, the function may be exercised (or, in the case of a duty, shall be performed) by the person for the time being occupying or acting in the office concerned.

5.33 Sections 14 to 16 of the New Zealand Interpretation Act deals as follows with the exercise of powers and avoid the need for individual Acts to provide expressly for the matters set out in those sections:²³

14 Exercise of powers by deputies

A power conferred on the holder of an office, other than a Minister of the Crown, may be exercised by the holder's deputy lawfully acting in the office.

16 Exercise of powers and duties more than once

(1) A power conferred by an enactment may be exercised from time to time.

(2) A duty or function imposed by an enactment may be performed from time to time.

5.34 The Irish Interpretation Bill of 2000 deals as follows with powers and duties:

22.(1) A power conferred by an enactment may be exercised from time to time as occasion requires.

(2) A power conferred by an enactment on the holder of an office as that holder shall be deemed to be conferred on, and may accordingly be exercised by, the holder for the time being of that office.

...

23.(1) A duty imposed by an enactment shall be performed from time to time as occasion requires.

(2) A duty imposed by an enactment on the holder of an office as that holder shall be deemed to be imposed on, and shall accordingly be performed by, the holder for the time being of that office.

24 Where an enactment confers new jurisdiction on a court or extends or varies an existing jurisdiction of a court, the authority having for the time being power to make rules or orders regulating the practice and procedure of the court has, and may at any time exercise, power to make rules or orders for regulating the practice and

position.

²² The note to this section draws attention to the following sections: s 211 (appointment not affected by appointer changes); s 224 (acting appointment not affected by appointer changes); and s 241 (delegation not affected by appointer changes).

²³ http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html

procedure of the court in the exercise of the jurisdiction so conferred, extended or varied.

5.35 Section 33 of the Australian Commonwealth Acts Interpretation Act deals extensively with the exercise of powers and duties:

(1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where an Act confers a power or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

(2AA) In subsection (2), *office* includes a position occupied by an APS²⁴ employee.

(2B) Where an Act confers a power or function, or imposes a duty, on a body, whether incorporated or unincorporated, the exercise of the power or the performance of the function or duty is not affected merely because of a vacancy or vacancies in the membership of the body.

...

(5) Where an Act confers a power to make, grant or issue an instrument (including rules, regulations or by-laws) prescribing penalties not exceeding a specified amount or imprisonment for a specified period, that limitation on the penalties that may be prescribed does not prevent the instrument from requiring the making of a statutory declaration.

5.36 The Canadian Federal Interpretation Act provides as follows:

(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include

- (a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;
- (b) the successors of that minister in the office;
- (c) his or their deputy; and
- (d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

(3) Nothing in paragraph (2)(c) or (d) shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the Statutory Instruments Act.

(4) Words directing or empowering any public officer, other than a minister of the Crown, to do any act or thing, or otherwise applying to the public officer by his name of office, include his successors in the office and his or their deputy.

(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

5.37 The following provision is proposed on exercise of powers and performance of duties:

Exercise of powers and performance of duties

51. (1) If legislation confers a power or imposes a duty, that power may be

²⁴

APS means Australian Public Service.

exercised and that duty must be performed –

- (a) by the person on whom the power is conferred or the duty is imposed;
 - (b) if the power is conferred or the duty is imposed on the holder of a specific office –
 - (i) by the holder of that office; or
 - (ii) by a person acting in the capacity of the holder of that office; or
 - (c) if the power or duty, or any part of the power or duty, is delegated –
 - (i) by the person who delegated the power or duty, or that part of the power or duty; or
 - (ii) by the holder for the time being of the office to whom the power or duty, or any part of that power or duty, is delegated or the person acting in the capacity of the holder of that office.
- (2) A power may be exercised and a duty must be performed whenever –
- (a) the time or circumstances for the exercise of the power or the performance of the duty arise; or
 - (b) if the time or circumstances for the exercise of the power or the performance of the duty is not determinable, from time to time at the discretion of a person referred to in subsection (1).
- (3) A reference in any legislation to the holder of an office includes a reference to an acting holder of that office.
- (4) Something done –
- (a) by the holder of an office or an acting holder of an office, is not affected merely because –
 - (i) the person who held office at the time that thing was done has ceased to hold office; or
 - (ii) the person who acted as the holder of the office at the time that thing was done has ceased to act as holder of the office; or
 - (b) by a person in terms of a delegation, is not affected merely because of the repeal of the delegation.

G. POWER TO APPOINT PERSONS

5.38 The Australian Commonwealth Interpretation Act provides as follows on appointing persons:

33(4) Where an Act confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to appoint a person to act in the office or place until:

- (a) a person is appointed to the office or place; or
- (b) the expiration of 12 months after the office or place was created or became vacant, as the case requires:

whichever first happens, and as also including a power to remove or suspend any person appointed, and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:

Provided that where the power of such person or authority to make any such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power to make an appointment to act in an office or place or such power of removal shall, unless the contrary intention

appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

(4A) In any Act, *appoint* includes re-appoint.

5.39 Section 205 of the ACTLA sets out the application of division 19.3.1. It provides that this division applies if a law authorises or requires an entity (the "appointer") to appoint a person— (a) to a position under a law; or (b) to exercise a function or do anything else under a law. (*Function* is defined in part 1 of the dictionary to include authority, duty and power. Section 206(1) provides that an appointment must be made, or evidenced, by writing (the *instrument of appointment*) and signed by the appointer. Subsection (2) provides that if a law provides for a maximum or minimum period of appointment, the instrument of appointment must state the period for which the appointment is made. (Examples of stated appointment periods are two years or until age 65.) Section 207(1) provides that the appointer may make an appointment by— (a) naming the person appointed; or (b) nominating the occupant of a position (however described), at a particular time or from time to time. Subsection (2) provides that for this division, the person named, or the occupant of the position nominated, is the *appointee*.

5.40 Section 208 of the ACTLA deals with the power of appointment. It provides in subsection (1) that the appointer's power to make the appointment includes the power—

- (a) to suspend the appointee, and end the suspension; or
- (b) to end the appointment, and appoint someone else or reappoint the appointee if the appointee is eligible to be appointed to the position; or
- (c) to reappoint the appointee if the appointee is eligible to be appointed to the position.

5.41 Subsection (2) provides that the power to suspend the appointee, or end the appointment, is exercisable in the same way, and subject to the same conditions, as the power to make the appointment. This provision is explained in an example as follows: "If the appointment power is exercisable only on the recommendation of a body, the power to suspend, or end the appointment, is exercisable only on the recommendation of the body." (This example is further clarified by a note stating that an example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears.)

5.42 Section 209 makes it clear that the power of appointment includes the power to make an acting appointment. Subsection (1) provides that if the appointer's power

is the power to make an appointment to a position, the power to make the appointment also includes power to appoint a person, or two or more people, to act in the position—

- (a) during any vacancy, or all vacancies, in the position, whether or not an appointment has previously been made to the position; or
- (b) during any period, or all periods, when the appointee cannot for any reason exercise functions of the position.²⁵

5.43 Section 209(2) provides that the power to appoint a person to act is exercisable in the same way, and subject to the same conditions, as the power to make the appointment. (The Act uses the following example to explain this subsection: “If the appointment power is exercisable only on the recommendation of a body, the power to appoint a person to act is exercisable only on the recommendation of the body”.) Subsection (3) provides that without limiting subsection (2), if the law (or another law) requires—

- (a) the appointee to hold a qualification; or
- (b) the appointer (or someone else) to be satisfied about the appointee's suitability (whether in terms of knowledge, experience, character or any other personal quality) before appointing the appointee to the position;

a person may only be appointed to act in the position if the person holds the qualification or the appointer (or other person) is satisfied about the person's suitability.

5.44 The following examples are provided in the Act to explain section 209(3): If an Act requires the appointee to be a magistrate, a person can be appointed to act in the position only if the person is a magistrate. If a regulation requires the appointee to be a lawyer of at least five years' standing, a person can be appointed to act in the position only if the person is a lawyer of at least five years' standing. If an Act requires the appointee to have, in the executive's opinion, appropriate expertise, training or experience in relation to the needs of a particular group of people, a person can be appointed to act in the position only if the person has, in the executive's opinion, that expertise, training or experience.

5.45 Section 210 deals with resignation. It provides that an appointment ends if the

²⁵ Examples for par (b): the appointee is ill or on leave, the appointee is acting in another position, the appointee is outside the ACT or Australia. (Function is defined in the dictionary to include authority, duty and power.)

appointee resigns by signed notice of resignation given to the appointer. If, however, the appointer is the Executive, the notice of resignation may be given to a Minister. Section 211 deals with situations where the appointer changes position. If the appointer is a body, an appointment made by the body does not end only because the membership of the body changes. If the appointer is the person for the time being occupying a position, an appointment made by the person does not end only because the person ceases to be the occupant of the position. Section 212 provides that an appointment, or anything done under an appointment, is not invalid only because of a defect or irregularity in or in relation to the appointment.

5.46 The Interpretation Act of New Zealand provides as follows on the power to appoint to an office:

12 Power to appoint to an office

The power to appoint a person to an office includes the power to-

- (a) remove or suspend a person from the office:
- (b) reappoint or reinstate a person to the office:
- (c) appoint another person in place of a person who-
 - (i) as vacated the office; or
 - (ii) as died; or
 - (iii) is absent; or
 - (iv) is incapacitated in a way that affects the performance of that person's duty.

5.47 It is explained that although the powers contained in section 12 will often be found in New Zealand statutes that specifically provide for the appointment of a person, this section has been retained to avoid uncertainty.²⁶

5.48 The Australian Commonwealth Acts Interpretation Act deals as follows with the power to make appointments:

(4) Where an Act confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to appoint a person to act in the office or place until:

- (a) a person is appointed to the office or place; or
- (b) the expiration of 12 months after the office or place was created or became vacant, as the case requires:

whichever first happens, and as also including a power to remove or suspend any person appointed, and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:

Provided that where the power of such person or authority to make any such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power to make an appointment to

²⁶

http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html

act in an office or place or such power of removal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

(4A) In any Act, *appoint* includes re-appoint.

5.49 The Australian Commonwealth Acts Interpretation Act also deals extensively with acting appointments:

33A.(1) Where legislation confers on a person or body (in this section called the appointer) a power to appoint a person (in this section called the appointee) to act in a particular office, then, except so far as the legislation otherwise provides, the following paragraphs apply in relation to an appointment made under the provision:

- (a) the appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment;
- (b) the appointer may:
 - (i) determine the terms and conditions of the appointment, including remuneration and allowances; and
 - (ii) terminate the appointment at any time;
- (c) where the appointee is acting in an office other than a vacant office and the office becomes vacant while the appointee is acting, then, subject to paragraph (a), the appointee may continue so to act until:
 - (i) the appointer otherwise directs; or
 - (ii) the vacancy is filled;
 whichever happens first;
- (d) the appointment ceases to have effect if the appointee resigns in writing delivered to the appointer;
- (e) while the appointee is acting in the office:
 - (i) the appointee has and may exercise all the powers, and shall perform all the functions and duties, of the holder of the office; and
 - (ii) that or any other Act applies in relation to the appointee as if the appointee were the holder of the office.

5.50 Appointment and retirement of officers are dealt with in the Canadian Federal Interpretation Act as follows:

23. (1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment

(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect.

(3) Where there is authority in an enactment to appoint a person to a position or to engage the services of a person, otherwise than by instrument under the Great Seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which that person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than sixty days before the day on which the instrument is issued, is deemed to be the day on which the appointment or engagement takes effect.

(4) Where a person is appointed to an office, the appointing authority may fix, vary or terminate that person's remuneration.

(5) Where a person is appointed to an office effective on a specified day, or where the appointment of a person is terminated effective on a specified day, the appointment or termination is deemed to have been effected immediately on the expiration of the previous day.

24. (1) Words authorizing the appointment of a public officer to hold office during pleasure include, in the discretion of the authority in whom the power of appointment is vested, the power to

- (a) terminate the appointment or remove or suspend the public officer;
- (b) re-appoint or reinstate the public officer; and
- (c) appoint another person in the stead of, or to act in the stead of, the public officer.

5.51 Professor Crabbe proposes the following provision in his Interpretation Act:

20.(1) Words in an enactment which authorizes the appointment of a person to an office confer, in addition, on the authority in whom the power is vested,

- (a) a power, at the discretion of the authority, to remove or suspend that person;
- (b) a power, exercisable in the like manner and subject to the like consent and conditions applicable to the appointment,
 - (i) to reappoint or reinstate that person; or
 - (ii) to appoint another person, whether substantively or in an acting capacity;
 - (iii) to determine the remuneration and the terms of payment of the remuneration applicable to that office.

(2) Where the power of appointment is exercisable only upon the recommendation or subject to the approval, consent or concurrence of some other authority or person, the power of removal shall be exercised only upon the recommendation or subject to the approval, consent or concurrence of that other authority or person.

(3) In an enactment a reference, without qualification, to the holder of an office includes a reference to a person for the time being holding that office, and in particular

- (a) words in an enactment directing, or empowering the holder of an office to do an act or thing, or otherwise applying to the holder of that office, shall apply to the successors in office and to a deputy;
- (b) where an enactment confers a power or imposes a duty on the holder of an office, as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the exercise or performance of the powers and duties of the office.

(4) Where the change of title of a public officer is notified in the Gazette by a Government Notice setting out the former title and the substituted title of the officer, a reference to the former title in an enactment or in a document made or issued under that enactment shall be construed as a reference to the substituted title.

(5) Where a public officer is by reason of absence or incapacity through illness or any other sufficient cause unable to perform a function conferred upon that officer by or under an enactment, that function shall be performed by a public officer or person designated by the appropriate authority subject to the conditions, exceptions or qualifications specified by the appropriate authority.

5.52 It is considered that legislation which confers the power to appoint a person to

an office must be read as including the power to determine the duration and the terms and conditions of the appointment to suspend or remove a person from office in the event of misconduct, incapacity or incompetence to re-appoint a person previously appointed and to appoint a person in an acting capacity if there is a vacancy or the holder of the office is absent or not available for the performance of the duties of office. These powers may be exercised also in relation to a person appointed in an acting capacity. The following provision is proposed on appointment of persons:

Power to appoint persons

52. (1) Legislation which confers the power to appoint a person to an office, whether the word “appoint”, “designate” or any other word is used, must be read as including the power –

- (a) to determine the duration and the terms and conditions of the appointment;
- (b) to suspend or remove a person from office in the event of misconduct, incapacity or incompetence;
- (c) to re-appoint a person previously appointed; and
- (d) to appoint a person in an acting capacity if there is a vacancy or the holder of the office is absent or not available for the performance of the duties of office.

(2) The powers contained in subsection (1) (a), (b) and (c) may be exercised also in relation to a person appointed in an acting capacity.

H. POWER TO DIFFERENTIATE WHEN ISSUING SUBORDINATE LEGISLATION

5.53 The grant of a power sometimes begs the question as to the degree of discretion to be allowed in its exercise.²⁷ Does the power granted enable its exercise in relation to – some cases but not all, all cases subject to specified exceptions, specified cases or classes of case? Further, can it make, in relation to the cases in which it is exercised - the full provision to which it extends or any lesser provision; the same provision in relation to all cases, or different provisions for different cases or classes of case; different provisions as respects the same case or class of case for different purposes of the enactment; any such provision either unconditionally or subject to a specified condition?

5.54 The Australian Commonwealth Interpretation Act provides as follows in this regard:²⁸

²⁷ Roger Rose “Should We Expect More Assistance From Interpretation Legislation?” at http://www.jerseylegalinfo.je/Publications/jerseylawreview/Oct00/Interpretation_Legislation.aspx

²⁸ The Northern Ireland Interpretation Act provides as follows in section 17(5):
(5) Any power conferred by an enactment to make a statutory instrument or issue a statutory document may be exercised

33.(3A) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) with respect to particular matters (however the matters are described), the power shall be construed as including a power to make, grant or issue such an instrument with respect to some only of those matters or with respect to a particular class or particular classes of those matters and to make different provision with respect to different matters or different classes of matters.

(3B) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall not be taken, by implication, not to include the power to make provision for or in relation to a particular aspect of a matter by reason only that provision is made by the Act in relation to another aspect of that matter or in relation to another matter.

5.55 It is considered that there is a need to include a provision in the Bill dealing with the power to differentiate when issuing subordinate legislation. The following provision is proposed:

Power to differentiate when issuing subordinate legislation

53. (1) Legislation which confers a power to issue subordinate legislation, must be read as including the power –

- (a) to limit the application of such subordinate legislation to –
 - (i) a particular category of persons;
 - (ii) a particular matter or category of matters; or
 - (iii) a particular area or category of areas; or
- (b) to differentiate between –
 - (i) different categories of persons;
 - (ii) different matters or categories of matters; or
 - (iii) different areas or different categories of areas.

(2) Subsection (1) does not permit unfair discrimination.

I. DELEGATION OF POWER

5.56 Section 10(6) of our Interpretation Act states that where any provision in any law confers a power or imposes a duty or entrusts a function to any Minister of State or other authority and authorises such Minister of State or authority to delegate the

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- (a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of case; and
 - (b) so as to make, as respects the cases in relation to which it is exercised
 - (i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise);
 - (ii) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or classes of case, or different provision as respects the same case or class of case for different purposes of the enactment;
 - (iii) any such provision either unconditionally or subject to any specified condition.

exercise or performance of such power, duty or function to the holder of an office as such or to any particular person, and if the exercise or performance of such power, duty or function is delegated to the holder of any office, that power, duty or function may or shall, unless the contrary intention appears, be exercised or performed by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.

5.57 Baxter explains that although the practical necessity of delegation of power has always been recognised, the power to delegate does not automatically exist: it must be provided for either expressly or impliedly.²⁹ Judge Stafford remarked in *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission and Another*³⁰ that the practical necessity of government requires delegation to take place within the framework of a deconcentration of administrative power, that this is clearly a most important factor where the authority so to delegate power is a necessary implication of the enabling section, and a fortiori is this so when one deals with express authorisation. Baxter notes that when power is conferred upon an office or statutory body it is intended that the power should be exercised by that office or body and no one else. Should the recipient of the power allow the power to be exercised by someone who was not chosen, he or she will have abdicated his or her power and will not be in compliance with the legislation providing for the power. Unlawful delegation is the most common form of abdicating power; others are acting under dictation and unlawful referral or “passing the buck”.³¹

5.58 Administrative delegation may take the form of a mandate, deconcentration or decentralisation.³² An instruction or a mandate is the simplest form of delegation. The superior official or administrator takes a decision and another lower official gets the task of implementing or executing the decision. The head of the administrative hierarchy or superior official (delegans) may withdraw the delegation at any time and perform the function personally. He or she may also prescribe conditions relating to the exercise of the function by the delegate. The delegans may intervene and decide the matter before the matter has been finalised by the delegate. The delegans cannot undo performance of the delegated function once the matter has been finalised.

5.59 It is noteworthy that section 238 of the Constitution provides as follows:

Agency and delegation

²⁹ Baxter *Administrative Law* (1984) 432.

³⁰ 1987 (4) SA 155 (W).

³¹ See Hoexter *Administrative Law* 129 et seq.

³² LAWSA vol 1 2nd edition par 101.

An executive organ of state in any sphere of government may-

- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

5.60 Delegation of powers was dealt with in the case of *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd.*³³ This case dealt with the Nature Conservation Act 10 of 1987 of the former Republic of Ciskei. At issue was a written contract which the Ciskei government entered into in November 1989 with a person acting as the nominee for a company to be formed, in terms of which it purported to lease three reserves to the company for a specific period. Counsel for the appellant conceded that within the framework of the Act the government was entitled to conclude contracts affecting the control, maintenance, development and management. Any such contract, however, (so it was argued) would have to relate to a specific project, undertaking or activity.

5.61 For the purposes of this case Plewman JA was prepared to assume that the “vesting” of management of the reserves by section 25(1) imposed a duty on the government to manage them. Section 25(2)(l) expressly authorised the government to carry out any of the activities mentioned by engaging outside bodies or corporations to do so. The court considered that it could hardly be suggested that statutory control by the government was being lost. The distinction which should, in the court’s view, be drawn was one between a situation where a power is being exercised and one where it is being abandoned. The court noted that here, management involved activities of various kinds and the statute provided that those activities could be contracted out. The analysis of the contract pointed, in the court’s view, inescapably to the conclusion that the government was exercising its powers.

5.62 In the *Frontier Safaris* case Streicher AJA was unable to agree with the conclusion reached by Plewman JA. The judge said that by vesting the control, maintenance, development and management of the reserves in the Department, the legislature conferred authority or power on the Department to control, maintain, develop and manage the reserves. He pointed out that having done so, unless the contrary appeared to be the case, one had to assume that the legislature intended the Department to exercise the authority or power and not someone else. He noted that Baxter *Administrative Law* at 434 states the position thus:

³³ 1998 (2) SA 19 (SCA).

In modern democracies original power derives from the political authority of elected legislatures. Because of the practical requirements of government it is recognised that such bodies may delegate their powers. In South Africa, Parliament is recognised to have unlimited powers of delegation. Considerable latitude is also given to such 'original' authorities as provincial councils. But all other administrative authorities are treated as delegees, power having been delegated to them by the original authority. Not being the direct repositories of public trust they are not permitted the same freedom to choose who shall exercise their powers. There is a presumption that they may not further delegate (ie subdelegate) their powers: *delegatus non potest delegare*.

5.63 In the *Frontier Safaris* case Judge Streicher held that whether or not the Department could delegate its authority to control, maintain, develop and manage the reserves therefore turned upon a construction of the empowering statute. In his view no express authority to delegate the Department's authority to manage the reserves was to be found in the statute. His view was that whether or not a particular activity should be carried on and how it should be done required a policy decision, and the various activities needed to be co-ordinated. Judge Streicher pointed out that an express authority to authorise another person to carry on any of those activities could therefore not be considered to be an express authority to authorise another person to control, maintain, develop and manage the reserves. He held that no implied authority to delegate the Department's authority to manage the reserves was to be found in the statute either, but that the contrary was the case. The fact that the legislature specifically provided that the Department could authorise a third party to carry on any or all of the activities mentioned in section 25(2) and not that the Department could authorise a third party to control, maintain, develop and manage the reserves was a clear indication that the legislature did not intend the Department to have such power.

5.64 At issue in *Chairman, Board on Tariffs and Trade v Teltron (Pty) Ltd*³⁴ was the introduction of surcharge rates on imported goods. The respondent applied for exemption to the payment of the surcharge. Later it became apparent that the Board had not dealt with the application itself but had purported to delegate its functions to a committee known as the Industrial Investigation Committee (IIC). The court noted that the powers of administrative bodies, such as the Board in this case, are conferred on them or delegated to them by the legislature, and they cannot delegate the powers so conferred to some other person or body except in so far as they have expressly or by necessary implication been empowered to do so. The Board had, in terms of the Act, been authorised to delegate any of the powers or duties granted or assigned to it to a committee, subject to such directions as the Board might issue from time to time. The court remarked that the power to delegate was therefore

³⁴ 1997 (2) SA 25 (A).

circumscribed and limited to those powers and duties granted or assigned to it. Furthermore, the authority to consider applications for exemption and to make recommendations to the second respondent was a power conferred on the Board not by the Act.

5.65 The court pointed out in the *Teltron* case that on the first appellant's own showing the Minister of Finance considered the Board to be the most appropriate body to deal with the matter and make recommendations to the second appellant. The court noted that in such circumstances the dictum in *Shidiack v Union Government (Minister of the Interior)*³⁵ is most apposite: “[W]here the Legislature places upon any official the responsibility of exercising a discretion which the nature of the subject-matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged. The persons concerned have a right to demand the judgment of the specially selected officer.” The court pointed out in *Teltron* that the Act conferred certain limited powers of delegation on the Board, this in itself was a strong indication that the legislature intended the Board to have only those limited powers and no more, and the facts of this case also militated against any such implication. It held that the Board therefore had no authority whatsoever to delegate its powers or duties in this respect to the IIC.

5.66 In *Minister of Health v New Clicks South Africa (Pty) Ltd*³⁶ Chief Justice Chaskalson remarked as follows on delegation:

[280] It may well be legitimate for the Minister and the Pricing Committee to make provision for a system which will require the prices of medicines in South Africa to be brought into line with international benchmarks, and to delegate to the Director-General the responsibility for making the calculations necessary to give effect to that methodology. But the regulations go much further than that. They delegate to the Director-General the power to determine the methodology itself. The Director-General has to decide what factors that influence price are relevant and have to be taken into account, what medicines are deemed to be equivalent for the purpose of the benchmarking, what countries are to be used for the purpose of the benchmarking, and what methodology is to be applied in determining whether or not the SEP is in conformity with “international benchmarks”.

[281] The methodology will ultimately determine the SEP of every medicine or Scheduled substance. That was pre-eminently a task for the Minister and the Pricing Committee. The Pricing Committee was appointed because of its special expertise. Policy considerations require the Minister's involvement as well. They must determine the pricing system themselves, and not delegate this function to the Director-General. I would therefore hold that regulation 5(2)(e) constitutes an unauthorised delegation of power and for that reason is invalid. This defect in the regulation can be remedied by reading words into the regulation. I would do so by reading into the regulation the words: “the Minister on the recommendation of the Pricing Committee” in place of “the

³⁵ 1912 AD 642 at 648.

³⁶ 2006 (2) SA 311 (CC) and also 2006 (1) BCLR 1 (CC).

Director-General”.

. . .

[300] The regulations do not, however, address what the cap for an appropriate fee will be, or how it is to be determined. They leave that to the Minister to determine if “in her opinion” it is necessary to do so. The maximum logistics fee, like the maximum SEP, is an important part of the pricing system. If it was considered necessary to have greater flexibility than is possible by prescribing a maximum fee in the regulations, or a formula for determining it, the fixing of the fee should have been delegated to the Pricing Committee and the Minister, and not to the Minister alone. I would therefore hold that the provision vesting in the Minister the power to determine a cap for the logistics fee constitutes an impermissible delegation. I would, however, remedy that defect by reading into regulation 5(2)(g) after the word “the Minister”, the words “on the recommendation of the Pricing Committee”.

5.67 Section 34AA of the Australian Commonwealth Acts Interpretation Act deals as follows with delegation of power:

Where an Act confers power to delegate a function or power, then, unless the contrary intention appears, the power of delegation shall not be construed as being limited to delegating the function or power to a specified person but shall be construed as including a power to delegate the function or power to any person from time to time holding, occupying, or performing the duties of, a specified office or position, even if the office or position does not come into existence until after the delegation is given.

5.68 Section 34AB of the Australian Commonwealth Acts Interpretation Act sets out the exercise of powers and functions by a delegate out as follows:

Exercise of certain powers and functions by a delegate

Where, under any Act, the exercise of a power or function by a person is dependent upon the opinion, belief or state of mind of that person in relation to a matter and that power or function has been delegated in pursuance of that or any other Act, that power or function may be exercised by the delegate upon the opinion, belief or state of mind of the delegate in relation to that matter.

5.69 Section 34AB of the Australian Commonwealth Acts Interpretation Act sets out the effect of delegation as follows:

Where an Act confers power on a person or body (in this section called the authority) to delegate a function or power:

- (a) the delegation may be made either generally or as otherwise provided by the instrument of delegation;
- (b) the powers that may be delegated do not include that power to delegate;
- (c) a function or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority;
- (d) a delegation by the authority does not prevent the performance or exercise of a function or power by the authority; and
- (e) if the authority is not a person, section 34A applies as if it were.

5.70 The Legislation Act 2001 of the Australian Capital Territory deals extensively with delegation of powers:

230 Application of pt 19.4 generally

(1) This part applies if a law authorises or requires an entity (the appointer) to delegate (or subdelegate) a function.³⁷

(2) For subsection (1), if a law gives a function to an entity, the law may be taken to authorise the delegation of the function even if the law provides for another way in which the function may be exercised.

231 Application of pt 19.4 to subdelegations (IA s 30AB)

(1) This part applies to the subdelegation of a function in the same way as it applies to the delegation of the function.

(2) However, if the appointer delegates a function to a delegate, the delegate may not subdelegate the function.³⁸

(3) Subsection (2) is a determinative provision.

5.71 The Australian Capital Territory Legislation Act sets out further the power to delegate as follows:

232 Delegation must be in writing etc

A delegation must be made, or evidenced, by writing signed by the appointer.

233 Delegation may be made by name or position (IA s 29A)

(1) The appointer may delegate by—

- (a) naming the person to whom the delegation is made; or
- (b) nominating the occupant of a position (however described), at a particular time or from time to time.

(2) For this part, the person named, or the occupant of the position nominated, is the delegate.

234 Instrument may provide when delegation has effect etc (IA s 29B (a))

The instrument making or evidencing a delegation may provide—

- (a) that the delegation has effect only in stated circumstances or subject to stated conditions, limitations or directions; or
- (b) that all of a function, or a stated part of the function, is delegated.³⁹

³⁷ A note to the section explains that *function* is defined in part 1 of the dictionary of the Act to include authority, duty and power.

³⁸ The Act provides the following two examples to make this section clearer:

1. The ABC Act 2003 provides that an appointer (X) may delegate X's functions to Y. The Act is silent on the subdelegation of the functions. Y may not subdelegate X's functions to Z.
2. The ABC Act 2003 provides that an appointer (X) may delegate X's functions to Y, with authority for Y to subdelegate those functions. Because the Act authorises subdelegation, it expressly displaces this Act, section 231 (2) (see s 6). Y can therefore subdelegate X's functions to Z (compare s 236, which deals with the subdelegation of a power to delegate) .

(The Act also explains that an example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears.)

³⁹ The Act contains the following examples

- 1 The delegation provides that, when the appointer (Y) is outside Australia, the delegate (X) may exercise her functions except that stated functions may only be exercised with Y's approval.
- 2 The delegation provides that X may enter into a contract for the purchase of property of not more than \$50 000 in value.

235 Delegation may be made to 2 or more delegates

The appointer may delegate the appointer's function, or any part of the function, to 2 or more delegates.

236 Power to delegate may not be delegated

(1) The appointer may not delegate the appointer's power to delegate.

(2) Subsection (1) is a determinative provision.⁴⁰

237 Delegation may be amended or revoked

(1) The appointer may amend a delegation or revoke it in whole or part.

(2) The power to amend or revoke a delegation is exercisable in the same way, and subject to the same conditions, as the power to delegate.⁴¹

238 Appointer responsible for delegated function

The delegation of a function, or a part of a function, does not relieve the appointer of the appointer's obligation to ensure that the function is properly exercised.

239 Exercise of delegation by delegate (IA s 29B (c), (e), s 30)

(1) A delegate must exercise the delegation subject to any conditions, limitations or directions in the instrument making or evidencing the delegation.

(2) All Territory laws apply to the delegate in the exercise of the delegation as if the delegate were the appointer.⁴²

(3) Without limiting subsection (2), if the exercise of a function by the appointer is dependent on the appointer's state of mind and the function is delegated, the function may be exercised by the delegate on the delegate's state of mind.

(4) Anything done by or in relation to the delegate in the exercise of the delegation is taken to have been done by or in relation to the appointer.

(5) In this section:

"state of mind" includes knowledge, intention, opinion, belief or purpose.

240 Appointer may exercise delegated function (IA s 29B (d))

3 The delegation provides that X may grant licences under a stated Act but that, in considering applications, X must take account of the policy of the agency (authorised by the Act) that there should not be more than 100 licences current at any time.

⁴⁰ The Act provides the following examples to this section:

1 The ABC Act 2003 provides that an appointer (X) may delegate X's functions to Y. The Act is silent on X's power to delegate the power to delegate. X may not delegate X's power to delegate to Y.

2 The ABC Act 2003 provides that an appointer (X) may delegate X's functions to Y, with authority for X to delegate X's power to delegate. Because the Act authorises the delegation of the power to delegate, it expressly displaces this Act, section 236 (1) (see s 6). X can therefore delegate X's power to delegate to Y (compare s 231, which deals with the subdelegation of a delegated function).

⁴¹ The following example illustrates this provision: "If the power to delegate is exercisable only with the Minister's approval, the power to revoke the delegation is exercisable only with the Minister's approval".

⁴² Note 1 Section 94 provides that a delegation under a law that is in force immediately before an amendment of the law continues to have effect as if made under the amended law.

Note 2 Section 196 gives a delegate the powers necessary or convenient to exercise a delegated function.

A function that has been delegated may, despite the delegation, be exercised by the appointer

241 Delegation not affected by appointer changes (IA s 30AA)

(1) If the appointer is a body, a delegation made by the body does not end only because the membership of the body changes.

(2) If the appointer is the person for the time being occupying a position, a delegation made by the person does not end only because the person ceases to be the occupant of the position.

(3) This section does not limit the following sections:

- (a) section 199 (Functions of bodies)
- (b) section 200 (Functions of occupants of positions).

242 Delegation not affected by defect etc

(1) A delegation, or anything done under a delegation, is not invalid only because of a defect or irregularity in or in relation to the delegation.

(2) Anything done by or in relation to the delegate while the delegate purports to exercise the delegation is not invalid only because—

- (a) the delegation had been amended or revoked; or
- (b) the occasion for the delegate to exercise the delegation had not arisen or had ended.

5.72 Section 46A of the Interpretation Act of the Northern Territory deals as follows with the power of delegation:

(1) A provision of an Act that confers a power to delegate a power or function on a person (whether by reference to an office, designation, position or otherwise) is to be construed as conferring on the person a power to delegate the power or function to -

- (a) a person by name;
- (b) a person by reference to the office, position or designation held or occupied by the person; or
- (c) a person from time to time holding, acting in or performing the duties of a named office, designation or position.

(2) A provision of an Act that confers a power to delegate a power or function is not to be construed as including the power to delegate that power of delegation.

(3) If a power or function is delegated under an Act, the power or function is, when exercised or performed by the delegate, to be taken to be exercised or performed by the person who delegated it.

(4) The delegation of the power or function under an Act does not prevent the exercise of the power or the performance of the function by the person who delegated it.

5.73 In relation to our own Interpretation Act Hofman notes that the wording of section 10(6) (added in 1977) could be made simpler. He suggests that it might have a better home under the PAJA.

5.74 Support was expressed at the three consultative meetings held in August 2004 for provisions setting out in more detail the issue of delegation than the Interpretation Act presently does. The justification mentioned in Durban and Cape

Town was that greater clarity may be effected in this way. There was, however, also opposition expressed in Pretoria to including more detailed provisions. It was considered that it would not be useful to have provisions in the Interpretation Act such as are contained in the Australian legislation. Another suggestion was that it might be useful if provisions on delegation modelled on the Australian legislative example were inserted into PAJA.

5.75 The Commission's preliminary view is that section 10(6) may not, in fact, have a better home under the Promotion of Administrative Justice Act. The Commission considers that this provision serves a useful purpose and needs to be retained in the Interpretation of Legislation Bill. The Commission proposes that in view of considerable support expressed at the meetings of experts more detailed provisions should be included in the new Interpretation Act setting out what delegation entails.

5.76 The Commission provisionally proposes the following clause:

Delegation of powers and duties

54. (1) If legislation provides for the delegation of a power or duty contained in that or any other legislation, the delegation –

- (a) must be in writing;
- (b) is subject to any conditions, limitations or directions as may be determined by the person delegating the power or duty or part of the power or duty;
- (c) may provide for the subdelegation of the delegated power or duty or part of a power or duty;
- (d) does not divest the person delegating the power or duty, or part of the power or duty, of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty; and
- (e) may at any time be amended or repealed by the person delegating the power or duty.

(2) If legislation provides for the delegation of a power or duty contained in that or any other legislation without indicating to whom the power or duty may be delegated, that power or duty, or any part of that power or duty, may be delegated to a specific person or persons or the holder of a specific office or offices performing their functions under the control or supervision of the person delegating the power or duty or part of the power or duty.

(3) A power or duty, or a part of a power or duty, delegated in terms of legislation –

- (a) may, despite such delegation, be exercised or performed by the person delegating the power or function; and
- (b) may in the absence of express authority not be subdelegated.

J. TRANSFER OF LEGISLATION, POWERS AND FUNCTIONS

5.77 Section 10(5) of our Interpretation Act relates to the assignment of powers. Section 10(5) deals with the situation where a power is conferred or duty is imposed on or a function is entrusted to an assigned Minister, a member of an Executive

Council of a province or other authority and under the Constitution the power or duty has been assigned by the President or the Premier of a province to any other Minister, member of such Executive Council or authority, as the case may be, in order that that power or duty may be exercised by such other Minister, member of the Executive Council or authority. Section (5) provides as follows:

Whenever the administration of any law or any provision of any law which confers a power or imposes a duty upon or entrusts a function to any Minister of State, member of the Executive Council of a province or other authority has under the Constitution been assigned by the President or the Premier of a province to any other Minister, member of such Executive Council or authority, as the case may be, that power may be exercised by such other Minister, member of the Executive Council or authority and that duty shall and that function may be performed by him, and –

- (a) any reference in that law or provision to a department, including any division of any department or administration, administered by such firstmentioned Minister, member of the Executive Council or authority shall be construed as a reference to the department administered by such lastmentioned Minister, member of the Executive Council or authority;
- (b) any reference in that law or provision to an officer in the public service attached to such firstmentioned department or to any such officer holding a specified office in that department, shall be construed as a reference to an officer in the public service attached to such lastmentioned department, or as the case may be, as a reference to such an officer holding a corresponding office in that department;
- (c) any power, duty or function vested in or imposed upon or entrusted to –
 - (i) an officer of such firstmentioned department who is then an officer of such lastmentioned department; or
 - (ii) the holder of a specified office in that department,

by or under that law or provision, shall be deemed to have been duly vested in or imposed upon or entrusted to the officer concerned in his capacity as an officer of such lastmentioned department or, as the case may be, to the holder of a corresponding office in that department;

- (d) any regulation made or any notice, direction or order issued or any appointment made or any action taken under that law or provision prior to the date on which the administration thereof was so assigned, shall remain in full force and effect as if it had been made, issued or taken by the person who on that date was, by virtue of the assignment of the administration of that law or provision or the provisions of this subsection, competent to make such regulation or to issue such notice, direction or order or to make such appointment or to take such action.

5.78 Section 10(5A) states that the provisions of subsection (5) shall apply in so far as the President or the Premier of a province does not determine otherwise in the assignment concerned and, if the administration of any law or a provision of any law has been assigned to any other Minister, member of the Executive Council of a province or authority as contemplated in that subsection, but in relation to a matter specified in the assignment, the provisions of that subsection shall apply accordingly. Subsection (5B) was deleted in 1993.⁴³

⁴³

By section 5(d) of Act 201 of 1993: “Whenever the administration of a law referred to in subsection (2) of section 98 of the Republic of South Africa Constitution Act 1983,

5.79 At issue in the recent case of *President of the Republic of South Africa v Eisenberg and the Minister of Home Affairs*⁴⁴ was the power of the Minister of Home Affairs to make regulations called for, or conducive to, the implementation of the Immigration Act 13 of 2002. Counsel for the Minister submitted the following –

- where Parliament confers upon a Minister, in plain and unmistakable terms, the power to make regulations, the Minister is vested with subordinate law-making powers which derive from an enactment of Parliament;
- the origination of the Minister's power in the statute is not altered by the fact that the Minister is a member of the Cabinet appointed by the President;
- the repository of the power remains the Minister, and the origin of the power remains the enactment of Parliament;
- the provisions of section 85 of the Constitution neither divest a Minister of the power given to him by Parliament to make regulations, nor do they render the exercise of the Minister's power subject to Cabinet supervision.

5.80 Judge Erasmus remarked that the validity of these submissions as statements of general principle could not be faulted, but that there were two qualifications of the general principle. First, in the exercise of power conferred on him by Parliament, a Minister must comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of that law.⁴⁵ The second qualification was that the exercise of the power must accord with the grant of the power or, put differently, there must be compliance with the jurisdictional facts upon which the valid exercise of the power pursuant to the enabling enactment is dependent. It was accordingly necessary to examine the precise ambit of the power that Parliament conferred on the Minister to make regulations. Judge Erasmus noted that in exercising the power vested in him, the Minister was obliged to follow the consultative process set out in section 7 of the Immigration Act. In exercising the power the Minister also had to have regard to the aims of the Act and the objectives of immigration control as set out in it. The regulations made had to be rationally related to the purpose for which the power to make the regulations was given.

has been assigned to a Minister of State under subsections (3) (b) and (4) of that section, the provisions of subsections (5) and (5A) of this section shall apply mutatis mutandis as if the relevant executive committee or other executive authority referred to in the said subsection (2), the department or division of the relevant provincial administration in which the law was administered, and an officer of that administration, were a Minister of State, the department of State controlled by him, and an officer in the public service, respectively.”

⁴⁴ 2005 (1) SA 247 (C).

⁴⁵ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) par 18.

5.81 Judge Erasmus also pointed out that in terms of section 85(2)(b) of the Constitution, the development and implementation of national policy is a matter of collective executive responsibility. In so far as the Minister may elect to make national immigration policy in exercising his powers under section 7 of the Act, he is bound to do so under the hegemony of section 85(2)(b) of the Constitution. The unilateral implementation of policy to regulate portfolios other than his own by the Minister in regulations framed in terms of his powers under section 7 would also be in conflict with the central aims of coordination and cooperation which underlie the Act. The power to make regulations was conferred on the Minister within the context of the Act, which requires co-ordination of function and policy of different organs of state, and the exercise of that power by the Minister was, therefore, not a matter of individual but of collective responsibility. In the exercise of that collective responsibility, the provisions of section 7 of the Act had to be complied with.

5.82 In *Huisamen v Port Elizabeth Municipality*⁴⁶ the court held that there seemed no reason, as a matter of general principle, why a zoning scheme created under the authority of certain functionaries should cease to exist when the empowering provisions under which they were created were assigned to other functionaries. The court stated that even if the general principle was open to debate, the decisive answer to the appellants' argument lay in section 10(5)(d) of the Interpretation Act. This, somewhat surprisingly, was not referred to by counsel for either side. The zoning scheme remained in force and effect as if it had been made by a person competent to make it by virtue of the assignment of the administration of the ordinance, it was fatal to the appellants' contention that the zoning scheme had lapsed or become unenforceable.

5.83 Professor Hofman points out that section 10(5) of the Interpretation Act which deals with assignment of powers within national government, was amended in the light of the 1993 Constitution. The 1996 Constitution deals with these matters in:

- Section 97: Transfer of functions;⁴⁷
- Section 98: Temporary assignment of functions;⁴⁸

⁴⁶ 1998 (1) SA 477 (E) 481.

⁴⁷ **Section 97 Transfer of functions**

The President by proclamation may transfer to a member of the Cabinet –

(a) the administration of any legislation entrusted to another member; or
 (b) any power or function entrusted by legislation to another member.

⁴⁸ **Section 98 Temporary assignment of functions**

- Section 99: Assignment of functions;⁴⁹
- Section 101(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.⁵⁰

Professor Hofman considers that one must ask whether the Interpretation Act ought to repeat these provisions.

5.84 The Commission's preliminary view is that it would rather err on the side of caution and retain a section similar to section 10(5) of the Interpretation Act dealing with the transfer of powers and functions even it is strictly an unnecessary duplication of the provisions in the Constitution. The following clauses are proposed:

Transfer of legislation, powers and functions by President to other Cabinet members

55. If the administration of legislation entrusted to a Cabinet member, or a power or function entrusted by legislation to a Cabinet member, is transferred by the President in terms of section 97 of the Constitution to another Cabinet member –

- (a) a reference in that legislation to –
 - (i) the Cabinet member entrusted with the legislation, power or function, must be read as a reference to the Cabinet member to whom the legislation, power or function is transferred;

The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

49

Section 99 Assignment of functions

A Cabinet member may assign any power or function that is to be performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment –

- (a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
- (b) must be consistent with that of Parliament in terms of which the relevant power or function is exercised or performed; and
- (c) takes effect upon proclamation by the President.

50

Section 101 Executive decisions

- (1) A decision by the President must be in writing if it –
 - (a) is taken in terms of legislation; or
 - (b) has legal consequences.
- (2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.
- (3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.
- (4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be –
 - (a) tabled in Parliament; and
 - (b) approved by Parliament.

- (ii) a department or office under the control of the Cabinet member entrusted with the legislation, power or function, must be read as a reference to a department or office under the control of the Cabinet member to whom the legislation, power or function is transferred; and
 - (iii) a person employed or holding a specific post in a department under the control of the Cabinet member entrusted with the legislation, power or function, must be read as a reference to a person employed or holding a corresponding post in a department under the control of the Cabinet member to whom the legislation, power or function is transferred;
- (b) a role or responsibility given to a person employed or holding a specific post in a department under the control of the Cabinet member entrusted with the legislation, power or function, must be read as having been given to a person employed or holding a corresponding post in the department under the control of the Cabinet member to whom the legislation, power or function is transferred; and
 - (c) nothing done in terms of such legislation or in the exercise or performance of such power or function before the transfer is affected merely because the transfer.

Transfer of legislation, powers and functions by Premiers to other members of Executive Council

56. If the administration of legislation entrusted to an MEC, or a power or function entrusted by legislation to an MEC, is transferred by the Premier in terms of section 137 of the Constitution to another MEC –

- (a) a reference in that legislation to –
 - (i) the MEC entrusted with the legislation, power or function, must be read as a reference to the MEC to whom the legislation, power or function is transferred;
 - (ii) a department or office under the control of the MEC entrusted with the legislation, power or function, must be read as a reference to a department or office under the control of the MEC to whom the legislation, power or function is transferred; and
 - (iii) a person employed or holding a specific post in a department under the control of the MEC entrusted with the legislation, power or function, must be read as a reference to a person employed or holding a corresponding post in a department under the control of the MEC to whom the legislation, power or function is transferred;
- (b) a role or responsibility given in that legislation to a person employed or holding a specific post in a department under the control of the MEC entrusted with the legislation, power or function, must be read as having been given to a person employed or holding a corresponding post in the department under the control of the MEC to whom the legislation, power or function is transferred; and
- (c) nothing done in terms of such legislation or in the exercise or performance of such power or function before the transfer, is affected merely because the transfer.

CHAPTER 6

WORDS AND EXPRESSIONS OFTEN USED IN LEGISLATION

A. INTRODUCTION

6.1 It is explained in Chapter 2 above that the definition clause in an Act usually contains definitions applicable to that particular legislation, although an Interpretation Act deals with the interpretation of all legislation. The definition section in the current Interpretation Act contains a list of definitions applicable to all legislation.

6.2 Thornton¹ states that definitions of words and expressions are suitable to be included in an Interpretation Act if –

- (a) the words and expressions are demonstrably of general application to a reasonably broad range of legislation, and
- (b) the definition conforms to the criteria applicable to all statutory definitions.²

6.3 Thornton further states that a definition in interpretation legislation should not stipulate a sense that is substantially different from conventional usage. Thornton also gives a list of definitions thought to be worth considering.³

6.4 The New Zealand Law Commission⁴ stated that the characteristics of definition provisions in interpretation statutes are that –

- they give standard meanings to words or phrases that are frequently used throughout the statute book;
- they do in fact generally apply wherever those words or phrases are used (and are not subject to frequent exclusion by context or special definition);

¹ *Legislative Drafting* 115

² Thornton discusses the criteria at page 147. A definition must have a clear purpose, either to remove ambiguity or to abbreviate.

³ At 115.

⁴ New Zealand Law Commission Report No 17 para 362.

- in general, they provide a meaning which is common in ordinary usage or close to it.

6.5 Definitions contained in Interpretation Acts fall into certain categories:

- (a) terms for different categories of legislation, eg Act, enactment, subordinate legislation, written law, by-laws;
- (b) definitions of officials, eg President, Premier;
- (c) definitions of bodies or institutions, eg Parliament, province;
- (d) terms defining certain actions, eg amend, contravene, occupy, perform, repeal;
- (e) terms describing people, eg individual, person, adult, child, minor.

6.6 In the draft Bill for a Interpretation Act which is contained in Appendix B to his book, Crabbe⁵ divides the definitions into the following categories:

- Definitions for legislative purposes;
- Definitions for judicial purposes;
- Definitions for executive purposes;
- References relating to land; and
- Miscellaneous definitions

6.7 Part V of the Australian Commonwealth Interpretation Act deals with words and references in Acts such as – references to the Sovereign; the Governor-General; the Governor of a State; Stipendiary Magistrate and Magistrate; Constitutional and official definitions; definitions relating to the Australian Public Service; reference to a paper or document purporting to be printed by the Government Printer; interpretation of the terms *The United Kingdom* and *British possession*; parts of speech and grammatical forms; how Chairs and Deputy Chairs may be referred to; a Portfolio Minister may authorise a non-portfolio Minister or a member of the Executive Council who is not a Minister to act on his or her behalf in the performance of statutory functions or the exercise of statutory powers; mention of Minister; references to

⁵ *Understanding Statutes*

Ministers and Departments; reference to Minister, Department etc where there is no longer any such Minister, or a Department is abolished etc; reference to Minister, Department etc that is inconsistent with changed administrative arrangements; application of sections 19B⁶ and 19BA where a Department is abolished and a Department with the same name is established; revocation of orders made under sections 19B and 19BA; orders under sections 19B, 19BA and 19BB are to be published in the Gazette; references in agreements to a Department, Minister, officer or body; mention of an officer in general terms; Office etc. means office etc. of the Commonwealth; meaning of certain words; rules as to gender and number; references to writing documents and records; production of records kept in computers etc; alterations of names and constitutions; compliance with forms; content of statements of reasons for decisions; and attainment of a particular age. Part VI is termed "Judicial expressions" and contains clauses in regard to judicial definitions; meaning of words like "oath", "affidavit" and "statutory definitions";⁷ Rules of Court, service of documents, meaning of service by post, and miscellaneous definitions.⁸

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- ⁶ 19B(1) Where:
- (a) reference is made in a provision of an Act to a particular Minister of State;
 - (b) there is no longer any such Minister; and
 - (c) the Governor-General, by order under this section, directs that the provision, or provisions that include the provision, shall have effect:
 - (i) as if there were substituted for that reference a reference to a Minister or Ministers specified in the order; or
 - (ii) as if, in so far as the provision applies in a particular respect specified in the order, being one of several respects so specified, there were substituted for that reference a reference to a Minister or Ministers specified in the order;

the provision shall, on and from the date of the order or such later date as is specified in the order, have effect accordingly for all purposes, including the purpose of the making of any subsequent order under this subsection or subsection 19BA(1), other than such an order that is expressed to have effect as if the first-mentioned order had not been made.

- ⁷ 27. In any Act, unless the contrary intention appears:
- (b) The words "oath" and "affidavit" shall, in the case of [persons](#) allowed by law to affirm declare or promise instead of [swearing](#), include affirmation, declaration, and promise, and the word "swear" shall in the like case include affirm, declare, and promise;
 - (c) The words "statutory declaration" shall mean a declaration made by virtue of any Act authorizing a declaration to be made otherwise than in the course of a judicial proceeding.

- ⁸ The Hong Kong Interpretation and General Clauses Ordinance of 2003 defines the following – adult, infant, Chinese citizen, alien, Chinese national, foreign country, foreign currency, general revenue, Chief justice, magistrate, Chief judge, consul,

6.8 Section 2 of the Canadian Federal Interpretation Act (entitled “Interpretation”) contains the definitions for the Interpretation Act only,⁹ and section 35 (entitled “General Definitions”) contains the definitions that are applicable to all legislation. The Australian Capital Territory Legislation Act also contains two lists of definitions. Part 1 of the dictionary to the Act defines terms commonly used in Acts (including the Legislation Act) and statutory instruments. For example, because of the definition “month” means calendar [month](#), the term ‘month’ has the defined meaning wherever the term is used in an Act or statutory instrument unless [the Act](#) or instrument provides otherwise or the contrary intention otherwise appears. Part 2 of the dictionary defines certain terms used in [the Legislation Act](#) and a definition in pt 2 applies to [the Act](#) unless the definition, or another provision of [the Act](#), provides otherwise or the contrary intention otherwise appears.

6.9 The 1999 New Zealand Interpretation Act follows an arrangement similar to that in the South African Interpretation Act, although the definition section (section 29) appears towards the end of the Act.

6.10 In a discussion paper on the review of the Commonwealth Acts Interpretation Act 1901 prepared by the officers of the Australian Attorney-General’s department and the Office of Parliamentary Counsel in 1998, the various kinds of provisions that might be used to achieve the objectives of an Interpretation Act were considered. These included provisions that contain, among other things, rules about gender and number and the use of other parts of speech.

6.11 The Canadian methodology differs from the South African drafting practice where the definitions are usually consolidated in a single provision at the beginning of the legislation. The view has been expressed that all definitions in an Interpretation Act should apply to all legislation (including the Interpretation Act itself), unless excluded expressly or by necessary implication, and that a system where two different definition clauses are used in different parts of the Act will cause unnecessary confusion. It has been suggested that the definitions be divided into different categories and that where certain sections of the Interpretation Act require

Chief executive in counsel, Court, court of appeal, Court of First Instance, High Court, harbour, pier, prison, public place, ship, street, road, vessel, Hong Kong waters, aircraft, movable property, immovable property, property, occupy, contravene, import, sell, medical practitioner, master of a ship, police officer, solicitor, counsel, health officer, arrestable offence, committed for trial, offence, summary conviction.

⁹ Words such as Act, enact, enactment, public officer, regulation and repeal are defined.

definitions pertaining to their provisions, these definitions be inserted at the beginning of the section.

6.12 The positioning of the definition section in the Interpretation Act was discussed at the expert meetings. There were a number of divergent views on the matter. Many of the participants felt that the definition section should be at the beginning of the Act and that the definitions should be listed in alphabetical order. Others favoured the positioning of the definitions at the end of the Act as in the Labour Relations Act 66 of 1995. There was consensus that wherever the definition section was situated, definitions dealing with certain subject-matter eg, computation of time should be dealt with in the section dealing with that subject. The index or contents of the Interpretation Act would make it clear that these concepts are defined in the section dealing with that specific subject-matter. Where possible, the definition should be incorporated into the body of the provision.

6.13 The following are examples of how interpretation statutes of foreign jurisdictions are drafted on this issue:

- **Definitions**

27.(1) In an Act or regulation the expression —¹⁰

- **Expressions defined**

29 In an enactment:¹¹

- **Definitions**

35(1) In every enactment,;¹²

- **Interpretation**

4.(1) In this Act and in every other Act or statutory instrument, unless the contrary intention appears—¹³

¹⁰ Section 27 of the Newfoundland and Labrador Interpretation Act.

¹¹ The British Columbian Interpretation Act.

¹² The Canadian federal Interpretation Act.

¹³ The South Australian Interpretation Act.

- In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context —¹⁴
- **3.(1)** In this **Act**, and in any **Act** passed after the commencement of this **Act**, unless the contrary intention appears –¹⁵

6.14 It is proposed that the Bill should provide as follows in the introductory clause on general definitions for words and expressions often used in legislation and that it should qualify these words and expressions (where applicable) as follows :

General definitions for words and expressions often used in legislation

25. (1) When a word or expression defined in this section occurs in legislation, that word or expression has the meaning as defined in this section except in legislation where –

- (a) that word or expression is defined differently;
- (b) the context in which that word or expression occurs indicates another meaning; or
- (c) the definition is clearly inappropriate.

B. LIST OF GENERAL DEFINITIONS FOR WORDS AND EXPRESSIONS

6.15 It is proposed that the following general definitions for words and expressions often used in legislation definitions be included in the Bill:

6.15.1 **“Act of Parliament”** means an Act passed by Parliament;

6.15.2 **“affidavit”** means a voluntary statement of facts written down and sworn to, or affirmed or declared to be the truth by the person making the statement in the presence of a person authorised to administer oaths or affirmations;¹⁶

¹⁴ The General Clauses Act of India.

¹⁵ The Malta Interpretation Act.

¹⁶ The Rules of the Constitutional Court defines *affidavit* as follows: 'affidavit' includes an affirmation or a declaration contemplated in section 7 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963). The Australian Capital Territory Legislation Act defines affidavit as follows: "affidavit", in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration and promise. The Indian General Clauses Act provides that "affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing. The British Columbian Interpretation Act provides that "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm. The Australian Commonwealth Acts

6.15.3 **“affirmation”** means a formal declaration confirming the truth of a statement made by a person who, for moral or religious reasons, objects to taking an oath;

6.15.4 **“aircraft”** means a craft of any kind whatsoever which is capable of flying, whether self-propelled or not, and includes the fittings, furnishings and equipment of such craft;¹⁷

6.15.5 **“Auditor-General”** means the Auditor-General referred to in section 188 in the Constitution;¹⁸

6.15.6 **“Cabinet”** means the Cabinet referred to in section 91 (1) of the Constitution;¹⁹

6.15.7 **“calendar month”**²⁰ means one of the twelve months of a calendar year;²¹

Interpretation Act provides in section 27 that in any Act, unless the contrary intention appears: (a) the words "oath" and "affidavit" shall, in the case of [persons](#) allowed by law to affirm declare or promise instead of [swearing](#), include affirmation, declaration, and promise, and the word "swear" shall in the like case include affirm, declare, and promise; and (b) the words "statutory declaration" shall mean a declaration made by virtue of any Act authorizing a declaration to be made otherwise than in the course of a judicial proceeding.

¹⁷ The Marine Living Resources Act of 1998 provides that 'aircraft' means any craft capable of self-sustained movement through the atmosphere and includes a hovercraft. The Aviation Act of 1962 provides that 'aircraft' means any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface and the National Environmental Management Act 1998 provides that 'aircraft' means an airborne craft of any type whatsoever, whether self-propelled or not, and includes a hovercraft.

¹⁸ Section 188 of the Constitution sets out the functions of the Auditor-General.

¹⁹ The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.

²⁰ The Unemployment Insurance Act 30 of 1966 provided (prior to repeal by Act 63 of 2001) that 'calendar month' means a period extending from the first to the last day, both days inclusive, of any one of the 12 months of a year.

²¹ The Indian General Clauses Act provides that "month" shall mean a month reckoned according to the British calendar. The South Australian Interpretation Act and the Canadian federal Interpretation Act provide that "month" means calendar month. The Australian Capital Territory Legislation Act provides that "calendar month" means a period beginning at the start of any day of a named [month](#) and ending — (a) at the end of the day before the corresponding day of the next named [month](#); or (b) if there is no such corresponding day—at the end of the last day of the next named [month](#). The Act explains the definition with the following two examples: 1. The period beginning at the start of 5 July 2000 and ending at midnight on 4 August 2000 is a

- 6.15.8 “calendar year”²² means a year commencing 1 January;²³
- 6.15.9 “commence” or “take effect”, in relation to legislation or a provision in legislation, means to become operational or enforceable as a law;²⁴
- 6.15.10 “Constitution”²⁵ means the Constitution of the Republic of South Africa, 1996;²⁶
- 6.15.11 “constitutional institution” means an institution established in terms of section 6(5),²⁷ 155(3)(b),²⁸ 178(1),²⁹ 179(1),³⁰ 181(1),³¹ 196(1),³² 220(1)³³ or 223³⁴ of the Constitution;

calendar [month](#). 2. The period beginning at the start of 30 January 2001 and ending at midnight on 28 February 2001 is a calendar [month](#). The calendar [month](#) ends on the last day of February because in that year February does not have a day corresponding to 29 January (because 2001 is not a leap year). If the period began at the start of 30 January 2004 (ie, a leap year), the calendar [month](#) would end at midnight on 29 February 2004. The Australian Commonwealth Acts Interpretation Act provides that *calendar month* means a period commencing at the beginning of a day of one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month.

²² The Plant Improvement Act 1976 provides that 'calendar year' means a year from 1 January to 31 December.

²³ The Interpretation Act of Newfoundland and Labrador provides that "year" means a calendar year, and the Australian Capital Territory Legislation Act states that "calendar year" means a period of 12 [months](#) beginning on 1 January." The British Columbia Interpretation Act provides that "year" means any period of 12 consecutive months; but a reference to a "calendar year" means a period of 12 consecutive months beginning on January 1, and a reference by number to a dominical year means a period of 12 consecutive months beginning on January 1 of that dominical year;" The Australian Commonwealth Acts Interpretation Act provides that *calendar year* means a period of 12 months commencing on 1 January.

²⁴ The South Australian Acts Interpretation Act provides that "*commencement*", in relation to an Act or statutory instrument, means the day on which the Act or statutory instrument comes into operation. The British Columbian Interpretation Act provides that "*commencement*", with reference to an enactment, means the date on which the enactment comes into force.

²⁵ The Interpretation Act defines *Constitution* as follows: 'the Constitution' means the Constitution of the Republic of South Africa, 1993.

²⁶ The Citation of Constitutional Laws Act, No 5 of 2005 to which the President assented on 23 June 2005, provides that from the date of commencement of the Act, no Act number is to be associated with the "Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)" and any reference to the "Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)", contained in any law in force prior to the commencement of the Act, must be construed as a reference to the "Constitution of the Republic of South Africa, 1996".

²⁷ This section deals with the establishment of the Pan South African Language Board.

²⁸ This section provides that national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority. The

6.15.12.1 The proposed legislation should address the question of “*after consultation with*” versus “*in consultation with*”.

6.15.12.2 In *Minister of Health v New Clicks South Africa (Pty) Ltd*³⁵ Chief Justice Chaskalson considered the decision making and consultation process envisaged under the Regulations passed in terms of the Medicines Act:

Increases in the SEP

[282] We live in times when inflation and volatile exchange rates have an impact on prices. Prices are continually changing in relation to these factors and other market considerations. It could never have been contemplated that the regulations would require the SEP to be firm, and not subject to increase from time to time.

[283] Having made provision for a maximum SEP it was necessary for that determination to be subject to review from time to time. The regulations address this issue by making provision for an annual review, and for reviews at other times to be made in exceptional circumstances. Here too objection has been taken to the delegation of powers to the Minister, and to the vagueness of the relevant regulations.

[284] Regulation 8 deals with annual increases. Regulation 8(1) provides:

“The extent to which the single exit price of a medicine or Scheduled substance may be increased will be determined annually by the Minister, after consultation with the Pricing Committee, by notice in the Gazette with regard to—

- (a) the average CPI for the preceding year;
- (b) the average PPI for the preceding year;
- (c) changes in the rates of foreign exchange and purchasing power parity;
- (d) international pricing information relating to medicines and Scheduled substances;

Municipal Demarcation Board was established by section 2 of the Local Government: Municipal Demarcation Act 27 of 1998.

²⁹ This section deals with the establishment of the Judicial Service Commission.

³⁰ This section deals with the National Prosecuting Authority.

³¹ This section deals with the following state institutions which strengthen constitutional democracy in the Republic – the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission.

³² This section deals with the Public Service Commission.

³³ This section deals with the Financial and Fiscal Commission.

³⁴ This section deals with the Reserve Bank.

³⁵ 2006 (1) BCLR 1 (CC) and also 2006 (2) SA 311 (CC).

- (e) comments received from interested persons in terms of regulation 8(2); and
- (f) the need to ensure the availability, affordability and quality of medicines and Scheduled substances in the Republic.”

Interested parties are given an opportunity to make representations to the Minister before such determination is made and the procedure to be followed in that regard is set out in regulation 8(2).

[285] Because of the different factors which may affect the determination of a maximum price for a particular SEP, it would have been difficult for the regulations to prescribe a formula for this to be done. Had the regulations made provision for the Pricing Committee and the Minister to exercise control over the process that would have been consistent with section 22G(2). The regulations do not, however, do this. They provide that the determination shall be made by the Minister “after consultation with the Pricing Committee”. This would require the Minister to give serious consideration to the views of the Pricing Committee, but would leave her free to disagree with them. This is in contrast with the Medicines Act, which requires agreement between the Minister and the Pricing Committee on the pricing system.

[286] The annual review is an important component of the pricing system. It involves a consideration of factors in which expertise in the pricing of medicines is required. Since the Pricing Committee has to be involved in the process there is no practical necessity for delegating this function to the Minister alone. What the regulation does is to leave to the Minister alone, a task which is the joint responsibility of the Minister and the Pricing Committee, without there being any practical necessity for this to be done, or any obvious reason why the Pricing Committee’s power should be subordinated to that of the Minister. In my view the delegation of the decisionmaking power to the Minister alone is an improper delegation of a power vested jointly in the Minister and the Pricing Committee by the Medicines Act. I would hold regulation 8(1) to be invalid for this reason. I would, however, correct this defect by reading into the regulations the words: “the Minister on the recommendation of the Pricing Committee” in place of the words: “the Minister after consultation with the Pricing Committee”. (footnotes omitted)

6.15.12.3 In many cases inexperienced drafters would use these terms indiscriminately, not realising the fundamental difference between the two. Whilst the first one denotes mere consultation before a power is exercised, the second one actually means that the power can only be exercised “with the concurrence of” of the party who must be consulted. “*In consultation with*” in effect gives a veto power to the other party. Consultation mechanisms is key to the implementation of the constitutional requirement of co-operative government as set out in Chapter 3 of the Constitution and most laws enacted after 1996 contain provisions on consultation between the different spheres and different governments. Veto powers are contrary to the spirit of Chapter 3 and should not slip in inadvertently by the wrong choice of words. In the interim Constitution the terms “*after consultation with*” and “*in consultation with*” were critical for implementing the system of government of national unity and section 233 (3) and (4) was accordingly inserted in the interim Constitution to ensure a correct interpretation of these terms. Similar provisions should be included in the Interpretation Bill in relation to legislation generally.

6.15.12.4 The following definition of “consult” is therefore proposed:

“**consult**” means to seek the views of another person and to consider any views expressed by that other person, whether such views were sought or expressed –

- (a) orally or in writing;
- (b) in discussions; or
- (c) in any other form of communication;

6.15.13 “**continental shelf**” has the meaning assigned to it in the Maritime Zones Act, 1994 (Act 15 of 1994);³⁶

6.15.14 “**delegation**”, in relation to a duty, includes an instruction or request to perform or to assist in the performance of the duty;³⁷

6.15.15 “**Deputy President**” means the Deputy President of the Republic appointed by the President in terms of section 91(2) of the Constitution;

6.15.16 “**district**” means an area established by the Cabinet member responsible for the administration of justice in terms of section 2 of the Magistrates Court Act, 1944 (Act No. 32 of 1944);³⁸

6.15.17 “**document**”³⁹ includes –

³⁶ Section 8 of the Maritime Zones Act, 1994 provides as follows:

8.(1) The continental shelf as defined in Article 76 of the United Nations Convention on the Law of the Sea, 1982, adopted at Montego Bay on 10 December 1982, shall be the continental shelf of the Republic.

(2) Subject to any other law the outer limits of the continental shelf shall consist of a series of straight lines joining the co-ordinates mentioned in Schedule 3.

(3) For the purposes of-

- (a) exploration and exploitation of natural resources, as defined in paragraph 4 of Article 77 of the United Nations Convention on the Law of the Sea, 1982; and
- (b) any law relating to mining of precious stones, metals or minerals, including natural oil,

the continental shelf shall be deemed to be unalienated State land.

³⁷ The Local Government: Municipal Systems Act 32 of 2000 provides that 'delegation', in relation to a duty, includes an instruction to perform the duty, and 'delegate' has a corresponding meaning.

³⁸ The Interpretation Act defines *district* as follows: 'district' means the area subject to the jurisdiction of the court of any magistrate. The definition of 'district' has been substituted by s. 74 of the Magistrates' Courts Amendment Act 120 of 1993, a provision which will be put into operation by proclamation. It provides as follows: 'district' means the area subject to the jurisdiction of a magistrate's court;

- (a) any paper or other object on or in which there is –
 - (i) writing;
 - (ii) images; or
 - (iii) perforations, indentations or raised text having meaning;
- (b) any object from which writing, sounds or images can be reproduced or retrieved with or without the aid of any device; or
- (c) any electronically stored information that is transmittable;⁴⁰

6.15.18 **“enact”**, in relation to legislation, means to pass, make or issue legislation, whether or not the legislation has taken effect;⁴¹

³⁹ The South African Library for the Blind Act of 1998 provides that 'document' means any object which is intended to store or convey information in textual, graphic, visual, auditory or other intelligible format through any medium, and any version or edition of a document which is significantly different from that document in respect of its information content, intelligibility or physical presentation, is considered to be a separate document: Provided that public records as defined in section 1 of the National Archives of South Africa Act, 1996 (Act 43 of 1996), or in provincial legislation pertaining to records and archives, other than published records, are not considered to be documents for the purposes of this Act.

⁴⁰ The General Clauses Act of India and the Interpretation Act of Malta provide that “document” shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter. The Australian Capital Territory Legislation Act provides that "document" means any record of information, and includes — (a) anything on which there is writing; or (b) anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for persons qualified to interpret them; or (c) anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or (d) a drawing, map, photograph or plan. Section 25 of the Australian Commonwealth Acts Interpretation Act of 1901 deals with references to writing, documents and records:

In any act unless the contrary intention appears:

“document” includes:

- (a) any paper or other material on which there is writing;
- (b) any paper or other material on which there are marks, figures symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device.

“record” includes information stored or recorded by means of a computer.

“writing” includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.

⁴¹ The Australian Capital Territory Legislation Act provides in section 29 that in an Act or statutory instrument, a reference to the enactment or passing of an Act is a reference to the making of [the Act](#) having been notified in the register or the gazette. The Malta Interpretation Act provides in section 2 that "pass", and any derivative thereof, used in relation to the word Act, includes the making of any instrument having the force of law

6.15.19 **"exclusive economic zone"** has the meaning assigned to it in the Maritime Zones Act, 1994 (Act 15 of 1994);⁴²

6.15.20 **"Executive Council"**, with reference to a province, means a provincial Executive Council referred to in section 132(1) of the Constitution;⁴³

6.15.21 **"Gazette"**⁴⁴ –

- (a) in relation to national legislation, means the national Government Gazette;
- (b) in relation to provincial legislation, means the official Gazette of the relevant province; or
- (c) in relation to a municipal by-law, means the official Gazette of the province in which the relevant municipality is situated, or, in the case of a cross-border municipality, the official Gazettes of the provinces in which the municipality is situated;

and provides in section 3 that "enactment" means a written law or any provision thereof.

⁴² 7(1) The sea beyond the territorial waters referred to in section 4, but within a distance of two hundred nautical miles from the baselines, shall be the exclusive economic zone of the Republic.

(2) Subject to any other law the Republic shall have, in respect of all natural resources in the exclusive economic zone, the same rights and powers as it has in respect of its territorial waters.

⁴³ The Constitution provides as follows:

132(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.

⁴⁴ The Interpretation Act defines *Gazette* presently as follows:

'Gazette' –

- (a) in the case of laws, proclamations, regulations, notices or other documents published prior to the thirty-first day of May, 1910, and required under a law in force prior to that day to be published in the Gazette, means the Government Gazette of the Colony wherein that law was in force; and
- (b) in the case of laws, proclamations, regulations, notices or other documents published after the thirty-first day of May, 1910, and required under any law to be published in the Gazette, means the Government Gazette of the Republic or, if the matter is one entrusted to a provincial council under the Republic of South Africa Constitution Act 1961, means the Official Gazette of the province concerned;
- (c) in the case of laws, proclamations, regulations, notices or other documents published after the date of commencement of the Constitution and required under any law to be published in the Gazette or the Provincial Gazette or any other official Gazette, means the Government Gazette of the Republic or the relevant Provincial Gazette, according to whether the administration of the law concerned or, as the case may be, the law conferring the power to make or issue such a proclamation, regulation, notice or other document, vests in, or in a functionary of, the national government or a provincial government;

- 6.15.22 **"individual"**, with reference to a person, means a natural person;⁴⁵
- 6.15.23 **"juristic person"** means an entity, other than a natural person, having the capacity to perform legal acts and to sue or be sued in a court in its own name;⁴⁶
- 6.15.24 **"MEC"**, with reference to a province, means a member of the Executive Council of a province appointed by the Premier of the province in terms of section 132 (2) of the Constitution;
- 6.15.25 **"Minister"** means a Minister appointed by the President in terms of section 91 (2) of the Constitution;
- 6.15.26 **"month"** means a period which –
- (a) if it begins on the first day of a calendar month, ends at the end of the last day of that calendar month; or
- (b) if it begins on any other day during a calendar month, ends at the end of the day preceding the corresponding day in the next calendar month;⁴⁷
- 6.15.27 **"municipal by-law"** means legislation passed by –
- (a) a municipal council in terms of section 256 (2) of the Constitution; or
- (b) a municipality or other local authority before the Constitution took effect;
- 6.15.28 **"municipality"**, when referred to as –

⁴⁵ The Australian Capital Territory Legislation Act provides that "individual" means a natural person.

⁴⁶ The Higher Education Act 101 of 1997 and the Further Education and Training Act 98 of 1998 define *foreign juristic person* and *local juristic person* as follows:

'foreign juristic person' means a person –

- (i) registered or established as a juristic person in terms of a law of a foreign country; and
- (ii) recognised or registered as an external company in terms of the Companies Act, 1973 (Act 61 of 1973);

'local juristic person' means a person established as a juristic person in South Africa in terms of the Companies Act, 1973 (Act 61 of 1973);

⁴⁷ The Australian Commonwealth Acts Interpretation Act provides in section 22(1)(b) that *month* shall mean calendar month.

- (a) an entity, means a municipality as described in section 2 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000); and
- (b) a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998);⁴⁸

6.15.29 "name" –⁴⁹

- (a) in relation to a natural person, means that person's name as it appears on that person's birth certificate, identity document or passport or other official document from which that person's identity can be determined;⁵⁰ or
- (b) in relation to a person which is not a natural person, means –
 - (i) the name of the person registered in terms of legislation whether in the Republic or elsewhere, and includes any registered literal translation of that name into any official language of the Republic and any registered

⁴⁸ This definition is the same as the definition of *municipality* contained in the Local Government: Municipal Systems Act.

⁴⁹ The Interpretation Act defines *Christian name* and not *name*: 'Christian name' means any name prefixed to the surname, whether received at Christian baptism or not.

⁵⁰ The Identification Act 68 of 1997 provides for the following particulars to be included in the population register:

8 There shall in respect of any person referred to in section 3, be included in the population register the following relevant particulars available to the Director-General, namely-

- (a) his or her identity number referred to in section 7;
- (b) his or her surname, full forenames, gender, date of birth and the place or country where he or she was born;
- (c) if he or she has attained the age of 16 years, his or her ordinary place of residence and his or her postal address;
- (d) if he or she is a South African citizen but is not a citizen by birth or descent, the date of his or her naturalisation or registration as such a citizen, and, if he or she is an alien and was not born in the Republic, the date of his or her entry into the Republic, and the country of which he or she is a citizen;
- (e) the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage, and such other particulars concerning his or her marital status as may be furnished to the Director-General;
- (f) a recent photograph of himself or herself, if he or she has attained the age of 16 years;
- (g) his or her fingerprints, if he or she has attained the age of 16 years;
- (h) particulars concerning passports and travel documents granted to him or her;
- (i) after his or her death, the required particulars furnished when notice of his or her death was given, and on permanent departure from the Republic, the date of such departure, and particulars concerning the cancellation in the prescribed manner of his or her identity card or that card with the exception of the prescribed section thereof (if any); and
- (j) any other particulars determined by the Minister by notice in the Gazette as particulars which, subject to the conditions, exceptions or exemptions (if any) mentioned in the notice, shall be included in the register.

shortened form of that name or translation of that name; or⁵¹

- (ii) if the person has no such registered name, the name under which that person conducts its affairs;⁵²

6.15.30 “**oath**” means –

- (a) a confirmation of the truth of a statement by swearing to it; or
 (b) an affirmation;⁵³

6.15.31 “**ordinary post**” means the mail delivery service of the South African Post Office Ltd or any other postal service recognised or registered in terms of legislation;

6.15.32 “**Parliament**” means the Parliament of the Republic referred to in section 42(1) of the Constitution;

6.15.33 “**person**”⁵⁴ or any other word denoting a person, such as “**someone**”, “**anyone**”, “**no-one**”, “**nobody**”, “**one**”, “**another**” or “**whoever**”, means a natural or juristic person, and includes⁵⁵ –

⁵¹ The Births, Marriages and Deaths Registration Act 81 of 1963 (prior to repeal by Act 51 of 1992) provided that 'name' includes a surname, except in sections 8 and 9 where it does not include a surname. Section 8 dealt with the alteration of a person's name in the birth register and section 9 dealt with the prohibition of nameless birth registrations and amplification of certain nameless birth registrations. It provided in section 9(1) that no person's birth shall be registered unless a name has been assigned to him and subsection (3) provided that for the purposes of the section 'name' means the word or words by which a person is designated as an individual and which precede his surname.

⁵² The Interpretation of Legislation Act of Victoria provides that the "full name" and "proper full name", in relation to a [person](#) who has a Christian or other [given](#) name and a surname, mean the christian or other name [given](#) to that [person](#) and the surname of that [person](#). The Interpretation Act of British Columbia defines common names as follows: In an enactment, the name commonly applied to a country, place, body, corporation, society, officer, functionary, person, party or thing means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation of it. The Interpretation Act of Malta provides that "name" used in relation to an individual includes surname.

⁵³ The Defence Act 55 of 1957 provides that 'oath' includes a solemn declaration or affirmation. The Civil Aviation Offences Act 10 of 1972 provides that 'oath' includes an affirmation or declaration in the case of persons allowed by the law of any country concerned to affirm or declare instead of swearing.

⁵⁴ The Interpretation Act defines *person* as follows: 'person' includes-

(a) any divisional council, municipal council, village management board, or like authority;

- (a) a company, close corporation or co-operative incorporated or registered in terms of legislation whether in the Republic or elsewhere;
- (b) a body of persons corporate or unincorporated;
- (c) an estate of a deceased or insolvent person; or
- (d) a partnership, trust or trust fund,

but excludes an organ of state unless section 27 applies,⁵⁶

6.15.34 **"Premier"**⁵⁷ means the Premier of a province referred to in section 128 of the Constitution, and includes any acting Premier referred to in section 131 of the Constitution;

6.15.35 **"premises"** includes –⁵⁸

- (b) any company incorporated or registered as such under any law;
- (c) any body of persons corporate or unincorporated.

⁵⁵ The Australian Commonwealth Acts Interpretation Act provides in section 22(1)(a) that expressions used to denote [persons](#) generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual; and in 22(1)(aa) *individual* means a natural [person](#).

⁵⁶ The Local Government: Municipal Property Rates Act 6 of 2004 provides that 'person' includes an organ of state. The Financial and Intermediary Services Act 37 of 2002 provides that 'person' means any natural person, partnership or trust, and includes – (a) any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996); (b) any company incorporated or registered as such under any law; (c) any body of persons corporate or unincorporate. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that 'person' includes a juristic person, a non-juristic entity, a group or a category of persons. The National Forests Act 84 of 1998 provides that 'person' includes a juristic person and a community. The Water Act 36 of 1998 provides that 'person' includes a natural person, a juristic person, an unincorporated body, an association, an organ of state and the Minister. The National Forests Act 84 of 1998 provides that 'person' includes a juristic person and a community. It has been held that "the state" – that is, the government and government bodies on a level other than the local level – is not included in the definition of "person(s)" in section 2 of the Interpretation Act. De Ville is of the opinion that this is a consequence of the presumption that statutes do not bind the state. However, should it be accepted that the said presumption is inconsistent with the idea and practice of constitutional democracy, there is no reason to exclude the state as such (or organs of the state at all levels of government) from the Act's definition of "person".

⁵⁷ The Interpretation Act defines *Premier* as follows: 'Premier', with reference to a province, means the Premier of that province, including any acting Premier, acting in terms of the Constitution;

⁵⁸ The Meat Safety Act 40 of 2000 provides that 'premises' includes any building, structure, enclosure, land, road, harbour, jetty, quay or mooring. The Human Rights Commission Act 54 of 1994 provides that 'premises' includes land, any building or structure, or any vehicle, conveyance, ship, boat, vessel, aircraft or container. The Commission on Gender Equality Act 39 of 1996 provides that 'premises' includes

- (a) an erf,⁵⁹ plot, site, stand, smallholding, farm or other piece of land, whether surveyed or not; or
- (b) a building or other fixed structure, whether above or beneath the surface of the land;

6.15.36 **"President"**⁶⁰ means the President of the Republic referred to in section 86 of the Constitution, and includes any acting President referred to in section 90 of the Constitution,⁶¹

6.15.37 **"Prince Edward Islands"** means the Prince Edward Islands referred to in the Prince Edward Islands Act, 1948 (Act No. 43 of 1948),⁶²

land, any road, building or structure, or any vehicle, conveyance, ship, boat, vessel, aircraft or container. The Criminal Procedure Act 51 of 1977 provides that 'premises' includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft. The Basic Conditions of Employment Act 3 of 1983 provided (prior to its repeal by Act 75 of 1997) that 'premises' includes any building or structure, or part thereof, whether above or below the surface of the land or water, or any vehicle, vessel or aircraft.

⁵⁹ The Deeds Registries Act 47 of 1937 provides that 'erf' means every piece of land registered as an erf, lot, plot or stand in a deeds registry, and includes every defined portion, not intended to be a public place, of a piece of land laid out as a township, whether or not it has been formally recognized, approved or proclaimed as such. The Upgrading of Land Tenure Rights Act 112 of 1991 provides that 'erf', in relation to a township, means any surveyed or any informally demarcated unit in the township or, if a general plan has been prepared for the township, any unit indicated on such general plan as an erf, plot or stand. The Land Survey Act 8 of 1997 provides that 'erf' means any piece of land registered as an erf, lot, plot or stand in a deeds registry, and includes a stand or lot forming part of a piece of land laid out as, but not proclaimed, a township, or a portion of such erf, stand or lot.

⁶⁰ The Interpretation Act defines *President* as follows: 'President' means the President of the Republic, including any acting President, acting in terms of the Constitution;

⁶¹ Prior to 1994, it was held that "State President" means "State President acting by and under the advice of the Executive Council". Section 85(1) of the Constitution confirms this position, stating that the president "exercises the executive authority, together with the other members of the Cabinet". See Lourens du Plessis *Butterworths Bill of Rights Compendium Interpretation of Statutes and the Constitution* para 2C36. The Interpretation Act provides also that 'State President' means, subject to section 232 (1) (c) of the Constitution, the President or the Premier of a province. Du Plessis notes that the Constitution referred to is the transitional Constitution. Section 232(1)(c) of that Constitution dealt, inter alia, with references to the State President in preserved legislation existing immediately prior to 27 April 1994.

⁶² Section 1(1) of the Prince Edward Islands Act provides that the territory known as the Prince Edward Islands, consisting of Marion Island, situate latitude 46 53'S., longitude 37 45' E., and Prince Edward Island, situate latitude 46 36'S., longitude 37 57'E. (hereinafter called the Territory) is hereby declared to have been annexed to and to form part of the Union of South Africa. See also section 4 which provides that no Act of the Union Parliament passed after the date of commencement of this Act shall apply to the Territory, unless by such Act it is specifically expressed so to apply or unless it is declared to apply by proclamation of the Governor-General.

6.15.38 **"province"**⁶³ means any of the nine provinces of the Republic listed in section 103 of the Constitution;⁶⁴

6.15.39 **"provincial Act"** means an Act passed by a provincial legislature;

6.15.40 **"public holiday"** means a day declared as a public holiday⁶⁵ in terms of national legislation;⁶⁶

6.15.41 **"record"**⁶⁷ means information preserved, kept or stored regardless of the form in or medium by which it is preserved, kept or stored;⁶⁸

⁶³ The Interpretation Act refers to the 1993 Constitution in defining *province*: 'province'-

(a) in the case of a law referred to in section 229 of the Constitution, means a province of the Republic as it existed immediately before the commencement of the Constitution;

(b) in the case of a law passed or made after the commencement of the Constitution, or passed or made before such commencement, but with reference to the Constitution, means a province of the Republic referred to in section 124 (1) of the Constitution.

Section 229 of the 1993 Constitution provided as follows – "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority".

⁶⁴ Du Plessis states that provinces, for purposes of retaining laws that were in force immediately prior to 27 April 1994 in any area presently forming part of the national territory, are provinces as they existed under the 1983 Constitution. In the case of laws passed since the commencement of the transitional Constitution (including laws passed after the commencement of the 1996 Constitution), a "province" is one of the nine provinces as constitutionally defined.

⁶⁵ The Basic Conditions of Employment Act 75 of 1997 provides that 'public holiday' means any day that is a public holiday in terms of the Public Holidays Act, 1994 (Act 36 of 1994). The Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court provides that 'public holiday' means a public holiday referred to in section 1 of the Public Holidays Act, 1994 (Act 36 of 1994), or a day proclaimed as a public holiday under section 2 of that Act.

⁶⁶ The Public Holidays Act 36 of 1994 provides that 'public holidays' means the days mentioned in Schedule 1 and any other day declared to be a public holiday under section 2A.

⁶⁷ The National Archives Act 43 of 1996 defines *record* and *recording* as follows: 'record' means recorded information regardless of form or medium; 'recording' means anything on which sounds or images or both are fixed or from which sounds or images or both are capable of being reproduced, regardless of form. The Promotion of Access to Information Act 2 of 2002 defines record as follows: 'record' of, or in relation to, a public or private body, means any recorded information – (a) regardless of form or medium; (b) in the possession or under the control of that public or private body, respectively; and (c) whether or not it was created by that public or private body, respectively.

⁶⁸ The British Columbia Interpretation Act provides that "*record*" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other

6.15.42 **"state"** includes all organs of state in all three spheres of government referred to in section 40(1) of the Constitution, including all constitutional institutions;

6.15.43 **"territorial waters"** has the meaning assigned to it in the Maritime Zones Act, 1994 (Act No. 15 of 1994);⁶⁹

6.15.44 **"the Republic"**,⁷⁰ when referred to as –

- (a) a state, means the Republic of South Africa referred to in section 1 of the Constitution; or
- (b) a geographic area, means the territory of the Republic of South Africa including its territorial waters;

6.15.45 **"vehicle"** means –

- (a) any motor car, van, truck, trailer, motor cycle, wagon, cart, cycle, wheelbarrow or other means of conveyance of any kind whatsoever capable of moving on land, whether self-propelled or not, including its fittings, furnishings and equipment; or

thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise.

⁶⁹ 4 Territorial waters

(1) The sea within a distance of twelve nautical miles from the baselines shall be the territorial waters of the Republic.

(2) Any law in force in the Republic, including the common law, shall also apply in its territorial waters and the airspace above its territorial waters.

(3) The right of innocent passage shall exist in the territorial waters.

⁷⁰ The Interpretation Act provides that 'the Republic' means, subject to section 232 (1) (a) of the Constitution, the territorial limits of the Republic of South Africa referred to in section 1 of the Constitution. Note, however that the Interpretation Act refers to the 1993 Constitution which provided in section 232(1) as follows: Unless it is inconsistent with the context or clearly inappropriate, a reference in a law referred to in section 229 –

- a. to the Republic or to any territory which after the commencement of this Constitution forms part of the national territory –
 - i. as a constitutional institution, shall be construed as a reference to the Republic referred to in section 1; or
 - ii. as a territorial area, shall be construed as a reference to that part of the national territory in which the law in question was in force immediately before such commencement, unless such law is applied by a law of a competent authority to the whole or any part of the national territory;

Section 1(2) of the 1993 Constitution provided that the national territory of the Republic shall comprise the areas defined in Part 1 of [Schedule 1](#).

- (b) any pack animal, including its harness and tackle, but excludes any aircraft, vessel or railway train;

6.15.46 **"vessel"** means a craft of any kind whatsoever, including a hovercraft, capable of moving in, on or under water, whether self-propelled or not, and includes the fittings, furnishings and equipment of such craft, but excludes a permanently moored floating structure which is not a ship or a boat;⁷¹

6.15.47 **"working day"** means any day except a Saturday, Sunday or public holiday;

6.15.48 **"week"** means a period of seven consecutive days;⁷²

6.15.49 **"word"** includes any lettering, figure, character or symbol;⁷³

6.15.50 **"writing"**⁷⁴ means expressing words in a visible form, whether by means of handwriting, type-writing, electronic word processing, printing,

⁷¹ The Sea Fishery Act 12 of 1988 provides that 'vessel' means any water-navigable craft of any type whatsoever, whether self-propelled or not. The National Parks Act 57 of 1976 provides that 'vehicle' means any conveyance which can be used for the transportation of persons or goods on land, whether such conveyance is self-propelled or not; 'vessel' means any conveyance which can be used for the transportation of persons or goods on, in or over water, whether such conveyance is self-propelled or not; The National Environmental Management Act 107 of 1998 after amendment by the National Environmental Management Amendment Act 46 of 2003 provides that 'vessel' means any waterborne craft of any kind, whether self-propelled or not, but does not include any moored floating structure that is not used as a means of transporting anything by water.

⁷² The Unemployment Insurance Act 63 of 2001 provides that 'week' means any period of seven consecutive days.

⁷³ The British Columbia Interpretation Act provides as follows: "*words*" includes figures, punctuation marks, and typographical, monetary and mathematical symbols. It further provides that "*writing*", "*written*", or a term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form. The Northern Territory Interpretation Act provides in section on references to writing that in an Act, words, expressions and provisions referring to writing shall be construed as including references to any mode of representing or reproducing words, figures or symbols in a visible form whether or not an optical, electronic, mechanical or other means or process must be used before they can be perceived. In the Australian Discussion Paper the following was stated in para 3.76: "It might be thought that as we move towards paper-less offices and as delegations of authority within government are, for example, conveyed electronically, and secure electronic 'identifiers' become common, provision should be made to ensure that the definition of 'writing' covers particular forms of electronic message-conveying".

⁷⁴ Section 3 of the Interpretation Act provides as follows on the interpretation of expressions relating to writing. – In every law expressions relating to writing shall, unless the contrary appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in

photocopying, telegraphic or electronic messaging, faxing, photographing, filming or any other medium;⁷⁵

C. DEFINITIONS IN OLD ORDER LEGISLATION

6.16.1 The following concern was raised at the expert meetings: a term not defined in the new Act but defined in old-order legislation would have the definition as in the old Interpretation Act which would be repealed. It was suggested that the old-order legislation definitions be included in a schedule to the new Act alternatively that they be included in a section of the new Interpretation Act since they would be more easily accessible.

6.16.2 The drafters of the New Zealand Interpretation Act, 1999 faced a similar problem.⁷⁶ They decided to include a provision in the new Act in which they listed definitions in enactments passed before commencement of the 1999 Act. (Section 30 of the New Zealand Interpretation Act, 1999 retains certain definitions contained in the Acts Interpretation Act, 1924.) These definitions apply only to Acts passed or regulations made before the new Interpretation Act of 1999. Section 30 of the New Zealand Act reads as follows:

30 Definitions in enactments passed or made before commencement of this Act

In an enactment passed or made before the commencement of this Act, -

Act includes rules and regulations made under the Act:

constable includes a police officer of any rank:

Governor means the Governor-General:

land includes messuages, tenements, hereditaments, houses, and buildings, unless there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure:

visible form. Section 12 of the Electronic Communications and Transactions Act 25 of 2002 states: that a requirement in law that a document or information must be in writing is met if the document or information is – (a) in the form of a data message; and (b) accessible in a manner usable for subsequent reference.

⁷⁵ The New Zealand Interpretation Act provides that *writing* includes representing or reproducing words, figures or symbols – (a) in a visible and tangible form by any means and in any medium: (b) in a visible form in any medium by electronic means that enables them to be stored in permanent form and be retrieved and read.

⁷⁶ New Zealand Legislative Advisory Committee *Guidelines on Process and content of Legislation 2001 edition* (accessed 20 September 2004) http://www.justice.gov.nz/lac/pubs/2001/legislative_guide_2001/chapter_3.htm p 41.

person includes a corporation sole, and also a body of persons, whether corporate or unincorporate.

6.16.3 The Commission is of the view that there is no need for the inclusion in the Bill of a section containing the old-order definitions which apply to legislation passed before the commencement of the new Act. The Commission considers that this aspect is sufficiently dealt with in the Constitution in Schedule 6, Item 3:

3 Interpretation of existing legislation

(1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect –

- (a) to the Republic of South Africa or a homeland (except when it refers to a territorial area), must be construed as a reference to the Republic of South Africa under the new Constitution;
- (b) to Parliament, the National Assembly or the Senate, must be construed as a reference to Parliament, the National Assembly or the National Council of Provinces under the new Constitution;
- (c) to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed as a reference to the President, the Deputy President, a Minister, a Deputy Minister or the Cabinet under the new Constitution, subject to item 9 of this Schedule;
- (d) to the President of the Senate, must be construed as a reference to the Chairperson of the National Council of Provinces;
- (e) to a provincial legislature, Premier, Executive Council or member of an Executive Council of a province, must be construed as a reference to a provincial legislature, Premier, Executive Council or member of an Executive Council under the new Constitution, subject to item 12 of this Schedule; or
- (f) to an official language or languages, must be construed as a reference to any of the official languages under the new Constitution.

(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation –

- (a) to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or of a homeland, must be construed as a reference to –
 - (i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
 - (ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or

- (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or of a homeland, must be construed as a reference to –
 - (i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
 - (ii) the Premier of a province under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.

6.16.4 It is proposed that the following proviso be included in the Bill to qualify the preceding definitions:

- (2) Subsection (1) must be read subject to Item 3 of Schedule 6 of the Constitution.

D. DERIVATIVES AND OTHER GRAMMATICAL FORMS OF DEFINED WORDS AND EXPRESSIONS

6.17 The expression “corresponding meaning” appears many times in the statute book. In the Promotion of Access to Information Act⁷⁷ transfer is described as follows:

'transfer', in relation to a record, means transfer in terms of section 20 (1) or (2), and 'transferred' has a corresponding meaning;

6.18 Prescribe is defined as follows in the Electoral Act.⁷⁸

'prescribe' means prescribe by regulation in terms of section 100 and 'prescribed' has a corresponding meaning;

6.19 Sell is defined as follows in the Hazardous Substances Act.⁷⁹

'sell' includes offer, advertise, keep, display, transmit, consign, convey or deliver for sale, or exchange, or dispose of to any person in any manner, whether for a consideration or otherwise, or manufacture or import for use in the Republic; and 'selling' and 'sale' have a corresponding meaning;

6.20 This repetition could be avoided by the use of a provision similar to that that is used in the New Zealand Interpretation Act 1999. Section 32 of that Act provides that parts of speech and grammatical forms of a word that is defined in an enactment have corresponding meanings in the same enactment.

⁷⁷ Act No 2 of 2000.

⁷⁸ Act No 73 of 1998.

⁷⁹ Act No 15 of 1973.

6.21 Section 4(1) of the *Zambian Interpretation and General Provisions Act* provides as follows:

4.(1) Where any word or expression is defined in a written law, the definition shall extend to the grammatical variations of the word or expression so defined.

6.22 Section 33(3) of the *Canadian Federal Interpretation Act* provides as follows on other parts of speech and grammatical forms of the same word:

(3) Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.

6.23 The *Interpretation Act of New Brunswick* provides similarly in section 22(i) *that* where a word is defined, other parts of speech and tenses of the same word shall have corresponding meanings.⁸⁰ The *Interpretation Act of Malta* also provides in section 4(a) that the definition of any word or expression shall extend to all grammatical variations and to cognate expressions of the word or expression so defined.⁸¹ The *Revised Ordinances of Honolulu* provides in section 27-2.1 that for the purpose of the code, certain terms, phrases, words and their derivatives shall be construed as specified in either the chapter or as specified in the building code, and where terms are not defined, they shall have their ordinary accepted meanings within the context with which they are used.⁸² The *Municipal Code of the City of South Milwaukee* provides similarly in section 16.06 that for the purpose of the code, certain terms, phrases and words and their derivatives shall be construed as set out therein.

6.24 The inclusion of a provision dealing with derivatives and other grammatical forms of defined words and expressions would mean that it would no longer be necessary to state in a definition of a word that a word or expression which is a derivative or other grammatical form of a word or expression defined in legislation, has a corresponding meaning. The following clause is proposed:

⁸⁰ The *Interpretation Act of Newfoundland* contains a similar provision in section 22(i) under the heading *implied powers*: “Where a word is defined, other parts of speech and tenses of the same word have corresponding meanings”.

⁸¹ The *Interpretation and General Provisions Act of the Solomon Islands* provides in section 11 that where a word or an expression is defined in an Act for any purpose then for that purpose all grammatical variations and cognate and related expressions are to be understood in the same sense.

⁸² It provides further that Webster's Third New International Dictionary of the English Language, Unabridged, copyright 1986, shall be considered as providing ordinary accepted meanings. Words in the singular include the plural and the plural the singular. Words used in the masculine gender include the feminine and the feminine the masculine.

Derivatives and other grammatical forms of defined words and expressions

26. A word or expression which is a derivative or other grammatical form of a word or expression defined in legislation, including this Act, has a corresponding meaning in the same legislation.

E. REFERENCE TO “PERSON” INCLUDES REFERENCE TO ORGAN OF STATE

6.25 It is proposed that a provision be included in the Bill setting out that a reference to a person includes a reference to an organ of state:

27. A reference in any legislation to a “**person**” or to any other word denoting a person, such as “**someone**”, “**anyone**”, “**no-one**”, “**nobody**”, “**one**”, “**another**” or “**whoever**”, includes a reference to an organ of state if the provision which contains the reference binds the state or is otherwise applicable to that organ of state.

F. GENDER

6.26 Section 6(a) of the Interpretation Act, 1957 reads as follows:

6. Gender... – In every law, unless the contrary intention appears –
- (a) words importing the masculine gender include females;

6.27 This clause allowed drafters to use the masculine gender only in legislation prior to 1994. The statement that words importing the masculine gender include females can be regarded as supporting the traditional view that it is acceptable for women to be subsumed within men linguistically.⁸³ The enactment of legislation in masculine language has been perceived as contributing to the perpetuation of a male-oriented society in which women are seen as having a lower status and value. It has been argued that the general use of masculine nouns and pronouns “implies that personality is really a male attribute and that women are a sub-species”.⁸⁴

6.28 Discrimination founded on gender or sex was a serious concern of the drafters of the Constitution. This was made clear by the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mindset and statutory drafting style.⁸⁵ Furthermore, section 9(3) of the Constitution reads as follows:

⁸³ New Zealand Law Commission Report No 17 para 425.

⁸⁴ Thornton *Legislative Drafting* 74.

⁸⁵ See *President of the Republic of South Africa v Hugo* 1997 (1) SA 1 CC, para 73 “. . . the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mindset and statutory drafting style (sanctified by s 6(a) of the

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

6.29 There is still old-order-legislation on the statute books which refers only to the masculine gender. The current provision is therefore still necessary. If section 6 (a) is removed from the Interpretation Act this old-order legislation will not apply to women.⁸⁶ However, the provision is not acceptable in its present form. The New Zealand Law Commission concluded that a similar provision was necessary because much of their statute book referred only to the masculine gender. It therefore recommended that the provision should be redrafted to read “words denoting a gender include each other gender”.⁸⁷

6.30 Current drafting practice requires legislation to be drafted in a gender-neutral style. Lawmakers in many jurisdictions have accepted that sexist language offends the sensitivities of many women.⁸⁸ It is accepted that sexist language is objectionable. Thornton⁸⁹ thus suggests that legislation should treat men and women equally and that gender-neutral legislation should become the general rule.

6.31 However, situations still arise where drafters are not complying with the direction to draft in a gender-neutral style. In November 2000 the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women complained that although the policy and practice of Parliament was to draft the Constitution and all Bills in a gender-sensitive manner, the Banks Amendment Bill failed to meet this standard. The joint committee called on the Finance Ministry to ensure that its drafters formulated all finance Bills in a gender-sensitive manner in line with the

Interpretation Act 33 of 1957) which used the masculine gender only”. See for example section 10 and 13 of the 1993 Constitution which provide as follows on human dignity and privacy respectively: “every person shall have the right to respect for and protection of his or her dignity”; and “every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications”. Note however that sections 10 and 14 of the 1996 Constitution was drafted in gender neutral language: “everyone has inherent dignity and the right to have their dignity respected and protected”; and “everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed”.

86 *S v Mafunisa* 1986 (3) SA 495 (V).

87 Section 22 of the Draft Interpretation Act contained in New Zealand Law Commission Report No 17.

88 Thornton *Legislative Drafting* 74.

89 *Ibid* 75.

Constitution. The committee also urged the Justice Ministry to amend the relevant section of the Interpretation Act as a matter of urgency.

6.32 In 2000 a practice manual for legislative drafting was compiled by the State Law Advisers of the Department of Justice and Constitutional Development in which it is stated that “it seems preferable that legislation should treat men and women equally and that gender-neutral legislation should become the general rule”.⁹⁰ A number of methods are recommended for framing legislation so that it is gender-neutral.

6.33 The matter of gender sensitivity was also considered in the Australian Discussion Paper on the Interpretation Act.⁹¹ The House of Representatives Committee believed that legislative drafting should ensure that women are not “invisible” in the law and that interpretation legislation should require phasing in of use of words of appropriate gender in all legislation. The Committee recognised, however, that it would help keep legislation simpler if interpretation legislation were to extend the meaning of words of either feminine or masculine gender to include equivalent meanings in the neuter gender. That would allow pronouns for “person”, which is defined by the Australian Interpretation Act to include a body corporate as well as a natural person, to be limited to “he or she” rather than “he, she or it”. The Committee recommended that Commonwealth interpretation legislation should provide that in all principal legislation made after 1 January 1994, or legislation amending principal legislation made after 1 January 1994, words of masculine or feminine gender include the neuter gender, but words of masculine gender do not include the feminine gender and words of feminine gender do not include the masculine gender.

6.34 It was further observed⁹² that the current Commonwealth drafting policy of using both feminine and masculine pronouns in all legislation was rarely, if ever, breached although no legal consequences then attached to such a breach. However, if the Australian Interpretation Act were amended as recommended by the House of Representatives Committee, a failure to use both feminine and masculine pronouns would have real legal consequences: the legislation would have to be interpreted as not applying to members of the sex not identified. Inadvertent

90 *Practice Manual for Legislative Drafting* 190.

91 Para 3.74 of the Discussion Paper.

92 At para 3.75 of the Discussion Paper.

omissions of relevant pronouns could cause considerable embarrassment, or worse, and would have to be corrected quickly (sometimes retrospectively).

6.35 Section 31 of the New Zealand Interpretation Act of 1999 reads as follows:

31 Use of masculine gender in enactments passed or made before commencement of this Act

In an enactment passed or made before the commencement of this Act, words denoting the masculine gender include females.

6.36 In a commentary to the Act the New Zealand legislative advisory committee states that this section only applies to enactments made or passed before 1 November 1999.⁹³ In enactments passed after the new Interpretation Act of 1999, there are no rules regarding the meaning of gender-specific terms. This is because these rules are not needed as New Zealand legislation is drafted in gender-neutral language. For enactments passed or made after 1 November 1999, gender-specific terms will have their ordinary meaning.

6.37 The South Australian Acts Interpretation Act of 1915 provides as follows:

26. Words importing masculine gender and singular number to include feminine and plural

26. In every Act –

- (a) every word of the masculine gender will be construed as including the feminine gender;
- (ab) every word of the feminine gender will be construed as including the masculine gender;
- (b) every word in the singular number will be construed as including the plural number;
- (c) every word in the plural number will be construed as including the singular number;
- (d) every word in either of those genders or numbers will be construed as including a body corporate as well as an individual;
- (e) every phrase consisting of a masculine pronoun and a feminine pronoun joined by the conjunction "or" will, if the antecedent is capable of referring to a body corporate, be construed as applicable to a body corporate as well as a natural [person](#).

93 New Zealand Legislative Advisory Committee *Guidelines on Process and content of Legislation 2001* available at http://www.justice.gov.nz/lac/pubs/2001/legislative_guide_2001/chapter_3.html (accessed on 20 September 2004).

6.38 The Rules of the Senate of the State of New York of 2005-2006 provides in the Preamble that in the construction or interpretation of any provision or part of the rules, use of words of the masculine gender shall include the feminine and the neuter; and, when the sense so indicates, words of the neuter gender may refer to any gender. The USA Uniform Commercial Code provides that words of the masculine gender include the feminine and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.⁹⁴

6.39 At the expert meeting in Durban, Professor Devenish expressed the view that the drafting of legislation in gender-neutral language was a fundamental constitutional imperative and that we therefore had no choice but to include a provision as in the Australian and New Zealand Interpretation Acts. The contrary view was expressed by some of the experts who felt that this was too prescriptive and that the rule that legislation should be drafted in gender-neutral language should be contained in the drafting manual and not included in the new Interpretation Act.

6.40 The Commission proposes the following provision:

Gender

28. In any legislation a word denoting the masculine, feminine or neuter gender includes the other genders.

G. NUMBER

6.41 Section 6(b) of the Interpretation Act, 1957 reads as follows:

words in the singular number include the plural, and words in the plural number include the singular.

6.42 This provision is not contentious and has been referred to with approval in a number of decided cases, including *Gcilitshana v General Accident Insurance Co SA Ltd*.⁹⁵ Here the court decided that although section 7(a) of the Workmen's Compensation Act referred to the term "such workman's employer", as no contrary intention appeared in the Workmen's Compensation Act, section 6(b) of the

⁹⁴ The Texas Legislative Council drafting manual similarly notes that the masculine gender includes the feminine and neuter genders. The General Laws Of Massachusetts provide in Chapter 4, section 6 that words of one gender may be construed to include the other gender and the neuter. Section 22 of the USA General Construction Law provides that words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons; and, when the sense so indicates, words of the neuter gender may refer to any gender."

⁹⁵ 1985 (2) SA 367 (C).

Interpretation Act applied and extended the term to refer not only to the case where there happened to be a single employer, but to apply equally to a workman who was employed by several employers jointly or jointly and severally.

6.43 The South Australian Acts Interpretation Act of 1915 provides as follows:

26. In every Act –

...

(b) every word in the singular number will be construed as including the plural number;

(c) every word in the plural number will be construed as including the singular number;

6.44 The Commission proposes the following provision:

Number

29. In any legislation a word denoting the singular includes the plural and a word denoting the plural includes the singular.

H. WORDS AND EXPRESSIONS IN ASSIGNED OR SUBORDINATE LEGISLATION

6.45 The Commission considers that there is also a need to deal with the meaning of a word or expression used in assigned or subordinate legislation and which is defined in the legislation enabling such assigned or subordinate legislation. The following provision is proposed:

Words and expressions in assigned or subordinate legislation

30. (1) A word or expression used in assigned or subordinate legislation and which is defined in the legislation enabling such assigned or subordinate legislation has the meaning ascribed to it in the enabling legislation.

(2) Subsection (1) does not preclude assigned or subordinate legislation from having a different definition for a word or expression defined in the enabling legislation provided that such different definition falls within the scope of the enabling legislation.

(3) A reference in subordinate legislation to “the Act” must be read as a reference to the enabling legislation in terms of which that subordinate legislation was enacted.

I. PRODUCTION OF RECORDS KEPT IN COMPUTERS

6.46 Section 25A of the Australian Acts Interpretation Act of 1901 states

25A Production of records kept in computers etc.

Where a person who keeps a record of information by means of a mechanical, electronic or other device is required by or under an Act to produce the information or a document containing the information to, or make a document containing the information available for inspection by, a court, tribunal or person, then unless the court, tribunal or person otherwise directs, the requirement shall be deemed to oblige the person to produce or make available for inspection, as the case may be, a writing that reproduces the information in a form capable of being understood by the court, tribunal or person, and the production of such a writing to the court, tribunal or person constitutes compliance with the requirement.

6.47 Section 17 of the ECT Act provides for production of a document or information in electronic form.

6.48 The Commission recommends that a provision in this regard should not be included in the Interpretation Act. Production of records in computers is dealt with adequately in the ECT Act and in the law of evidence.

J. WORDS AND PHRASES

6.49 A number of countries have included provisions in their Interpretation Acts in relation to the interpretation of words and phrases. Chapter 19 of the Pennsylvania Consolidated Statutes dealing with Rules of Construction states as follows:

§1903. Words and phrases

(a) General rule – Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.

(b) General restricted by particular words – General words shall be construed to take their meaning and be restricted by preceding particular words.

6.50 The South Dakota Codified Laws and Constitution states:

23A-6-17. Words used in an indictment or information shall be interpreted according to their usual meaning in common language, except words and phrases defined by law, which shall be interpreted according to their legal meaning.

6.51 Chapter 19 of the Pennsylvania code contains the following provision in regard to tense:

§1902. Tense

Words used in the past or present tense shall include the future.

6.52 The general feeling at the expert meetings was that the inclusion of any of these provisions would be an attempt to codify the rules of interpretation. The Commission therefore proposes that provisions which set out basic guidelines with

regard to the interpretation of words and phrases should not be included in the new Interpretation Act.

CHAPTER 7

RECKONING OF TIME AND MEASUREMENT OF DISTANCE

A. INTRODUCTION

7.1 It is essential to have certainty about the time of expiry of a period prescribed by law. Many statutory and contractual regulations and clauses prescribe a time or period within which or after which certain actions are to begin, or be executed, abandoned or completed. Failure to comply with these provisions may adversely affect the rights of the parties concerned. A number of terms are used for ascertaining time or periods of time, such as reckoning, limitation, computation, construction and calculation of time. It is proposed that the term *reckoning of time* should be used in this paper and the Bill.

7.2 The reckoning of time periods for matters such as service, notice and appeal is of critical importance and can be a vexing exercise. Much uncertainty still exists in this regard. The purpose of a provision governing the reckoning of time is to establish a uniform method of reckoning any period of time prescribed or allowed by statute or by order of a court. A time reckoning provision is to be applied uniformly to all questions of time reckoning unless the terms of the statute specify another method. Where the rules of the Magistrate's or High Court specify other methods of reckoning time for filing or service of documents, the method in the Interpretation of Legislation Bill will not be applicable.

B. METHODS OF RECKONING TIME

7.2 In South Africa there are several recognised methods for the reckoning of time. Where the period is referred to in days,¹ section 4 of the Interpretation Act governs the calculation of time. Section 4 states:

4 Reckoning of number of days

When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

¹ The former Interpretation Acts were identical in this respect. With regard to their applicability see *Joubert v Enslin* 1910 AD 25 (Act 5 of 1883) and *Swarts v Minister of Justice* 1940 TPD 210 (Act 5 of 1910).

7.3 Section 4 will not apply where a contrary intention appears from the statute sought to be interpreted. In the case of *Thomas v Liverpool & London & Globe Insurance Co of SA Ltd* 1968 (4) SA 141 (C) the court considered whether section 4 of the Act should be applied to the reckoning of the period of 60 days referred to in sections 11(2)(a) and 11bis(2) of the Motor Vehicle Insurance Act 29 of 1942. The court found that the application of section 4 of the Act would lead to an anomalous situation and would be contrary to the general approach in relation to the suspension of prescription and to the intention underlying the relevant provisions of Act 29 of 1942. Section 1 of the Act therefore applied and the ordinary civil method was to be applied to the reckoning of the days. This decision was confirmed in the case of *South African Mutual Fire and General Insurance Co Ltd v Fouche en 'n ander* 1970 (1) SA 302 (A).

7.4 Where section 4 does not apply, our courts have accepted that the ordinary civil method of reckoning must be applied. In terms of the ordinary civil method, (*computatio civilis*), the first day of the prescribed period is included and the last day excluded. The time is calculated *de die in diem*, ie from the first moment of the day of the relevant event to the first moment of the last day of the relevant period².

7.5 The ordinary civilian method should not be departed from unless the language makes it clear that such departure was intended by the contracting parties or the law-giver.³ However, where the wording of a statute indicates a contrary intention the courts may adopt one of the following methods:

- (a) the natural method (*computatio naturalis*) where the prescribed time is reckoned from the hour (or even minute) of an occurrence to the corresponding hour or minute on the last day of the period in question (*de momento in momentum*);
- (b) the extraordinary civil method (*computatio extraordinaria*) where both the first and the last day are included in the computation;
- (c) the clear days method where both the first day and the last day are excluded.

² *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A); *Somdaka v Northern Assurance Co Ltd* 1961 (4) SA 764 (N).

³ *Kleynhans* (above) at 149.

7.6 In the case of *Makhutchi NO v Minister of Police* 1980 (2) SA 229 (W) the court considered the calculation of the one-month period prescribed in section 32(1) of the Police Act 7 of 1958. The section provided that “notice in writing of any civil action shall be given to the defendant one month at least before the commencement thereof”. The court held that the words “at least” and “before” gave a clear indication that the month should be exclusive of the date on which the action is instituted and the date on which the notice is given. The court concluded⁴ of the judgment that the correct method of computation, having regard to the language of the statute under consideration, was the clear days method. King J stated that:

Where words such as “clear days”, “not less than” or “before” are used it is indicative of an intention to exclude both the first and the last days in computing time in order to give the person concerned a clear and defined interval of time between the two days.

7.7 However, in the case of *Minister of Police v Subbulutchmi* 1980 (4) SA 768 (A), in which the method of computation of section 32(1) of the Police Act 7 of 1958 was again to be decided, the court held that the words “at least” read with the words “before the commencement thereof” did not sufficiently indicate an intention that the civil method of computation should not be applied. The civil method of computation was therefore applied.

7.8 In the case of *Pivot Point SA (Pty) Ltd v Registrar of Companies and another* 1980 (4) SA 74 (T) the court had to decide on the method of computation of the time period laid down in section 45 of the Companies Act 61 of 1973, which provides that the Registrar may “within one month after the date of such decision or order, apply to the Court for relief ...”. The court held that the language of the statute clearly indicated that the ordinary civil method of calculating time was not to be employed because of the phrase “after the *date* of such decision”. It held that it is usually accepted that a different intention is indicated when the word “after” is used in a statute. The court referred to the case of *Holmes v North Western Motors (Upington) Ltd* 1968 (4) SA 198 (C) at 204, where Corbett J referred to the case of *Versveld v SA Railways and Harbours* 1937 CPD 55. Here action under the statute had to be commenced “within 12 months after the cause of action arose”. The court held that the day upon which the cause of action arose should be excluded and the period should be reckoned to commence with the first instance of the following day. Watermeyer J said that if time is to run “from” a day or date or the occurrence of an

⁴ At page 234.

event, the instant would have to be determined either by the relevant intention or by rules of law, because the word “from” is ambiguous; the day or date from which the time runs or on which the event occurs from which time runs may or may not be included in the calculation. But he found that the word “after” is not ambiguous. If time is to run “after” a day or date, then clearly that day or date must be excluded from the reckoning of time.

7.9 The court referred to the statement made by Corbett J in *Holmes v North Western Motors (Upington) Ltd* 1968 (4) SA 198 (C)⁵:

The use of the word “after” in such cases is an important factor but not necessarily a decisive one. The provision in question must be examined in its general context in order to determine whether, in the case of a contract, the parties gave a definite indication of their intention.

7.10 Coetzee J concluded that the use of the phrase “after the *date* of such decision” clearly indicated that the ordinary civil method was not to be employed. The mention of date strongly suggested that the first day is to be excluded. If the phrase “after such decision” had been used it would not have been so decisive. A reference to an event rather than a date is not as decisive.

7.11 In the case of *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A), the court considered the computation of the period of time laid down in section 11(2) of the Motor Vehicle Insurance Act 29 of 1942. In terms of section 11(2), the right to claim compensation “prescribed upon the expiration of a period of two years as from the day of which the claim arose”. The accident occurred on 6 March 1954. Summons was served on 6 March 1956. The court held that the civil method was to be applied and that the action had prescribed as the summons should have been served before the end of the day on 5 March 1956. In a dissenting judgment, Steyn JA and De Beer JA held that the wording of the section indicated that the claimant was entitled to a full two-year period to institute action and that the two year period was not complete until the end of the day on 6 March 1956.

7.12 In the case of *Azisa (Pty) Ltd v Azisa Media CC and another* 2002 (4) SA 377 (C) the court considered the correct method of reckoning time where section 20(2)(b) of the Close Corporations Act 69 of 1984 specified that an application was to be brought “within a period of two years after registration of founding statement”. The court found that the use of the word “after” meant that the first day must be excluded.

⁵ At page 204.

7.13 The court criticised the civil method of computation. The court referred to the views of Hathorn JP expressed in the case of *Nair v Naicker* 1942 NPD 3 as follows:

It is regrettable that the law relating to the computation of time is still uncertain, although it has been discussed for centuries. Fortunately, however, certainty is gradually obtaining a foothold in South Africa. I regard s 5 of the Interpretation Act, 1910, as a godsend to lawyers who have to advise their clients in cases falling within its terms, though unfortunately its scope is limited to the computation of days, while *Joubert v Enslin* 1910 AD 6, holds a similar position in the realm of contract.

7.14 Nel J stated (at page 389) of the *Azisa* judgment that it was gratifying to come to the conclusion that the first day was to be excluded, as

it is in accordance with the views of the Courts in countries such as the United States of America. It also obviates the need to fall back upon the so-called civil method of computation of time. This was a method used by a largely illiterate and fairly primitive society who did not know the numeral 'nought' or 'zero', and who had to use fingers, pebbles in the sand or the abacus to record time. Hence the practical necessity to record the day on which an event had occurred by using the first finger or by placing the first pebble. The more literate members of the society counted backwards and included both the first and the last days in their computation of time.

7.15 The interpretation statutes of the majority of foreign jurisdictions refer to "reckoning of a period of time" rather than to "reckoning of a particular number of days" as our Interpretation Act does. The New Zealand Interpretation Act provides as follows:

- (1) A period of time described as beginning at, on, or with a specified day, act, or event includes that day or the day of the act or event
- (2) A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.
- (3) A period of time described as ending by, on, at, or with, or as continuing to or until, a specified day, act, or event includes that day or the day of the act or event
- (4) A period of time described as ending before a specified day, act, or event does not include that day or the day of the act or event.
- (5) A reference to a number of days between 2 events does not include the days on which the events happened.
- (6) A thing that, under an enactment, must or may be done on a particular day or within a limited period of time may, if that day or the last day of that period is not a working day, be done on the next working day.

7.16 Section 36(1) of the Australian Interpretation Act 1901 reads as follows:

- (1) Where in an Act any period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.

7.17 Section 151 of the Australian Capital Territory Legislation Act of 2001 reads as follows:

151 Reckoning of time (IA s 36)

- (1) This section applies if a period is provided or allowed for a purpose by an Act or statutory instrument.

- (2) In working out whether the purpose has been fulfilled within the period provided or allowed, the period is taken to begin at the start point.
- (3) For this section—
- (a) if a period is to begin from a particular day—the **start point** is the beginning of the next day; and
- (b) if a period is to begin when an act or event happens—the **start point** is the beginning of the day after the act or event happens.

Examples

1 The *ABC Act 1995* provides that a person who ceases to be an inspector must return his or her identity card to the authority within 21 days after ceasing to be an inspector. X is notified that his appointment as inspector ends on Friday 1 November. The period of 21 days starts on Saturday 2 November.

2 The *XYZ Act 2001* requires an application for review to be lodged not later than 28 days after service on the licensee of the decision objected to. The period of 28 days begins with the day following the day of service.

7.18 The Interpretation Act of New South Wales provides as follows:

36 Reckoning of time

(1) If in any Act or [instrument](#) a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall be reckoned exclusive of that day or of the day of that act or event.

(2) If the last day of a period of time prescribed or allowed by an Act or [instrument](#) for the doing of any thing falls:

- (a) on a Saturday or Sunday, or
- (b) on a day that is a public holiday or bank holiday in the place in which the thing is to be or may be done,

the thing may be done on the first day following that is not a Saturday or Sunday, or a public holiday or bank holiday in that place, as the case may be.

(3) If in any Act or [instrument](#) a period of time is prescribed or allowed for the doing of any thing and a power is conferred on any person or body to extend the period of time:

- (a) that power may be exercised, and
- (b) if the exercise of that power depends on the making of an application for an extension of the period of time—such an application may be made,

after the period of time has expired.

7.19 Section 27 of the Canadian Federal Interpretation Act states:

(3) Where a time is expressed to begin or end at, on or with a specified day or to continue to or until a specified day, the time includes that day.

(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

7.20 The Queensland Acts Interpretation Act of 1954 contains the following provisions:

38 Reckoning of time

(1) If a period beginning on a given day, act or event is provided or allowed for a purpose by an Act, the period is to be calculated by excluding the day, or the day of the act or event, and –

- (a) if the period is expressed to be a specified number of clear days or at least a specified number of days - by excluding the day on which the purpose is to be fulfilled; and
- (b) in any other case - by including the day on which the purpose is to be fulfilled.

(2) If the time, or last day of a period, calculated forwards that is provided or allowed by an Act for doing anything falls on an excluded day, the time, or last day, is taken to fall on the next day later that is not an excluded day.

(3) If the time, or earliest day of a period, calculated backwards that is provided or allowed by an Act for doing anything falls on an excluded day, the time, or earliest day, is taken to fall on the next day earlier that is not an excluded day.

(4) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens.

(5) In this section –

"excluded day" –

- (a) for filing or registering a document--means a day on which the office is closed where the filing or registration must or may be done; or
- (b) otherwise--means a day that is not a business day in the place in which the thing must or may be done.

7.21 The German Civil Code makes detailed provision in sections 187 to 193 on how to reckon periods of time which are applicable to dates and periods contained in statutes, court orders and legal transactions⁶. With regard to the beginning and end of a period, sections 187 and 188 are relevant:

§ 187. [Beginning of running of period]

(1) If a period begins to run from an event or a point of time occurring during the course of a day, then in computing the period the day in which the event or the point of time occurs is not counted.

(2) If the beginning of a day is the point of time from which a period begins to run, then this day is counted in computing the period. The same rule applies to the day of birth in the computing of age.

§ 188. [End of period]

(1) A period determined by days ends with the expiration of the last day of the period.

(2) A period determined by weeks, by months, or by a period of time covering several months - year, half-year, quarter - ends, in the case provided for by § 187(1), on the expiration of that day of the last week or of the last month which corresponds in name or number to the day in which the event or the point of time occurs; in the

⁶ Section 186 of the German Civil Code reads as follows:

186 [Applicability] The rules of interpretation of §§ 187 to 193 apply to the fixing of periods and dates contained in statutes, court orders and legal transactions.

case provided for by § 187(2), on the expiration of that day of the last week or of the last month which precedes the day which corresponds in name or number to the initial day of the period.

(3) If, in the case of a period determined by months, the day on which it is due to expire is lacking in the last month, the period ends with the expiration of the last day of the month.

7.22 The issue of excluded days is dealt with as follows in German law:

Section 193 German Civil Code [Sundays and holidays; Saturdays]

If, on a given day or within a given period, a declaration of intention is required to be made or any act of performance to be done, and if the given day or the last day of the given period falls upon a Sunday, a day officially recognised in the place of the declaration or performance as a public holiday, or a Saturday, then the next business day takes the place of such a day.

7.23 GC Thornton⁷ recommends that in order to achieve certainty and clarity in regard to the computation of time, the provisions of the Act should specify the interpretation to be followed where certain words are used.

7.24 Certain foreign jurisdictions also specify the use of the “clear days” method in certain instances. Section 27(1) of the Canadian Federal Interpretation Act reads as follows:

27. (1) Where there is a reference to a number of clear days or “at least” a number of days between two events, in calculating that number of days, the days on which the events happen are excluded.

7.25 The British Columbia Interpretation Act of 1996 reads as follows:

25 (4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

7.26 Section 24(3) of the New Zealand Interpretation Act, 1991 reads as follows:

(3) For the purpose of calculating whether a period of a given number of days or clear days has elapsed between two events or the days on which the events happened, the days on which the events happened are not included in the period.

7.27 The Courts have adequately interpreted the meaning where “the wording indicates otherwise”. The Courts have held that where there is a reference to a number of clear days or “at least” or “not less than” a number of days between two events, in calculating that number of days both the days on which the events happen

⁷ *Legislative Drafting* (4th Ed) Butterworths 1996 pg 122.

are excluded⁸. Where a provision stated that time is to run “after” a day or date, the courts have held that that day or date must be excluded from the calculation of time⁹.

7.28 Section 2 of the Interpretation Act 33 of 1957 defines the term “month” as a calendar month. In *Words and Phrases Legally Defined*¹⁰ the authors quote with approval from the case of *Migotti v Colvill* (1879) 4 CPD 233 at 238:

In computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one.'

7.29 In the Interpretation Acts of foreign jurisdictions the term “month” is often more fully defined. Section 28 of the Canadian Federal Interpretation Act reads as follows:

28. Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by
- (a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;
 - (b) excluding the specified day; and
 - (c) including in the last month counted under para (a) the day that has the same calendar number as the specified day, or if that month has no day with that number, the last day of the month.

7.30 Section 25(6) of the British Columbia Act of 1996 reads as follows:

- (6) If, under this section, the calculation of time ends on a day in a month that has no date corresponding to the first day of the period of time, the time ends on the last day of that month.

7.31 Section 1910 of the Pennsylvania Consolidated Statutes reads as follows:

§ 1910. Time; computation of months.

Whenever in any statute the lapse of a number of months after or before a certain day is required, such number of months shall be computed by counting the months from such day, excluding the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order as the day of the month from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of such month.

7.32 The Colorado Interpretation Act states that

If a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many

⁸ *Makhutchi NO v Minister of Police* 1980 (2) SA 229 (W).

⁹ *Pivot Point SA (Pty) Ltd v Registrar of Companies* 1980 (4) A 74 (T).

¹⁰ 2nd edition vol 3 at 291.

days in the concluding month, in which case the period ends on the last day of that month.

7.33 The Commission proposes that the difference between a month and a calendar month be specifically set out in the Act. The method of computing months should be set out in the Act.

7.34 The proviso to section 4 of the Interpretation Act 33 of 1957 reads as follows:

unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

7.35 The question has arisen whether Saturdays should also be regarded as excluded days. The Labour Appeal Court Sitting as Special Tribunal Act 30 of 1995 and the Mineral and Petroleum Resources Development Act 28 of 2002 describe "day" as follows:

'day' means a calendar day and when any particular number of days are prescribed for the doing of any act, those days shall be reckoned by excluding the first and including the last day, unless the last day falls on a Saturday, a Sunday or any public holiday, in which case the number of days shall be reckoned by excluding the first day and also any such Saturday, Sunday or public holiday;

7.36 Foreign jurisdictions have dealt with this problem in a variety of ways. The Ontario Interpretation Act states:

28 In every Act, unless the contrary appears,

- (h) Where the time limited by the Act for a proceeding or for the doing of anything under its provisions expires or falls under a holiday, the time so limited extends to and the thing may be done on the day next following that is not a holiday;
- (i) where the time limited for a proceeding or for the doing of any thing in a court office, a land registry office or a sheriff's office expires or falls on a day that is prescribed as a holiday for that office, the time so limited extends to and the thing may be done on the day next following that is not a holiday.

7.37 The Fiji Islands Interpretation Act reads as follows:

- (b) if the last day of the period is a Saturday, Sunday or a public holiday (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
- (c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

7.38 The British Columbia Interpretation Act reads as follows:

25(2) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.

(3) If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.

7.39 In the Colorado Interpretation Act, week is defined as any seven consecutive days. In the Basic Conditions of Employment Act of 1997 “week” is defined as “the period of seven days within which the working week of that employee ordinarily falls”. The Unemployment Insurance Act of 2001 describes “week” as “any period of seven consecutive days”.

7.40 It was proposed at the expert meetings that a clause be inserted to the effect that where no time is fixed for the doing of something, it must be done within a reasonable time. There are 183 instances in the statute book where it is specified that something must be done “within a reasonable time”. Section 9(4) of the Financial Services and Intermediary Services Act 37 of 2002 provides as follows:¹¹

(4) (a) The registrar must within a reasonable time after receipt of any response contemplated in subsection (3) (a) consider the response, and may thereafter decide to- ...

7.41 In the case of *S v Basson* 2004 (1) SA 246 (A) the court held that as the Criminal Procedure Act did not prescribe how long after an acquittal a question of law could be reserved, in the circumstance it had to happen within a reasonable time. The time periods prescribed for appeals gave an indication of what qualified as reasonable. The court in *Sanford v Haley* stated that

It is a given fact that plaintiff must proceed with his action within a reasonable time. What is reasonable depends on the facts and circumstances of each case.

7.42 It appears that it is possible for the Courts to ascertain what a reasonable time is in the circumstances. However, it also appears that where no time period is prescribed in an Act, the court will assume that it had to happen within a reasonable time.

7.43 The Commission proposes the following provisions on reckoning of time:

31. In this Part -

"excluded day" means a Saturday, Sunday or public holiday;

"period" means a period expressed as –

- (a) a number of days;
- (b) one week or a number of weeks;
- (c) one month or a number of months; or
- (d) one year or a number of years,

¹¹ Another example is the National Water Act of 1998 which provides that the Water Tribunal must, at the request of any party and within a reasonable time, give written reasons for its decision on any matter.

but excludes a period expressed as a calendar month or calendar year or a number of calendar months or calendar years.

When period starts for purposes of reckoning

- 32.** (1) When a period mentioned in legislation must be reckoned forward –
- (a) from or after a particular day, the period must be reckoned forward as from the start of the next day;
 - (b) from or after the end of a particular day, week, month or year, the period must be reckoned forward as from the start of the day immediately after that day, week, month or year has ended; or
 - (c) from or after the happening of a particular act or event, the period must be reckoned forward as from the start of the day immediately after the day on which the act or event has happened.
- (2) When a period mentioned in legislation must be reckoned backward –
- (a) from a particular day, the period must be reckoned backward as from the end of the previous day;
 - (b) from the end of a particular day, week, month or year, the period must be reckoned backward as from the end of the day immediately before that day, week, month or year has ended; or
 - (c) from the happening of a particular act or event, the period must be reckoned backward as from the end of the day immediately before the day on which the act or event has happened.

When period ends for purposes of reckoning

33. When a period mentioned in legislation must be reckoned either forward or backward, that period must be reckoned to the end of the last day of the period, but if the last day of the period falls on an excluded day, that period must be extended to the end of the next day which is not an excluded day.

Periods expressed in calendar months or calendar years

34. When a period mentioned in legislation is expressed in calendar months or calendar years, that period must be reckoned from the start of the first calendar month or year in that period until the end of the last calendar month or year in that period.

Reasonable time

35. (1) If legislation states that something may or must be done within a reasonable time, the time within which it may or must be done must be determined in accordance with what is reasonable in the circumstances of the particular case.

(2) Legislation which states that something must be done without stating the time within it must be done, must be read as implying that it must be done within a reasonable time.

C. MEASUREMENT OF DISTANCE

8.44 Section 5 of the Interpretation Act reads as follows:

5 Measurement of distance

In the measurement of any distance for the purpose of any law, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

8.45 Reference is made in old-order legislation such as in the Election Act of 1979 to distances “as the crow flies”. Section 11(4) of this Act provided that any person who has, on or after the date of independence of an independent State, his home in

the said State, shall, provided he is otherwise qualified for registration, be registered in the division in which is situated the magistrate's office in the Republic which is the nearest to his home as the crow flies.

8.45 The distance between two points is the [length](#) of a straight line between them.¹² In the case of two locations on Earth, usually the distance along the surface is meant: either "[as the crow flies](#)"¹³ (along a great circle) or by [road](#), [railroad](#), etc. Distance is sometimes expressed in terms of the time to cover it, for example walking or by car. Sometimes a distance is ambiguous because the means of transport is neither mentioned nor obvious. Distance is sometimes not symmetric, hence not a metric: this applies to distance by car in the case of one-way streets, and also in the case the distance is expressed in terms of the time to cover it (a road may be more crowded in one direction than in the other, for a [ship](#) upstream and downstream makes a difference). The distance covered by a vehicle (often recorded by a [odometer](#)), person, animal, object, etc. should be distinguished from the distance from starting point to end point, even if latter is taken to mean eg the shortest distance along the road, because a detour could be made, and the end point can even coincide with the starting point. The [\(Euclidean\) distance](#),¹⁴ between two points

¹² The linear extent in space from one end to the other or the longest horizontal dimension of something that is fixed in place. See <http://www.wku.edu/geoweb/techcrse/491study.htm> (accessed on 4 October 2005).

¹³ Measurement of distance as the crow flies: when lost or unsure of their position in coastal waters, ships would release a caged crow. The crow would fly straight towards the nearest land thus giving the vessel some sort of a navigational fix. The tallest lookout platform on a ship came to be known as the crow's nest.¹³ Fathom was originally a land measuring term derived from the Anglo-Saxon word "faetm" meaning to embrace. In those days, most measurements were based on average size of parts of the body, such as the hand (horses are still measured this way) or the foot (that's why 12 inches are so named). A fathom is the average distance from fingertip to fingertip of the outstretched arms of a man, about six feet. Since a man stretches out his arms to embrace his sweetheart, Britain's Parliament declared that distance be called a "fathom" and that it be a unit of measure. A fathom remains six feet. The word was also used to describe "taking the measure of" or "to fathom" something. Today, of course, when one is trying to figure something out, they are trying to "fathom it" or "get their arms around it." See <http://www.sailorschoice.com/Terms/scphrases.htm> (accessed on 4 October 2005).

¹⁴ In [mathematics](#) the Euclidean distance or Euclidean metric is the "ordinary" [distance](#) (the property created by the space between two objects or points) between the two points that one would measure with a ruler, which can be proven by repeated application of the [Pythagorean theorem](#). By using this formula as distance, Euclidean space becomes a [metric space](#) (In [mathematics](#), the Pythagorean theorem or Pythagoras's theorem, is a relation in [Euclidean geometry](#) between the three sides of a right triangle.) See http://www.absoluteastronomy.com/encyclopedia/p/py/pythagorean_theorem.htm (accessed on 4 October 2005).

expressed in [Cartesian coordinates](#) equals the [square root](#) of the sum of the squares of the changes of each coordinate.

7.46 The Australian Commonwealth Interpretation Act of 1901¹⁵ contains a provision identical to that contained in the South Africa Interpretation Act.¹⁶ In the Australian Discussion Paper on the Interpretation Act, the view was expressed that the value of this section was questionable and might be unnecessary since the context would usually make clear how a distance mentioned in legislation is to be measured.¹⁷ It was explained that in many cases the provision will be displaced by a contrary intention, for instance substantial differences would usually be intended to be measured over the earth's (curved) surface and short distances will often be intended to be measured in the shortest straight line between 2 points in any plane.

7.47 Satellite Laser Ranging or SLR is the measurement of the distance to a satellite fitted with retro-reflectors, by measuring the time taken for a laser beam to travel to the satellite and back. These measurements are used to determine satellite orbits and to monitor the movement of the earth.¹⁸

15 Section 35.

16 The Australian Capital Territory Legislation Act also provides in section 150 that in applying an Act or statutory instrument, distance is to be measured in a straight line on a horizontal plane.

17 Para 3.94.

18 See <http://www.dli.wa.gov.au/corporate.nsf/web/Glossary> (accessed on 4 October 2005). The two-color electronic distance measuring instrument (EDM) is an ultra-precise distance measuring instrument with a precision of 0.5 to 1.0 mm for ranges between 1 and 12 km. This instrument is unique for laser distance measuring instruments because it uses two colours to measure the transit time of light through the atmosphere. Commercially available electronic distance measuring instruments (EDM) use one laser, usually red or infra-red, as a carrier. By modulating the laser, the instrument measures the round-trip travel time of light through the atmosphere for that particular wavelength between the active instrument and its remotely located reflector. If the index of refraction for the atmosphere is known through measuring its average temperature and pressure, then the velocity of light is known, and the distance is calculated by multiplying the measured travel time by the velocity. To be able to measure distances to a 1 mm precision over a 10 km long baseline, or 0.1 part-per-million, the average temperature and pressure along the 10 km path need to be known to better than 0.1 degree C and 1 mb. In practice, this is difficult to achieve without instrumenting an aircraft with temperature and pressure probes to obtain a profile of these quantities. However, the two-colour EDM measures the travel time of light for two wavelengths, red and blue. Because the atmosphere is dispersive, there is a difference in travel time which is a direct function of temperature and pressure. The difference in travel time is used to measure the average temperature and pressure in the atmosphere for calculating the index of refraction. With the index of refraction, the distance is computed from the travel time of one of the colours. A mechanical analog is the bi-metallic thermometer where the temperature is measured

7.48 In accordance with American case law, distance is measured “as the crow flies, not as the car drives,”¹⁹ ie, in a straight light line to a specific property’s “nearest boundary line.”²⁰ Senate Bill 1512 amends section 893.13(1)(c) of the Florida Statutes to increase criminal penalties for the sale, delivery, manufacture, or possession with intent to sell controlled substances within 1000 feet of a library. The Legislature’s policy is to increase penalties that generally apply to controlled substance offences when those offences are committed within a specified distance of certain places. For example, sale of cocaine is generally punished as a second degree felony. If the cocaine is sold within 1000 feet of the real property comprising a state, county, or municipal park, the sale is a first degree felony punishable by a 3 year minimum mandatory sentence. If the sale occurs beyond 1000 feet from this property, it is a second degree felony.²¹

by the bending of two bonded pieces of metal having different coefficients of thermal expansion. For two-colour measurements of distance to achieve a 0.1 ppm precision, pressure needs to be known to within 50 mb, and there is essentially no requirement to know the temperature. However, the partial pressure of water needs to be known to 1 mb, but this is not too difficult to achieve by measuring the relative humidity near the instrument. During the past 15 years, Global Positioning Systems (GPS) have been developed as another method to measure crustal deformation over long baselines. This system relies on a suite of 24 satellites and many receivers on the Earth’s surface that are used to measure the location of each receiver. The precision of horizontal, relative positions with GPS is approximately 3 mm for baselines in excess of a couple kilometers. See <http://quake.wr.usgs.gov/research/deformation/twocolor/twocolor.html> (accessed on 4 October 2005).

¹⁹ *Howard v. State*, 591 So.2d 1067 (Fla. 4th DCA 1991).

²⁰ *State v. Burch*, 545 So.2d 279 (Fla. 4th DCA 1989).

²¹ In addition to the penalty enhancement for sale, delivery, manufacture or possession with intent to sell, deliver or manufacture controlled substances within 1000 feet of certain parks, the Bill also enhances the penalties for violations in, on, or within 1000 feet of the following locations:

- the real property comprising a child care facility, so long as the facility is posted with a sign visible to the public identifying it as a licensed child care facility;
- a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 midnight;
- a community centre, defined as a facility operated by a nonprofit community-based organization for the provision of recreational, social, or educational services to the public; and
- a publicly owned recreational facility.

For most Schedule I controlled substances and some Schedule II controlled substances, the penalty for a violation of s. 893.13(1)(c), F.S., is a first degree felony with a 3-year mandatory minimum sentence. (This mandatory minimum sentence does not apply to controlled substance offences within 1,000 feet of a child care facility.) For other Schedule II controlled substances, as well as Schedule III and Schedule IV controlled substances, the penalty is a second degree felony.

7.49 In April 2003 Florida Senate Bill 488 amended the law which prohibited offenders, who have committed certain sex offences against minors, from living within 1000 feet of a school, day care centre, park, playground, or other place where children regularly gather. The Bill required that the distance must be measured in a straight line from the boundary of the property to the offender's residence, without considering the distance that an automobile or pedestrian would travel. The law did not previously specify how the 1000 feet should be measured and therefore unintentionally created a possible loophole by which sexual predators could live near their potential preying grounds. By specifying the method of measurement, the possibility of subjective interpretation of the law was removed. "We have seen instances where a convicted sexual offender on probation or community control resides just a few feet from a school or park, but if you were to walk or drive from the offender's front door to the school or park using sidewalks or roads, it would be considered greater than 1000 feet. This Bill simply provides for measuring the distance 'as the crow flies' so there is no misinterpretation of what the original law intended," Senator Villalobos, the sponsor of the Bill explained.²²

7.50 In the case of *Weinstock & Lowenstein v R*²³ the court held that where it is not possible to measure by chain or tape, the distance must be calculated by means of a map.

7.51 It is proposed that the Bill should provide for the measurement of distances, in addition to the method of in a straight line on a horizontal plane, by means of beacons on a map, diagram or plan or any other acceptable method of measuring distances in a straight line on a horizontal plane:

Measurement of distances

- 36.** (1) When a distance must or may be measured for the purpose of any legislation, that distance must be measured in a straight line on a horizontal plane.
- (2) If it is not possible to measure a distance in terms of subsection (1) by means of a measuring appliance, the distance may be measured by means of –
- (a) beacons on a map, diagram or plan; or
 - (b) any other acceptable method of measuring distances in a straight line on a horizontal plane.

²² See <http://www.flsenate.gov/cgi-bin/ViewPage.pl?Tab=legislators&Submenu=1&File=041003.html&Directory=legislators/senate/038/press/> (accessed on 4 October 2005).

²³ 1939 SR 13.

CHAPTER 8

STANDARD PROVISIONS

A. INTRODUCTION

8.1 As stated in chapter 1, each subject-specific statute is intended to deal with particular subject matter and needs tailor-made provisions. But there could be certain areas in each Act in which the use of standard provisions might be considered. Where certain provisions are found to recur in a number of statutes, it is necessary that we –

- (a) identify these issues;
- (b) decide whether these particular matters should be dealt with according to a policy approach that is developed consistently across the statute book; and
- (c) decide whether, if there are standard policies, they should be expressed in provisions that are as far as possible identical (standard provisions).¹

8.2 The example given in the Australian review of the Interpretation Act is that of an Act imposing a new tax in which provisions for assessment and collection of tax could reflect existing provisions and existing administrative structures for the assessment and collection of other, similar taxes.

8.3 Other standard provisions found in the Interpretation Acts of other countries are the following:

- (a) Provisions relating to corporations and setting out corporate rights and powers² and conflict of interests.³
- (b) Provisions relating to majority or quorum.⁴

¹ Para 1.33.

² Section 16 of the Saskatchewan Interpretation Act, 1995.

³ Section 17 of the Saskatchewan Interpretation Act, 1995.

⁴ Section 18 of the Saskatchewan Interpretation Act, 1995.

- (c) Provisions relating to public officers, their appointment, appointment to certain boards, commissions and appointed bodies; implied powers of public officers.

B. DEFECT IN FORM

8.4 One of the standard provisions which appear in the South African statute book is the provision dealing with defects in the form of a document. This provision appears in a number of statutes.

8.5 Section 33 of the Agricultural Produce Agents Act 12 of 1992 reads as follows:

33 Defects in form

A defect in the form of any document which is in terms of this Act required to be executed in a particular manner, or in a notice or order in terms of this Act, shall not invalidate any administrative action to which such document, notice or order relates, or be a ground for exception in legal proceedings, provided the requirements for such a document, notice or order are substantially complied with and its meaning is clear.

8.6 Section 142(2) of the Defence Act 44 of 1957 reads as follows:

An order deviating from any form that may be prescribed for it shall not be rendered invalid merely because of such deviation.

8.7 The Magistrates' Courts Rules require strict compliance with certain forms. Rule 2 reads as follows:

(2) (a) With the exception of forms 2, 3, 5A and 5B which shall in all respects conform to the specimens, the forms contained in Annexure 1 may be used with such variation as circumstances require. Non-compliance with this rule shall not in itself be a ground for exception.

8.8 Section 32 of the Canadian Federal Interpretation Act states:

Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead do not invalidate the form used.

8.9 Section 28 of the British Columbia Interpretation Act provides similarly as follows:

28 (1) If a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

8.10 Section 25C of the Australian Acts Interpretation Act of 1901 states:

25C Compliance with forms

Where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient.

8.11 Section 26 of the New Zealand Interpretation Act of 1999 reads as follows:

26 Use of prescribed forms

A form is not invalid just because it contains minor differences from a prescribed form as long as the form still has the same effect and is not misleading.

8.12 Sections 36 and 37 of the Manitoba Interpretation Act provide as follows:

Using an approved form to report information

36 If an Act requires information to be given to a person or body, or authorizes a person or body to require information to be given, but does not provide for a prescribed form for doing so, the person or body may approve a form and require it to be used to give the information.

Differences in forms

37 A form that differs from the one prescribed or approved under an Act or regulation may be validly used if the differences do not affect the substance and are not likely to mislead.

8.13 It is clear from the discussion above that there is a need to deal with the issue of the use of official forms in the Bill. The following clause is proposed:

Use of official forms

37. Legislation which states that a specific form may or must be used for any specific purpose, does not preclude the use of a form which –

- (a) is substantially the same as the official form;
- (b) has the same effect as the official form; and
- (c) is not misleading.

C. METHODS OF SERVING, DELIVERING, SENDING OR SUBMITTING DOCUMENTS

8.14 Section 7 of the Interpretation Act reads as follows:

7 Meaning of service by post

Where any law authorizes or requires any document to be served by post, whether the expression 'serve', or 'give', or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

8.15 This section has been applied in a number of cases where the contrary intention does not appear from the provisions of the statute authorising or requiring service by post.⁵ Similar provisions are found in the Indian General Clauses Act, 1987⁶ and the Australian Commonwealth Acts Interpretation Act.⁷

8.16 The Income Tax Act 58 of 1962 provides as follows on authentication and service of documents:

106 Authentication and service of documents

(1) Any form, notice, demand or other document issued or given by or on behalf of the Commissioner or any other officer under this Act shall be sufficiently authenticated if the name or official designation of the Commissioner or officer by whom the same is issued or given is stamped or printed thereon.

(2) Any form, notice, demand, document or other communication required or authorized under this Act to be issued, given or sent to or served upon any person by the Commissioner or any other officer under this Act shall, except as otherwise provided in this Act, be deemed to have been effectually issued, given, sent or served

–

- (a) if delivered to him; or
- (b) if left with some adult person apparently residing at or occupying or employed at his last known abode or office or place of business in the Republic; or
- (c) if despatched by registered or any other kind of post addressed to him at his last known address, which may be any such place or office as is referred to in paragraph (b) or his last known post office box number or that of his employer; or
- (cA) if transmitted to that person by electronic means to that person's last known electronic address;
- (d) in the case of a company –
 - (i) if delivered to the public officer of the company; or
 - (ii) if left with some adult person apparently residing at or occupying or employed at the place appointed by the company under subsection (5) of section 101 or, in the case of any portfolio of a collective investment scheme referred to

⁵ *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A).

⁶ Section 43: Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression “serve” or either of the expressions “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

⁷ Section 29.

in paragraph (e) (i) of the definition of 'company' in section 1, the public officer of which is the manager, trustee or custodian referred to in the said subsection (5), by such manager, trustee or custodian, or where no such place has been appointed by the company, manager, trustee or custodian, as the case may be, if left with some adult person apparently residing at or occupying or employed at the last known office or place of business of the company, manager, trustee or custodian, as the case may be, in the Republic; or

- (iii) if despatched by registered or any other kind of post addressed to the company or its public officer at its or his last known address, which may be any such office or place as is referred to in subparagraph (ii) or its or his last known post office box number or that of his employer; or
- (iv) if transmitted to the company or its public officer by electronic means to that company's or public officer's last known electronic address;

(3) Any form, notice, demand, document or other communication referred to in subsection (2) which has been issued, given, sent or served in the manner contemplated in paragraph (c) or (d) (iii) of that subsection shall be deemed to have been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed, unless the Commissioner is satisfied that it was not so received or was received at some other time or, where the time at which it was received or the fact that it was received is in dispute in proceedings under this Act in any court having jurisdiction to decide the matter, the court is so satisfied: Provided that the preceding provisions of this subsection shall not apply where any person is in criminal proceedings charged with the commission of an offence under this Act by reason of his failure, refusal or neglect to do anything which he is required to do in terms of the said form, notice, demand, document or other communication, unless it was despatched to such person by registered or certified post.

(4) If the Commissioner is satisfied that any form, notice, demand, document or other communication (other than a notice of assessment) issued, given, sent or served in a manner contemplated in paragraph (b), (c) or (d) (ii) or (iii) of subsection (2), has not been received by the person to whom it was addressed or has been received by such person considerably later than it should have been received by him and that such person has in consequence been placed at a disadvantage, the Commissioner may, if he is satisfied that the circumstances warrant such action, direct that such form, notice, demand, document or other communication be withdrawn and be issued, given, sent or served anew.

8.17 The National Water Act 36 of 1998 provides as follows on service of documents:

162 Service of documents

- (1) Any notice, directive or other document in terms of this Act, must be served-
 - (a) if it is to be served on a natural person-
 - (i) by hand delivery to that person;

- (ii) by hand delivery to a responsible individual at that person's business or residential address;
 - (iii) by sending it by registered mail to that person's business or residential address; or
 - (iv) where that person's business and residential address is unknown, despite reasonable enquiry, by publishing it once in the Gazette and once in a local newspaper circulating in the area of that person's last known residential or business address; or
- (b) if it is intended for a juristic person-
- (i) by hand delivery to a responsible individual at the registered address or principal place of business of that juristic person;
 - (ii) by sending it by facsimile to the registered address or principal place of business of that juristic person;
 - (iii) by sending it by registered mail to the registered address or principal place of business of that juristic person;
 - (iv) by conspicuously attaching it to the main entrance of the registered address or the principal place of business of that juristic person; or
 - (v) by hand delivery to any member of that juristic person's board of directors or governing body.

(2) Any notice, directive or other document served according to subsection (1) is considered to have come to the notice of the person, unless the contrary is proved.⁸

⁸ The Local Government: Municipal Systems Act 32 of 2000 provides as follows:

115 Service of documents and process

(1) Any notice or other document that is served on a person in terms of this Act, is regarded as having been served –

- (a) when it has been delivered to that person personally;
- (b) when it has been left at that person's place of residence or business in the Republic with a person apparently over the age of sixteen years;
- (c) when it has been posted by registered or certified mail to that person's last known residential or business address in the Republic and an acknowledgement of the posting thereof from the postal service is obtained;
- (d) if that person's address in the Republic is unknown, when it has been served on that person's agent or representative in the Republic in the manner provided by paragraphs (a), (b) or (c); or
- (e) if that person's address and agent or representative in the Republic is unknown, when it has been posted in a conspicuous place on the property or premises, if any, to which it relates.

[NB: Sub-s. (1) has been amended by s. 94 of the Local Government: Municipal Property Rates Act 6 of 2004, a provision which will be put into operation by proclamation. Section 115 (1) - words preceding para. (a) Any notice or other document that is served on a person in terms of this Act or by a municipality in terms of any other legislation is regarded as having been served –]

8.18 The Magistrates' Courts Rules of Court deals extensively with service of process, notices and other documents. 'Deliver' is defined as follows in the Rules: 'deliver' (except when a summons is served on the opposite party only, and in rule 9) means to file with the clerk of the court and serve a copy on the opposite party, and 'delivery', 'delivered' and 'delivering' have corresponding meanings. Rule 9(1) of the Magistrates' Courts Rules of Court provides that a party requiring service of any process, notice or other document to be made by the sheriff shall deliver to him the original of such process, notice or document, together with as many copies thereof as there are persons to be served. The clerk of the court may, at the written request of the party requiring service, hand such process, notice or document and copies thereof to the sheriff. Rule 9(2)(a) provides that except as provided in paragraph (b) or in the case of service by post or upon order of the court, process, notices or other documents shall not be served on a Sunday or public holiday. Rule 9(2)(b) provides that an interdict, a warrant of arrest, and a warrant of attachment of person or property under section 30bis of the Act may be executed on any day at any hour and at any place.

8.19 Rule 9(3) of the Magistrates' Courts Rules of Court provides as follows:

(3) All process shall, subject to the provisions of this rule, be served upon the person affected thereby by delivery of a copy thereof in one or other of the following manners:

- (a) To the said person personally or to his duly authorised agent;
- (b) at his residence or place of business to some person apparently not less than 16 years of age and apparently residing or employed there;

'residence' for the purpose of this paragraph, when a building is occupied by more than one person or family, means that portion of the building occupied by the defendant;
- (c) at his place of employment to some person apparently not less than 16 years of age and apparently in authority over him or, in the absence of such person in authority, to a person apparently not less than 16 years of age and apparently in charge at his place of employment;
- (d) if the person to be served has chosen a domicilium citandi at the domicilium so chosen;

(2) When any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, it is sufficient if that person is described in the notice or other document as the owner, occupier or holder of the property or right in question, and it is not necessary to name that person.

(3) Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office.

- (e) in the case of a body corporate at its local office or principal place of business within the area of jurisdiction of the court concerned to a responsible employee thereof or in any other manner specially provided by law:
- (f) if the plaintiff or his authorised agent has given written instructions to the sheriff to serve by registered post, the process shall be so served:
- (g) in the case of a Minister, Deputy Minister or Administrator, in his official capacity, the State or provincial administration, at the Office of the State Attorney in Pretoria, or a branch of that Office which serves the area of jurisdiction of the court from which the process has been issued:

Provided that where such service has been effected in the manner prescribed by paragraphs (b), (c), (e) or (g), the sheriff shall indicate in the return of service of the process the name of the person to whom it has been delivered and the capacity in which such person stands in relation to the person, body corporate or institution affected by the process and where such service has been effected in the manner prescribed by paragraphs (b), (c) or (f), the court or clerk of the court, as the case may be, may, if there is reason to doubt whether the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid.⁹

9 Rule 9 provides further as follows:

- (5) Where the person to be served keeps his residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door or security gate of such residence or place of business or to place such copy in the post box at such residence or place of business.
- (6) Where the sheriff is unable after diligent search to find at the residence or domicilium citandi of the person to be served either that person or the person referred to in subrule (3) (b) or, in the case of a body corporate referred to in subrule (3) (e), a responsible employee, it shall be sufficient service to affix a copy of the process to the outer or principal door of such residence, local office or principal place of business or to leave a copy of the process at such domicilium.
- (7) Where the relief claimed in any action is limited to an order for ejectment from certain premises or land or a judgment for the rent thereof and for the costs of such proceedings and it is not possible to effect service in the manner prescribed in subrule (3), service of process may be effected by affixing a copy thereof to the outer or principal door of such premises or on some other conspicuous part of the premises or land in question.
- (8) Service of an interpleader summons where claim is made to any property attached under process of the court may be made upon the attorney of record (if any) of the party to be served.
- (9) Where two or more persons are to be served with the same process, service shall be effected upon each, except-
 - (a) in the case of a partnership, when service may be effected by delivery at the office or place of business of such partnership, or if there be none such, then by service on any member of such partnership in any manner hereinbefore prescribed;
 - (b) in the case of two or more persons sued in their capacity as trustees of an insolvent estate, liquidators of a company, executors, curators or guardians,

8.20 Since the passing of the Interpretation Act in 1957, there have been major advances in technology. The use of computers and electronic media has resulted in extensions of the meaning of writing and advancements in the methods of serving documents which are not reflected in the present Interpretation Act. Section 7 does not accommodate the use of electronic media to serve documents.

8.21 The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) provides for the facilitation and regulation of electronic communications and transactions. The ECT Act applies to all legislation except that certain provisions do not apply to the Wills Act, the Alienation of Land Act and the Bills of Exchange Act.

8.22 It was suggested that a provision be included in the Interpretation Act in regard to electronic signatures. Section 13 of the ECT Act states that where the signature of a person is required that requirement in relation to a data message is met by an advanced electronic signature. As the ECT Act applies to all legislation, it is considered not necessary to repeat this provision in the Interpretation Act.

8.23 Section 19(2) of the ECT Act has also extended the meaning of certain words by specifying that an expression in law, whether used as a noun or verb, including the terms 'document', 'record', 'file', 'submit', 'lodge', 'deliver', 'issue', 'publish', 'write in', 'print' or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided for in the Act. The following definition was inserted into the Companies Act 61 of 1973 by Act 35 of 2002.

'books or papers' and 'books and papers' include accounts, deeds, writings, electronic data reduced to paper format' and other documents,

8.24 The Companies and Close Corporations Act also contain numerous other amendments which expand definitions and procedures to include electronic means. Those amendments made after 2002 are superfluous as the ECT Act had already been enacted to deal with this. As the ECT Act deals with electronic communications and applies to all legislation, the Commission recommends that these provisions of

when service may be effected by delivery to any one of them in any manner hereinbefore prescribed;

- (c) in the case of a syndicate, unincorporated company, club, society, church, public institution or public body, when service may be effected by delivery at the local office or place of business of such body or, if there be none such, by service on the chairman or secretary or similar officer thereof in any manner hereinbefore prescribed.

the ECT Act should not be repeated in the Interpretation Act. Section 19(4) of the ECT Act states:

Where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said Post Office and sent by that Post Office to the electronic address provided by the sender.

8.25 Section 27 of the ECT Act deals with acceptance of electronic filing and issuing of documents. It provides that any public body that pursuant to any law accepts the filing of documents, or requires that documents be created or retained may, notwithstanding anything to the contrary in such law, accept the filing of such documents, or the creation or retention of such documents in the form of data messages.

8.26 The Interpretation Act of British Columbia contains the following definitions of *deliver* and *mail*:

"deliver", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business;

"mail" refers to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver;

8.28 The Australian Commonwealth Acts Interpretation Act provides as follows on service of documents:

28A Service of documents

(1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression "serve", "give" or "send" or any other expression is used, then, unless the contrary intention appears, the document may be served:

- (a) on a natural person:
 - (i) by delivering it to the person personally; or
 - (ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or
 - (b) on a body corporate—by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate.
- (2) Nothing in subsection (1):

- (a) affects the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorizes the service of a document otherwise than as provided in that subsection; or
- (b) affects the power of a court to authorize service of a document otherwise than as provided in that subsection.

29 Meaning of service by post

(1) Where an Act authorizes or requires any document to be [served](#) by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.¹⁰

(2) This section does not affect the operation of [section 160](#)¹¹ of the [Evidence Act 1995](#).

8.29 The Northern Territory Interpretation Act provides in section 47 that where an Act provides that a document or thing may be served on a person, it may be served on a person authorized by that person to accept service. The Interpretation of Legislation Act of Victoria provides as follows on service by post:

49 Service by post

¹⁰ The Interpretation Act of New Brunswick provides similarly in section 23:

Where an enactment or regulation authorizes or requires a document to be served or delivered by post, then, unless a contrary intention appears, service or delivery is deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

¹¹ 160 Postal articles

(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth [working day](#) after having been posted.

(2) This section does not apply if:

- (a) the proceeding relates to a contract; and
- (b) all the parties to the proceeding are parties to the contract; and
- (c) subsection (1) is inconsistent with a term of the contract.

(3) In this section:

"working day" means a day that is not:

- (a) a Saturday or a Sunday; or
- (b) a public holiday or a bank holiday in the place to which the postal article was addressed.

Note: Section 182 gives this section a wider application in relation to postal articles sent by a Commonwealth agency.

(1) Where an Act or subordinate instrument authorizes or requires a document to be served by post (whether the expression "serve" or the expression "give", "send" or "deliver" or any other expression is used), the service shall-

- (a) unless the contrary intention appears, be deemed to be effected by properly addressing, prepaying and posting the document as a letter to the person on whom it is to be served; and
- (b) unless the contrary is proved, be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(2) Where an Act or subordinate instrument authorizes or requires a document to be served by registered post or by certified mail (whether the expression "serve" or the expression "give", "send" or "deliver" or any other expression is used), the service shall-

- (a) unless the contrary intention appears, be deemed to be effected by properly addressing, prepaying and posting the document as a letter either by the registered post or through the certified mail service to the person on whom it is to be served; and
- (b) unless the contrary is proved, be deemed to have been effected at the time at which the letter would ordinarily be delivered by registered post or through the certified mail service, as the case requires.

8.30 The Acts Interpretation Act of South Australia provides as follows on the meaning of service by post:

Meaning of service by post

33.(1) Where any Act passed after the passing of this Act authorises or requires any document to be served by post (whether the expression "serve", "give", "deliver" or "send", or any other expression is used), then, unless the contrary intention appears, the Act will be taken to provide—

- (a) that the service is effected by properly addressing, prepaying and posting a letter or packet containing the document; and
- (b) that, unless the contrary is proved, service will be taken to have been effected at the time at which the letter or packet would be delivered in the ordinary course of post.

(2) Where any Act authorises or requires any document to be served by registered post (whether the expression "serve", "give", "deliver" or "send", or any other expression is used) then, unless the contrary intention appears, the Act will be taken to provide that service may be effected by certified mail.

8.31 The Australian Capital Territory Legislation Act provides as follows on service of documents:

Application of pt 19.5

This part applies to a document that is authorised or required under a law to be served (whether the word 'serve', 'give', 'notify', 'send' or 'tell' or any other word is used).¹²

12

The following definitions apply to this part of the Act:

In this part:

"administrator", of a law, means the entity administering or responsible for the law.

"agency" means—

- (a) an administrative unit; or
- (b) a statutory office-holder; or
- (c) any other entity established for a public purpose under a law;

and includes a member of, or a member of the staff of, the agency.

"business address", of an individual, corporation or agency in relation to anything done or to be done under a law, includes the latest business address, or address for service of notices (however described), of the individual, corporation or agency (if any) recorded in a register or other records kept by the administrator of the law.

"corporation" does not include an agency.

"document" includes a notice, an article that may be sent by post or anything else.

"email address", of an individual, corporation or agency in relation to anything done or to be done under a law, includes the latest email address of the individual, corporation or agency (if any) recorded in a register or other records kept by the administrator of the law.

"executive officer" means—

- (a) for a corporation—a person (however described and whether or not the person is a director of the corporation) who is concerned with, or takes part in, the corporation's management; or
- (b) for an agency that is an administrative unit—the chief executive of the administrative unit; or
- (c) for an agency that is a statutory office-holder—the occupant of the position; or
- (d) for an agency constituted by 2 or more people—the person who is entitled, because of the position occupied by the person, to preside at any meeting of the agency at which the person is present; or
- (e) for any other agency—the chief executive officer (however described) of the agency; or
- (f) for any agency—a person (however described) who is concerned with, or takes part in, the agency's management.

"fax number", of an individual, corporation or agency in relation to anything done or to be done under a law, includes the latest fax number of the individual, corporation or agency (if any) recorded in a register or other records kept by the administrator of the law.

"home address", of an individual in relation to anything done or to be done under a law, includes the latest home address, or address for service of notices (however described), of the person (if any) recorded in a register or other records kept by the administrator of the law.

"responsible", for a law, means allocated responsibility for the law under the Public Sector Management Act 1994, section 14 (1) (b) (Ministerial responsibility and functions of administrative units).

247 Service of documents on individuals

- (1) A document may be served on an individual—
- (a) by giving it to the individual; or
 - (b) by sending it by prepaid post, addressed to the individual, to a home or business address of the individual; or
 - (c) by faxing it to a fax number of the individual; or
 - (d) by emailing it to an email address of the individual; or
 - (e) by leaving it, addressed to the individual, at a home or business address of the individual with someone who appears to be at least 16 years old and to live or be employed at the address.
- (2) This section applies to service of a document outside the ACT in the same way as it applies to service of the document in the ACT.

248 Service of documents on corporations

- (1) A document may be served on a corporation—
- (a) by giving it to an executive officer of the corporation; or
 - (b) by sending it by prepaid post, addressed to the corporation (or an executive officer of the corporation), to the address of any of its registered offices or any other business address of the corporation; or
 - (c) by faxing it to a fax number of the corporation; or
 - (d) by emailing it to an email address of the corporation; or
 - (e) by leaving it, addressed to the corporation (or an executive officer of the corporation), at the address of any of the corporation's registered offices, or any other business address of the corporation, with someone who appears to be at least 16 years old and to be employed at the address.
- (2) This section applies to service of a document outside the ACT in the same way as it applies to service of the document in the ACT.

249 Service of documents on agencies

A document may be served on an agency—

- (a) by giving it to an executive officer of the agency; or
- (b) by sending it by prepaid post, addressed to the agency (or an executive officer of the agency), to the address of any office of the agency or any other business address of the agency; or
- (c) by faxing it to a fax number of the agency; or
- (d) by emailing it to an email address of the agency; or

- (e) by leaving it, addressed to the agency (or an executive officer of the agency), at the address of any of the agency's offices or any other business address of the agency with someone who appears to be employed at the agency.

250 When document taken to be served

- (1) A document served by post under this part is taken to be served when the document would have been delivered in the ordinary course of post.

- (2) However, subsection (1) does not affect the operation of the *Evidence Act 1995* (Cwlth), section 160.¹³

- (3) If the sender has no reason to suspect that a document served by fax or email under this part was not received by the recipient when sent, the document is presumed to be served when sent unless evidence sufficient to raise doubt about the presumption is given.

- (4) For subsection (3), the sender has reason to suspect that a document served by fax or email under this part was not received by the recipient when sent only if, on the day the document was sent or on the next working day, the equipment the sender used to send the document indicated by way of a signal or other message that—

- (a) the equipment did not send the document when the equipment was used to send the document; or
- (b) for a fax—the number to which the fax was sent to the recipient was not a fax number of the recipient; or
- (c) for an email—the address to which the email was sent was not an email address of the recipient.

- (5) A document addressed to the recipient, and left for the recipient as mentioned in section 247 (e), section 248 (e) or section 249 (e), is taken to be served when it was left.

- (6) In this section:

"recipient", for a document, means the individual, corporation or agency on whom the document is intended to be served.

"sender", for a document served, or to be served, by fax or email, means the person sending, or seeking to send, the document.

251 Other laws not affected etc

- (1) This part does not affect the operation of any other law that authorises or requires service of a document otherwise than as provided under this part.

- (2) Despite this part, a law (or, if the law is an Act, a regulation under the Act) may provide—

- (a) that a document of a particular kind may or must be served (however described) only in a particular way or to a particular address or number; or

¹³

The *Evidence Act 1995* (Cwlth), s 160 provides a rebuttable presumption that a postal article sent by prepaid post addressed to a person at an address in Australia or an external territory was received on the 4th working day after posting.

- (b) for the date (or date and time) when service (however described) of a document is taken to have been made.

252 Powers of courts and tribunals not affected

This part does not affect the power of a court or tribunal to authorise or require service of a document otherwise than as provided under this part.

8.32 It is proposed that the following clauses dealing with methods of serving, delivering, sending or submitting documents, methods of posting documents and serving documents by post, should be included in the Bill.

Methods of serving, delivering, sending or submitting documents

38. If legislation provides that a document may or must be served on or delivered, sent or submitted to a person without indicating how the document may or must be served, delivered, sent or submitted, the document may or must be served, delivered, sent or submitted by –

- (a) posting it to that person;
- (b) handing it to that person; or
- (c) leaving it at that person's last known place of residence or business with a person apparently older than 16 years.

Methods of posting documents

39. If legislation provides that a document may or must be posted, or served, delivered, sent, submitted or transmitted by post, the document may or must be posted, served, delivered, sent, submitted or transmitted –

- (a) by ordinary post; or
- (b) by courier; or
- (c) by fax or electronic means, but only if the receiver is equipped for the receipt of documents by fax or electronic means.

Serving of documents by post

40. (1) If legislation provides that a document may or must be served by post on a person, whether “serve”, “deliver”, “sent” or any other word is used, the action of serving that document–

- (a) if done by ordinary post, is accomplished if a letter containing the document was –
 - (i) addressed to the last known postal address of that person; and
 - (ii) posted at the South African Post Office Ltd by registered post; or
- (b) if done by electronic post, is accomplished if an electronic copy of the document was –
 - (i) sent by electronic means to the South African Post Office Ltd;

- (ii) registered by the South African Post Office Ltd; and
- (iii) sent by the South African Post Office Ltd to an electronic address provided by the sender as the last known electronic address of that person.

(2) Unless the contrary is proved, a document served in accordance with subsection (1) must be regarded as having been served on the addressee at the time at which the document would normally be delivered in the course of ordinary or electronic post, as the case may be.

D. CONSULTATION PROCEDURES

8.33 The new legislation should address the question of “after consultation with” versus “in consultation with”. In many cases inexperienced drafters would use these terms indiscriminately, not realising the fundamental difference between the two. Whilst the first one denotes mere consultation before a power is exercised, the second one actually means that the power can only be exercised “with the concurrence of” of the party who must be consulted.¹⁴ “In consultation with” in effect gives a veto power to the other party.

¹⁴ See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) (note also Chapter 6 above where the definition of *consult* is discussed). In this case Chief Justice Chaskalson considered the decision making and consultation process envisaged under the Regulations passed in terms of the Medicines Act:

[286] The annual review is an important component of the pricing system. It involves a consideration of factors in which expertise in the pricing of medicines is required. Since the Pricing Committee has to be involved in the process there is no practical necessity for delegating this function to the Minister alone. What the regulation does is to leave to the Minister alone, a task which is the joint responsibility of the Minister and the Pricing Committee, without there being any practical necessity for this to be done, or any obvious reason why the Pricing Committee’s power should be subordinated to that of the Minister. In my view the delegation of the decisionmaking power to the Minister alone is an improper delegation of a power vested jointly in the Minister and the Pricing Committee by the Medicines Act. I would hold regulation 8(1) to be invalid for this reason. I would, however, correct this defect by reading into the regulations the words: “the Minister on the recommendation of the Pricing Committee” in place of the words: “the Minister after consultation with the Pricing Committee”.

See also *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) where the then President of the Constitutional Court remarked as follows:

[85] For reasons which are not entirely clear, transfers of functions to and from provincial administrations and departments on the one hand, and national departments and other bodies not established by or under provincial law on the other, are dealt with differently to transfers between provincial departments and between them and other provincial bodies. In respect of the latter, the Premier has the authority to allocate functions to a department or abolish any function of a department and to determine whether or not such transfers should be effected. But in regard to the former, the Minister has such power, and is entitled to exercise it after consultation with the appropriate provincial MEC. The result is that the Minister must have regard to the views of the MEC concerned, but is not bound by them, and can direct that

8.34 Consultation mechanisms is key to the implementation of the constitutional requirement of co-operative government as set out in Chapter 3 of the Constitution and most laws enacted after 1996 contain provisions on consultation between the different spheres and different governments. Veto powers are contrary to the spirit of Chapter 3 and should not slip in inadvertently by the wrong choice of words.

8.35 In the interim Constitution the terms “after consultation with” and “in consultation with” were critical for implementing the system of government of national unity and section 233 (3) and (4) was accordingly inserted in the interim Constitution to ensure a correct interpretation of these terms.¹⁵ Similar provisions should be included in the Interpretation Bill in relation to legislation generally. The following clause is proposed:

Consultation procedures

41. (1) A requirement in terms of legislation that a decision or action may be taken only after consultation with another, is complied with when that other person has been consulted on the decision or action and the views of that other person have been considered.

(2) A requirement in terms of legislation that a decision or action may be taken only in consultation with another, is complied with if that other person has been consulted on the decision or action and has agreed to the decision or action.

E. EXERCISE OF POWERS, DUTIES OR FUNCTIONS BY PERSONS OTHER THAN NATURAL PERSONS

8.36 The Australian Capital Territory Legislation Act provides in on the functions of bodies as follows:

Functions of bodies

such transfers take place against the wishes of the provincial government. (Footnotes omitted) The Court also noted that although there are no comparable provisions in the 1996 Constitution, it was correctly accepted by counsel in the present case that the distinction between in consultation with and after consultation with is that the former calls for concurrence, whilst the latter does not (see footnote 94).

¹⁵ Section 233(3) of the interim Constitution provided:

Where in this Constitution any functionary is required to take a decision in consultation with another functionary, such decision shall require the concurrence of such other functionary: Provided that if such other functionary is a body of persons it shall express its concurrence in accordance with its own decision-making procedures.

Section 233(4) of the interim Constitution provided:

Where in this Constitution any functionary is required to take a decision after consulting with another functionary, such decision shall be taken in good faith after consulting and giving serious consideration to the views of such other functionary.

(1) If a law authorises or requires a body to exercise a function, it may do so by resolution.

(2) To remove any doubt, subsection (1) applies in relation to a function even though a law authorises or requires the function to be exercised in writing.

(3) If a law authorises or requires a signature by a person and the person is a body, the signature of a person authorised by the body for the purpose is taken to be the signature of the body.

8.37 The Commission considers that there is also a need for a clause dealing with the exercise of powers, duties or functions by persons other than natural persons. The following clause is proposed:

Exercise of powers, duties or functions by persons other than natural persons

42. (1) If legislation provides for a person which is not a natural person to exercise a power, duty or function, the power or function must be exercised by the natural person or body of natural persons acting on behalf of that person.

(2) If legislation requires a signature by a person which is not a natural person, the signature of a natural person acting on the authority of that person is the signature of that person.

F. DECISIONS OF BODIES CONSISTING OF MEMBERS, QUORUMS AND DISTANT PARTICIPANTS

8.38 Many statutes refer to decisions of bodies consisting of members. There are instances where it is not specified in a statute what number of members constitute a quorum or majority for purposes of a meeting or for taking decisions. The Agricultural Products Agents Act 112 of 1992 is one of the statutes which contain provisions on membership, decisions and quorums:¹⁶

6 Meetings and decisions of council

(1) The council shall meet at such times and places as the chairperson may from time to time determine.

(2) The chairperson of the council may at any time convene an extraordinary meeting of the council to be held at a time and place determined by him or her and

¹⁶

The Land and Agricultural Development Bank Act 15 of 2002 provides as follows on quorums and decisions of the board of directors of the Agricultural Development Bank of South Africa:

13(4) At a meeting of the Board-

- (a) the quorum is half the number of the Board members appointed at that time plus one;
- (b) a decision approved by the majority of the Board members present at a duly constituted meeting is a decision of the Board;
- (c) in the event of an equality of votes being cast by the Board members present at a meeting, the person presiding at that meeting has a deciding vote in addition to his or her deliberative vote.

shall, upon a written request signed by not less than three members of the council, convene an extraordinary meeting thereof to be held within two weeks after the date of receipt of such request, at a time and place determined by him or her.

(3) The person presiding at a meeting of the council shall determine the procedure at that meeting.

(4)(a) The quorum for a meeting of the council shall be a majority of all its members.

(b) The decision of a majority of the members of the council present at a meeting thereof shall constitute a decision of the council.

(c) In the event of an equality of votes on any matter the person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.

(5) No decision taken by the council or act performed under the authority of the council shall be invalid by reason only of a casual vacancy on the council or of the fact that any person not entitled to sit as a member of the council sat as such a member at the time the decision was taken or the act was authorized, if the decision was taken or the act was authorized by the majority of the members of the council who were present at the time and entitled to sit as members of the council.

8.39 The Manitoba Interpretation Act provides as follows on majority, quorum and meetings:

Majority

18 If an Act or regulation requires or authorizes something to be done by three or more persons, a majority of them may do it.

Quorum

19 If an Act or regulation requires or authorizes a body consisting of three or more members to do anything, the following rules apply:

1. If the body has a fixed number of members, a majority of that number is a quorum.
2. If the body has a minimum or maximum number of members rather than a fixed number, a majority of the members in office is a quorum.
3. Anything done by a majority of the members present at a meeting, as long as a quorum is present, is deemed to have been done by the body.
4. As long as a quorum is present, a vacancy on the body does not affect the body's power or jurisdiction, or impair the right of the members remaining in office to act or make a decision.

Meetings, teleconferences and documents

20(1) If an Act or regulation requires or authorizes two or more persons to act or make a decision, they may do so:

- (a) at a meeting;

- (b) by using a method of communication that permits them to communicate with each other simultaneously, if all the persons required or authorized to act or make the decision consent to communicating in that way; or
- (c) by means of a document that is signed by all the persons required or authorized to act or make the decision.

Number of persons

20(2) For the purpose of clauses (1)(a) and (b), if there are two persons, both must be present at the meeting or must participate in the communication, and if there are more than two, a quorum must be present or must participate.

8.40 The Interpretation Act of British Columbia provides as follows:

- 18** (1) If in an enactment an act or thing is required or authorized to be done by more than 2 persons, a majority of them may do it.
- (2) If an enactment establishes a board, commission or other body consisting of 3 or more members, in this subsection called the "association", the following rules apply:
- (a) if the number of members of the association provided for by the enactment is a fixed number, at least 1/2 of that number of members constitutes a quorum at a meeting of the association;
 - (b) if the number of members of the association provided for by the enactment is not a fixed number, at least 1/2 of the number of members in office constitutes a quorum at a meeting of the association, as long as the number of members is within the maximum or minimum number, if any, authorized by the enactment;
 - (c) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, is deemed to have been done by the association;
 - (d) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

8.41 Section 26 of the Local Government (Procedures at Meetings) Regulations 2000 of South Australia provides as follows on quorums for committees:

26. The prescribed number of members of a council committee constitutes a quorum of the committee and no business can be transacted at a meeting unless a quorum is present.

The prescribed number of members of a council committee is—

- (a) unless paragraph (b) applies—a number ascertained by dividing the total number of members of the committee by 2, ignoring any fraction resulting from the division, and adding one; or
- (b) a number determined by the council.

8.42 Chapter 19 of the Pennsylvania Consolidated Statutes also includes a clause on quorums:

§1905 Joint authority; quorum

(a) Joint authority.- Words in a statute conferring a joint authority upon three or more public officers or other persons shall be construed to confer authority upon a majority of such officers or persons.

(b) Quorum – A majority of any board or commission shall constitute a quorum.

8.43 Section 22 of the Canadian Federal Interpretation Act establishes the quorum requirements for boards, commissions and other bodies established by statute:

22(1) Where an enactment requires or authorises more than two persons to do an act or thing, a majority of them may do it.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members, in this section called an “association”,

(a) at a meeting of the association, a number of members of the association equal to,

(i) if the number of members provided by the enactment is a fixed number, at least one half of the number of members, and

(ii) if the number of members provided by the enactment is not a fixed number but is within a range having a maximum or minimum, at least one half of the number of members in office if that number is within that range,

constitutes a forum;

(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, is deemed to have been done by the association; and

(c) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

8.44 The question arose at the Commission’s meeting on 9 September 2006 when the draft discussion paper was considered whether the Bill should require that a decision of a body needs to be taken at a *meeting* of the body particularly where there is a unanimous assent on a specific issue. In what follows we will note common law requirements for meetings and also developments in other jurisdictions. Every

state in the USA has some version of an open meetings law.¹⁷ Michigan's Open Meetings Act requires that all "meetings of a public body be open to the public and shall be held in a place available to the general public." Decisions of a public body, as well as deliberations where a quorum is present, are required to be open to and accessible by the general public. The Act defines a meeting as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy." The Act does not speak in terms of physical presence at meetings nor does it make reference to the use of technology in the conduct of meetings. Some states have included specific provisions regarding the use of technological communication. Still others, like Michigan, have broad statutes that leave open the question whether virtual presence is permissible under the statute. About half of the states in the USA provide, in some form, for the use of technology in public meetings. Alaska, with its geographical enormity and rough climate, has one of the oldest and best developed programs for utilizing meeting technology. Its open meetings statute expressly states that "attendance and participation at meetings by members of a governmental body may be by teleconferencing." A number of other states either expressly allow for participation by electronic equipment or define the term "meeting" as contemplating attendance by teleconference or other electronic means.¹⁸

¹⁷ Michigan Law Revision Commission "A report on the use of technology to conduct government meetings and recommendation to the Legislature" in *Michigan Law Revision Commission 38th Annual Report 2003* 9 – 19 at 15 available at http://council.legislature.mi.gov/files/mlrc/2003/2003_MLRC_Annual_Report.pdf (accessed on 12 September 2006).

¹⁸ See, e.g., Kansas Stat. Ann. § 75-4317a ("As used in this act, 'meeting' means any gathering, assembly, telephone call or any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency"); Kentucky Rev. Stat. Ann. § 61.826 ("A public agency may conduct any meeting, other than a closed session, through video teleconference"); Missouri Rev. Stat. § 610.010 ("The term 'public meeting' . . . shall include a public vote of all or a majority of the members of a public governmental body, by electronic communication or any other means, conducted in lieu of holding a public meeting with the members of the public governmental body gathered at one location in order to conduct public business"); N.J. Rev. Stat. § 10:4-8 ('Meeting' means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body"); South Carolina Code Ann. §30-4-20 ('Meeting' means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power"); Utah Code Ann. § 52-4-2 ('Meeting' means the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power").

8.45 Other states allow for the use of technology, but restrict the type of technology that may be used. Hawaii, for example, permits government meetings by video conference so long as all members can see and hear each other. In contrast, North Carolina allows electronic meetings as long as the government agency provides a location where members of the public may simply hear the proceedings. Some state statutes limit what can be undertaken at a virtual meeting, as well as the circumstances in which such meetings are permitted. California and South Dakota, for example, allow deliberation to take place through teleconferencing, but do not allow any official action to be taken by a board or committee. Virginia government agencies may not conduct more than one-fourth of their meetings using electronic means. Iowa and New Mexico only allow electronic meetings when physical presence is impossible or impractical.¹⁹

¹⁹ Susan Ross makes the following recommendations on meetings held by US public bodies: (see “Breakdown or breakthrough in participatory government?: How state open meetings laws apply to virtual meetings” [Newspaper Research Journal Summer 1998](http://www.findarticles.com/p/articles/mi_qa3677/is_199807/ai_n8802854) available at http://www.findarticles.com/p/articles/mi_qa3677/is_199807/ai_n8802854 accessed on 12 September 2006).

“States need not, and should not, adopt specific chapters on virtual meetings. Virtual meetings should be treated no differently from physical meetings. States should redefine ‘meeting’ to incorporate virtual meetings and to subject them to all the requirements imposed on physical meetings. Accordingly, meetings may be: Any simultaneous or serial exchange of information or action related to public business by two or more members of a public board through any means. Under this definition, boards may do anything at a virtual meeting that may be done at a physical meeting, and the law makes no distinction between physical and virtual attendance of board members.

State laws also should prohibit any differences in citizen access to physical or virtual meetings. State statutes should require all meetings, virtual or physical, to provide public notice and to permit board members and the public to *exchange* messages. Public participation is devalued by statutes that protect only the right of citizens to see and/or hear meetings. Public involvement is jeopardized further by statutes that permit boards to levy fees on citizens who attend and participate through information technologies.

State laws should ensure free public access to the systems of virtual meetings both through dial-up connections to virtual government meetings and through public access terminals or screens in city halls, public libraries and other public locations. If virtual meetings are textual or audio only, government agencies should be required to provide copies of all printed or visual materials at all public access sites and, to the extent possible, on-line.

Under these guidelines, there is no reason to limit the number or frequency of virtual meetings conducted by an agency. However, states should adopt express prohibitions with severe penalties for circumvention of the act. Violations should be determined on the basis of the effect of the challenged action, not the intent of board members. Finally, exemptions from statutory requirements in cases of emergency should be clearly stipulated and narrowly construed.

In this way, technology can simultaneously improve the functioning of government agencies and increase citizen access to public business.”

8.46 Elizabeth Boros notes that there are multiple issues that arise with "virtual meetings," namely what is meant by the term "virtual meeting," what a "meeting" really is, and why corporations hold them.²⁰ She points out that the general meeting of shareholders, as it is currently practiced in widely-held public corporations, leaves a lot to be desired. These meetings (at least in Australia and the UK, she notes) are poorly attended by institutional shareholders, most of whom regard visits by analysts and direct contact with management as more effective ways to influence the governance and business direction of corporations in their portfolios. The concerns of institutional shareholders are usually dealt with before the general meeting, and to the extent that issues do arise for a vote at the meeting, the outcome will generally have been determined by proxy votes lodged by institutional shareholders well in advance of the meeting. The other main category of shareholders, retail shareholders, is rationally apathetic and very few attend meetings or vote. Most could not attend even if they wished because meetings are held during business hours and often far from the shareholders' homes. Therefore, the few individuals who do attend are likely to be unrepresentative of the general body of shareholders. Furthermore, the financial cost to the corporation of convening a meeting with a substantial number of shareholders can be very high.

8.47 Elizabeth Boros explains that courts have noted that a physical gathering provides a forum for deliberation and confrontation. Commentators have similarly observed that the feature of confrontation or "face-to-face accountability" is particularly valuable to retail shareholders. Courts and commentators also note that views expressed at a meeting by minority shareholders can change the course of corporate policy, even if they do not carry the vote. For example, a corporation may be keen to head off potential damage to its reputation stemming from environmental protests or other wider-stakeholder concerns. She remarks that the trend in the UK and Australia is not to disband the meeting, but rather to find ways to revive it, by encouraging or requiring institutional shareholders to participate more actively, and by suggesting modest improvements to the way meetings are conducted, such as clearer notices of meeting and better handled shareholder communication.²¹

²⁰ *Virtual Shareholder Meetings* 2004 Duke L & Tech Rev 8 available at <http://www.law.duke.edu/journals/dltr/articles/2004dltr0008.html> (accessed on 12 September 2006).

²¹ Wayne J Carroll notes that with the advent of and improvement in video-conferencing/teleconferencing technology, corporate management has been able to free itself from the traditional strictures of legal requirements with respect to meetings and decision-making. (available at <http://www.jura.uni-duesseldorf.de/>

8.48 Elizabeth Boros asks if the value of a meeting is the forum it provides for confrontation, debate, and deliberation, must it take the form of a traditional physical gathering?²² She considers that one of the areas in which the internet could have the greatest practical impact on corporate law is in the context of shareholder meetings in widely held companies.²³ Virtual shareholder meetings could herald either the elimination of the last vestige of director accountability to shareholders or the revival of a moribund forum by offering shareholders the prospect of a low-cost and geographically limitless means of participation. She explains that when corporations legislation was initially drafted, it was assumed that decisions would be made at conventional physical meetings. Even though the legislation in most countries now allows at least some decisions to be reached in other ways, it still contains a bias in favour of decisions reached in the traditional way. There are instances where judges have taken a literal view of what is required to constitute a meeting. For example, in *Guinness plc v Saunders*,²⁴ the English Court of Appeal had to decide whether a director had disclosed a payment involving a conflict of interest ‘at a meeting of directors’ as required by Section 317 of the *Companies Act 1985* (UK) c 6. It was

dozenten/noack/texte/hv/carroll.html accessed on 12 September 2006.) Larger companies with operations spread throughout the country or even worldwide have particularly benefited from the developments in long distance communication and the impact hereof on company decision-making. He notes that given the similarity between the corporate structure and the governing laws, a comparison with developments in other common law jurisdictions may be useful. In England, historically the personal appearance of at least two persons at a company meeting was required under § 370 (4) Companies Act 1985. Since then there has been some liberalization through the case law, though there is no direct case on point concerning holding a shareholder meeting per videoconference or Internet. In Ireland, the relevant sections of the Companies Act 1963 or Table A thereto do not have a provision directly addressing this issue. Nevertheless, the general consensus is that such a meeting would be possible, provided that an appropriate rule were contained in the Articles of Association of the Company. Following very recent changes in Australian law, corporate meetings by electronic transmission have been greatly facilitated. The case law in Australia has shifted several times and exhibits a general trend toward allowing and facilitating electronic meetings. Moreover, the practice shows growing acceptance of and little resistance to holding meetings this way, even internationally. The key here is to ensure that all participants in the meeting can partake fully (e.g. no hindrances to hearing or seeing speakers) and that the meeting chairperson can fulfill their role with the requisite care. In general, the movement toward liberalizing the means of holding shareholder meetings seems to be welcomed both by institutional investors and shareholders.

²² *Virtual Shareholder Meetings* 2004 Duke L & Tech Rev 8.

²³ Elizabeth Boros “Virtual Shareholder Meetings: Who Decides How Companies Make Decisions?” 2004 Melbourne University Law Review 9 available at <http://www.austlii.edu.au/au/journals/MULR/2004/9.html> (accessed on 12 September 2006).

²⁴ [1988] 1 WLR 863; aff'd [1990] 2 AC 663 (House of Lords).

argued that formal disclosure was unnecessary because the board knew about the payment. However, as Fox LJ held:

that does not alter the fact that the requirement of the statute that there be a disclosure to ‘a meeting of the directors of the company’ (which is a wholly different thing from knowledge by individuals and involves the opportunity for positive consideration of the matter by the board as a body) was not complied with.²⁵

8.49 Boros explains that provided there is some form of meeting of minds, courts have generally been open to finding that something other than a formally constituted meeting will suffice. For example, in *Swiss Screens (Australia) Pty Ltd v Burgess*,²⁶ Bryson J held that any event in which the company’s directors reached concurrence in taking some course in the company’s affairs could be described as a ‘meeting’.²⁷ In recent times, the most relevant application of this approach has been in the context of cases regarding directors’ meetings by telephone. Most companies now put the validity of such meetings beyond doubt by providing expressly for them in their constitutions or articles of association. In addition, in Australia the *Company Law Review Act 1998* (Cth) introduced amendments designed to clarify that a directors’ meeting may be held using any technology consented to by all of the directors.

8.50 Boros explains that even under articles that did not expressly refer to meetings using technology, the English judiciary was receptive to this development and, since at least 1989, it has been assumed that directors might validly be present at a board meeting by telephone.²⁸ Directors’ meetings by telephone were also accepted as valid (in the absence of any authority, either in the statute or the board’s own rules) by the Appellate Court of Illinois in *Freedom Oil Co v Illinois Pollution Control Board*.²⁹ Boros explains that in Australia, one particular judge, Perry J, of the

²⁵ *Guinness plc v Saunders* [1988] 1 WLR 863, 868. The other members of the Court of Appeal agreed with the judgment of Fox LJ. The same approach was taken in the much earlier case of *D’Arcy v Tamar, Kit Hill & Callington Railway Co* (1867) LR 2 Ex 158. For an Australian authority to similar effect, see *R v Byrnes* (1996) 20 ACSR 260, 270–1 (Bollen, Prior and Olsson JJ).

²⁶ (1987) 11 ACLR 756.

²⁷ See also *Wagner v International Health Promotions* (1994) 15 ACSR 419, 421–2 (Santow J); *Roden v International Gas Applications* (1995) 125 FLR 396, 397–8 (McLelland CJ).

²⁸ See, eg, *Re Equiticorp International plc* [1989] 1 WLR 1010. At the time, the Court of Justice of the European Communities also took this approach: see, eg, *R v HM Treasury; Ex parte Daily Mail & General Trust plc* [1989] 1 QB 446.

²⁹ 275 Ill App 3d 508 (1995). See also Jessica Natale “Exploring Virtual Legal Presence: The Present and the Promise” (2002) 1 *Journal of High Technology Law* 157

South Australian Supreme Court, has been much more hostile to departures from the physical meeting format. In *Re Southern Resources Ltd; Residues Treatment & Trading Co Ltd v Southern Resources Ltd*, his Honour held that:

The words in art 105 'meet together'; the requirements as to a quorum; the provisions of art 106 disentitling a director while out of Australia to notice of a meeting of the directors; the words in art 106 that a director 'may attend and vote by proxy'; the words in art 108 referring to a quorum being 'present'; the requirement in art 113 as to the keeping within the minutes of a meeting of the directors of the names of the directors 'present at each meeting', all point inexorably to the conclusion that in the articles the word 'meeting' has its ordinary meaning, namely, that it refers to an assembly of people, that is, the directors.³⁰

8.51 Perry J also considered that the result would be no different if a conference telephone were used.³¹ However, a few years later in *Bell v Burton*, Tadgell J would

available at <http://www.law.suffolk.edu/highlights/stuorgs/jhtl/publications/V1N1/JNATALEV1N1N.pdf> (accessed on 13 September 2006).

³⁰ (1989) 15 ACLR 770, 793.

³¹ In *B&M Property Enterprises P/L (In Liq) v Pettingill* [2001] SASC 75 Perry J remarked as follows: (available at <http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/march/2001sasc75.html> (accessed on 13 September 2006))

88. This gives rise to the need to address the question whether a director could properly participate in a directors' meeting, by telephone.

89. In *Magnacrete v Douglas Hill*, I observed:

"The law has not yet advanced to the position whereby board meetings of directors may lawfully be held by separate phone calls to directors: It may be that a meeting of directors could be held on a conference telephone, but that is not the position here."

90. I took the matter up again in *Re Southern Resources*. In that case, after referring to *Magnacrete*, I said:

"The question comes down to construction of the articles of association. In my opinion, the articles of association of Southern Resources do not contemplate participation in a meeting of directors by telephone. If some directors meet, and others are contacted by telephone either during the course of the meeting or otherwise, those contacted by telephone cannot be regarded as participants in the meeting or in the business conducted at the meeting. If they purport to vote, the vote is of no effect as a formal vote. The situation is no different if a conference telephone, as opposed to a conventional phone is used."

91. Since my decision in *Southern Resources*, the *Corporations Law* has been amended by the insertion of s 248D which provides:

"A directors' meeting may be called or held using any technology consented to by all the directors"

92. That section came into force on 1 July 1998.

93. It follows that at the time when the meeting in question was held, the common law, which of course takes into account any specific provisions to be found in the articles of association, applied.

have been prepared to countenance a directors' meeting by 'telephone, video link, or any other electronic means which caters for a meeting of their minds'.³² This approach received obiter approval from Santow J in *Wagner v International Health Promotions*, where he considered that a constitutional reference to the directors 'meeting together' could include a meeting of minds made possible by modern technology (in that case a conference telephone).³³ This approach was applied to hold valid a directors' meeting where one director attended by telephone in *Re Ferguson*³⁴ and has been adopted in several subsequent cases.³⁵

8.52 Elizabeth Boros notes that there has been very little judicial consideration of what amounts to a valid meeting of shareholders³⁶ the one exception being the decision of the English Court of Appeal in *Byng v London Life Association Ltd*,³⁷

94. As for the common law position as at the date of that meeting, I adhere to the view which I expressed in *Magnacrete* and *Southern Resources Ltd*, notwithstanding the fact that my observations in those cases have not been universally accepted.

³² (1993) 12 ACSR 325, 329.

³³ (1994) 15 ACSR 419. See *Farnell Electronic Components Pty Ltd* Matter No 3434/97 (30 October 1997) (available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme_ct/unrep543.html (accessed on 12 September 2006)) where the court stated with reference to this case: The first problem is whether the alleged meeting of directors was properly held. Regulation 69 of 1981 Table A provides that "The directors may meet together ... as they think fit." Articles such as 69 have been construed as requiring a meeting of the minds of the directors rather than their bodies; see *Wagner v International Health Promotions* (1994) 15 ACSR 419 and *Re Ferguson* (1995) 58 FCR 106. Accordingly, there is no barrier to the effectiveness of the resolution because the meeting was held by telephone.

³⁴ (1995) 58 FCR 106.

³⁵ See, eg, *Re Farnell Electronic Components Pty Ltd* (1997) 25 ACSR 345; *Mulcon v MYT Engineering* (1996) 20 ACSR 606, 609–10 (Bryson J). Cf *B & M Property Enterprises Pty Ltd (in liq) v Pettingill* [2001] SASC 75 (Unreported, Perry J, 22 March 2001) [94]. Elizabeth Boros notes that in this respect, judicial thinking seems to have moved on from the position described in Ross Grantham, 'The Unanimous Consent Rule in Company Law' (1993) 52 *Cambridge Law Journal* 245, 254–5.

³⁶ Elizabeth Boros "Virtual Shareholder Meetings: Who Decides How Companies Make Decisions?" 2004 *Melbourne University Law Review*.

³⁷ 1990 Ch. 170 183 (CA). The June 2003 Consultation Paper on *Corporate Governance Review* by the Hong Kong Standing Committee on Company Law Reform (available at http://www.info.gov.hk/archive/consult/2003/cgr2_e.pdf accessed on 12 September 2006)) noted at par 21.04 that there is no statutory definition of a "meeting" and that at common law, a meeting has been defined as "the coming together of at least two persons for any lawful purpose" (*Sharp v Dawes* (1876) 2 QBC 29). The Consultation Paper explained that a question arises as to whether as a matter of law a meeting must be held at the same place and that it was held in *Byng v London Life Association Ltd* [1989] 1 All ER 560 that a general meeting could take place in more than one room with adequate audio-visual links to enable everyone attending to see and hear what is going on in all the rooms being

which in 1990 accepted the validity of holding an AGM in several rooms connected by audiovisual links that enabled those in all the rooms to see and hear what was going on in the other rooms. Despite this evidence of the judiciary's willingness to embrace the use of technology in this context,³⁸ the Australian corporations

used. The Consultation Paper explained at par 21.05 that in Australia, legislation has been amended to provide for meetings at two or more places. Section 249S of the Corporations Act 2001 ("ACA") provides that a company may hold a meeting of its members at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. This contemplates the use of video-conferencing and electronic communications and requires opportunity to participate. The Consultation Paper noted at par 21.06 that in the United Kingdom, the Company Law Review Steering Group ("the CLRSG") recommended that a company should be permitted to hold a general meeting at more than one location, with two way real time communication between the participants, and that the law should if necessary make this clear. The CLRSG further recommends that detailed rules for dispersed meetings (e.g. on the type of communications, the arrangements for verifying attendance) need to be responsive to changing technology and should therefore be best left to non-statutory rules.

38

Boros notes that an interesting contrast is provided by the recent decision of Palmer J in the context of a creditors' meeting in *Holzman v New Horizons Learning Centre (Canberra) Pty Ltd* [2004] NSWSC 90 available at <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/february/2004nswsc90.htm> (accessed on 12 September 2006). This was an urgent application under s 447A(1) and (4) of the *Corporations Act 2001* (Cth) by the administrator of four companies for an order permitting him to attend, by video conference link, meetings of creditors of the companies required to be held pursuant to s 439A. The application was made because Austin J has held in *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612 that s 439B(1) of the Act requires personal attendance by an administrator at a meeting held under s 439A. His Honour repeated that view in *Re A&D Hagan Pty Ltd (Receiver and Manager Appointed) (Administrator Appointed)* (2003) 46 ACSR 434. The administrator was unsure whether his attendance at the meetings by video conference link qualifies as "personal attendance" – hence his application for an enabling order under s 447A. Palmer J held as follows:

8 In my view, it is important to ensure that meetings under s 439A are conducted in such a way as will not disadvantage the creditors who attend. Creditors will often have difficult decisions to make at such meetings and will require careful explanations, answers to complex questions, and the opportunity and time for full discussion. Video conferencing may meet all of these needs with considerable cost savings in some cases but not in others.

9 Where the issues are relatively straightforward or where the number of creditors is small, the administrator may easily be able to preside effectively and efficiently at a meeting by video conference link. However, where the issues are complex or the number of creditors is large, it may be difficult for an administrator presiding by video link to control the meeting and to provide satisfactory information to all those who wish to ask questions. The artificiality of communication through video link and the slight but perceptible delay between transmission and receipt can sometimes prevent the free flow of exchange in a way that would not occur at a meeting where all participants are present in the same room. Further, the cost of video conferencing may be perceived as inhibiting discussion to as full an extent as creditors would wish. . . .

legislation was amended in 1998 to clarify the legality of this approach. In the United Kingdom, the Company Law Review Steering Group was equivocal about whether such reforms might be necessary. She explains that extending this approach to encompass a meeting involving a large number of shareholders, at locations which are not supervised by the company, presents practical as well as legal challenges. The practical challenges include keeping track of which members are 'present', verifying their identities in some way, and devising a forum that incorporates the features of deliberation and debate as well as giving shareholders the opportunity to cast a vote in real-time.

8.53 Elizabeth Boros considers that law reform may also be required as in Australia, there is no express provision allowing a meeting to be held in no place, although the legislation does expressly provide for a meeting to be held in more than

15 If the meetings were to proceed by video conferencing, all of them could be held on one day at staggered times and the administrator would preside and be able to answer such questions as the creditors might wish to ask him. The administrator has obtained a quotation for the cost of video conferencing at the four meetings and has calculated that the saving of expense to creditors would be at least \$10,000.

16 Further, if all meetings could be held on 4 March rather than the first of them on 2 March, the administrator will have two extra days to digest the directors' proposals for Deeds of Company Arrangement and to prepare a report to creditors.

17 The evidence clearly shows that the administrator's attendance at the creditors' meetings by video link rather than by being physically present would result in a considerable saving of expense to the creditors. Further, the creditors would have the benefit of a more considered report from the administrator as to the proposed Deeds of Company Arrangement. Having regard to the relatively small number of creditors who attended the previous creditors' meetings, I do not think that the administrator's conduct of the meetings to be held under s 439A by video link would prove unwieldy.

18 I do not know whether the issues raised by the directors' proposed Deeds of Company Arrangement and the administrator's report thereon will be complex and difficult so that discussion with the administrator would be unduly inhibited if conducted by video link. If this proves to be the case, it is open to the meetings to vote to adjourn for further discussion at meetings at which the administrator is physically present.

19 As the matter stands at present, the evidence satisfies me that the creditors are not likely to be disadvantaged and that it is in their interests that the administrator be permitted to attend the s 439A meetings of the Defendant companies by video conference link. The orders do not extend to an adjourned meeting. If any of the meetings is adjourned the administrator would be obliged to seek a fresh order under s 447A if he wishes to preside by video conference link although if the creditors voted that the adjourned meeting should be conducted by video link I would expect that the administrator's application would be granted almost as a matter of course.

one place. Depending on how this requirement is interpreted, it might be possible to argue that this could extend to an entirely virtual meeting. The only guidance on how this provision might work is the statutory requirement that members as a whole must have a reasonable opportunity to participate in the meeting. In this context, the Explanatory Memorandum to the Company Law Review Bill 1997 (Cth) states:

This does not require that each individual member have an opportunity to participate. For most companies, a reasonable opportunity to participate would mean that each member is able to communicate with the chairman and be heard by other members attending the meeting, including those at the other venues. However, whether there has been a 'reasonable opportunity' will depend upon the circumstances of the meeting.

8.54 Elizabeth Boros notes that the Delaware General Corporation Law clarifies the common law position that meetings held in multiple venues are valid.³⁹ She explains that it is legally possible in Delaware to go a step further and hold a shareholder meeting without a physical venue, but, practically, it is much more difficult to conceive of a way to replicate the elements of confrontation, debate, and deliberation in an electronic environment where there is a large number of shareholders and the corporation has no control over their location. The few meetings held in Delaware under the above-cited provision do not appear to have involved real time participation by large numbers of widely-dispersed shareholders.

8.55 Elizabeth Boros remarks that admittedly, the Delaware law does not preserve all elements of the common law concept of "meeting" but by referring to "proceedings of the meeting," the statute arguably requires some kind of debate and deliberation. This might, for example, be satisfied by a "meeting" held via a company-sponsored bulletin board. On the other hand, it would appear not to be satisfied by a ballot held without any exchange of views. However, Delaware law does not appear to require the forum to provide an electronic analogy of confrontation. A bulletin board, for example, would not be able to convey the body language of the person answering the question. As a consequence, the Delaware provision permitting virtual meetings has drawn a hostile response from those concerned that it removes the element of face-to-face accountability so valued by retail shareholders. Such sentiments also resulted in the abandonment of a legislative proposal which would have permitted virtual meetings in Massachusetts. Delaware law contains a written consent option to allow stockholders to reach decisions without a meeting in limited situations, requiring the same percentage of votes necessary to approve the action at an actual meeting. Although this procedure does not involve electronic communications

directly, it is relevant to this discussion because it provides a mechanism for reaching a corporate decision by means other than a traditional physical gathering. The procedure is qualitatively different from the common law concept of a meeting, which offers the potential for both deliberation and face-to-face accountability, except in cases of unanimous agreement. The editors of *Delaware Corporation Law and Practice* note that it was originally intended as a procedural reform to remove red tape, but had the unintended consequence of potentially disadvantaging management in control contests. As a result, corporations often change this default rule in their articles of incorporation, resulting in the paradoxical consequence that physical gatherings will generally be held, even in Delaware.

8.56 As we noted in the preceding discussion, the advance of technology has made it easier to participate in meetings by telephone and video links. This matter was also raised in the Australian Discussion Paper. It was decided that a provision relating to participation in meetings via telecommunications technology would play a role in maintaining consistency in law and administration. It was proposed that section 33B be inserted into the Australian Interpretation Act. The Act now provides as follows on distant participation in meetings:

33B. Participation in meetings by telephone etc.

- (1) This section applies to a body (whether or not incorporated) established by an Act if [the Act](#) requires or permits meetings of the members of the body to be held.
- (2) The body may permit its members to participate in a meeting, or all meetings, by:
 - (a) telephone; or
 - (b) closed-circuit television; or
 - (c) any other means of communication.
- (3) A member who participates in a meeting under a permission under subsection (2) is taken to be present at the meeting.
- (4) This section has effect subject to any contrary intention in [the Act](#).

8.57 The issue of remote participation in Parliamentary Committee meetings was also recently considered in Victoria, Australia. The Scrutiny of Acts and Regulations Committee said that in recommending the use of webcasting, teleconferencing and/or videoconferencing for the collection of evidence, the Committee observed that there are few technical barriers to allowing Committees of the Parliament to conduct

business using these technologies.⁴⁰ The Committee noted that allowing a meeting to be conducted via Information and Communication Technology (ICT) would be of benefit where:

- Matters are urgent and a quorum is difficult to establish due to the absence of one or more MPs
- Parliament is not sitting and MPs are at a distance from Melbourne
- A MP is physically incapacitated, has carer's duties or has been detained
- The matter is so minor as not to justify the physical travel of MPs.

8.58 This matter was supported by the Members of the Rural and Regional Services and Development Committee (RRSDC) of the Parliament of Victoria, who note the considerable cost to Members associated with travel for routine Committee business. The RRSDC's submission noted:

The Rural and Regional Services and Development Committee is comprised of seven Members, all of whom represent rural and regional electorates. Members are required to travel for up to five hours to attend Committee meetings, which may only be of a short duration (ie. between one and two hours) relative to travel time. Whilst Members' attendance at Committee meetings and hearings has, to date, been consistently high, it has necessitated Members sacrificing many hours in travel time that could otherwise be applied to electorate or other activities. The Committee is therefore keen to explore alternatives which would enable them to meet their Committee obligations without undue impact on other duties and commitments. Teleconferencing and videoconferencing have been suggested as possibilities. (Submission No. a33, p. 1)

8.59 The Committee observed that precedent for this approach exists, and in some circumstances it had been acceptable for committees to take votes by facsimile - for minor matters. Thus, the general question of remote participation in Committee processes had already been resolved in the affirmative. The Committee noted that the Parliament of Western Australia and the Australian Senate both permit the conduct of meetings via electronic means, with the Senate permitting a range of technologies to constitute an electronic meeting, and the Parliament of Western Australia focusing on video-conferencing facilities. In the view of the Procedure and Privileges Committee of the Parliament of Western Australia, this approach for deliberative meetings was considered appropriate:

A committee member, when using video-conferencing from a remote location as a method to attend a deliberative meeting or hearing, will be counted as part of that committee's quorum. If members can participate fully, there is no reason not to count them for quorum purposes or to enable them to move motions and to vote. A chairman

⁴⁰ Scrutiny of Acts and Regulations Committee Final Report *Victorian Electronic Democracy* May 2005 available at http://www.parliament.vic.gov.au/SARC/E-Democracy/Final_Report/PartIV.htm (accessed on 12 September 2006).

of a committee will need to be careful to ensure that a member attending by video-conference has an equal opportunity with other members to participate. (Procedure and Privileges Committee, 2003:4)

8.60 The Committee noted that in addition, in its 2002 Report⁴¹ the Scrutiny of Acts and Regulations Committee made explicit comment on this matter:

15.11 The Committee also considered the appropriateness of conducting meetings held for the purposes of committee deliberation where all or some of the members were linked by electronic means. Section 4G(2) of the Parliamentary Committees Act 1968 provides a Joint Investigatory Committee may only sit and transact business in such places in Victoria or elsewhere as are convenient for the proper and speedy dispatch of business. The quorum requirements for the various committees are set out in section 4B of the Parliamentary Committees Act 1968.

15.12 Under the common law, a meeting required the physical presence of members. Thus in *Higgins v. O'Grady* [1971] IAS Current Review 65 it was held that resolutions purportedly passed by telephone hook-up were invalid. A body, however, could include a provision in its governing rules authorising the holding of a meeting by telephone. However, it was held in the New South Wales Supreme Court case of *Wagner v. International Health Promotions Pty Ltd* (1994) 15 ACSR 419 that the phrase "meet together" in a company's articles included a meeting of minds made possible by modern technology.

15.13 The Committee notes that all committees of the Senate may meet "electronically", without members being physically present in one place. It seems to the Committee that there is nothing in the Parliamentary Committees Act 1968 that would necessarily prohibit Parliamentary committees in Victoria from meeting electronically. However, to put this beyond doubt, the Committee is of the opinion that it should be directly expressed in an Act dealing with Parliamentary committees that committees may meet electronically. (SARC, 2002c)

8.61 Thus, given support for this approach, the Committee gave consideration to barriers that might prevent the use of ICTs to facilitate the business of Victorian Parliamentary committees. In hearings, the President of the Legislative Council, Ms M. Gould, MLC stated that:

This would also require legislative amendments because under the Constitution Act [1975] a committee is required to meet in a room and form a quorum whereas committees in other jurisdictions are established with standing orders, not legislation. (Minutes of Evidence, 16/02/05, p. 33)

8.62 The Committee noted that this specific prohibition appears to be located in the Parliamentary Committees Act 2003, which states that (ss23-25):

23. Quorum

(1) The quorum of a Joint Investigatory Committee is a majority of the members appointed to it.

⁴¹ [Audio-Video Records as Evidence](http://www.parliament.vic.gov.au/SARC/E-Democracy/Final_Report/PartIV.htm#AudioVideoRecordsasEvidence#AudioVideoRecordsasEvidence) available at http://www.parliament.vic.gov.au/SARC/E-Democracy/Final_Report/PartIV.htm#AudioVideoRecordsasEvidence#AudioVideoRecordsasEvidence (accessed on 13 September 2006).

(2) A quorum of a Joint Investigatory Committee must not consist exclusively of members of the Council or the Assembly.

24. Voting by members

(1) A question arising at a meeting of a Joint Investigatory Committee must be determined by a majority of votes of members present and voting on that question.

25. Sittings

(1) Subject to sub-sections (2) and (3), a Joint Investigatory Committee may sit and transact business-

(a) at times (including times when either House of the Parliament is not actually sitting); and

(b) in places in Victoria or elsewhere-

that are convenient for the proper and speedy dispatch of business.

(2) If a House of the Parliament is actually sitting, a Joint Investigatory Committee must not sit-

(a) except by leave of the House; and

(b) in any place, other than a place that is within the Parliamentary precincts.

(3) Business may only be transacted at a meeting of a Joint Investigatory Committee if a quorum is present.

8.63 Here the focus in the legislation is the concept of "presence". Thus, to bring finality to the recommendation of the SARC of the 54th Parliament (15.13), and the view of the Committee that electronic meetings be facilitated in for committees of the Victorian Parliament, the Committee noted that an amendment to the *Parliamentary Committees Act 2003* was required to the effect of:

"That a committee, through unanimous vote, is able to constitute itself with one or more remote Members participating via a telecommunications or like service."

8.64 It was the view of the Committee that, in practice, Committees should act on this power with due caution, and favour the physical attendance of Members where possible. The Committee observed, however, the use of the unanimous vote as a safeguard against misuse, and that:

- Clear guidance be provided to committees about acceptable practice in this area;
- Emphasis be given to the exceptional nature of the use of these meeting procedures prior to the development of experience with them;
- Care be taken to emphasise the use of a range of technologies, but also to focus on technological use that does not exclude another Member (such as the use of a single telephone line, which prevents a second caller);

- Clear guidance on the need for committees to adopt a resolution on the use of electronic meetings *prior* to the first meeting.

8.65 The Committee recommended that the Parliamentary Committees Act 2003 should be amended to permit the constitution of Committee meetings with Members participating by audio or video link where:

- The quality of this link is such that Members of the Committee attending physically can verify the identity of the absent Member.
- The participation of one Member remotely does not prevent the participation of another via a similar means (multiple participation by Members remotely).
- The Committee has resolved unanimously to permit the use of these technologies for Committee business.

8.66 The participants in the experts meetings, particularly in Cape Town, debated at length whether a provision relating to participation in meetings via telecommunications technology should be included in the new Interpretation Act. A few of the participants felt strongly that it should not be included due to problems that might arise as to proof of authenticity of the communication and problems of security. It was eventually agreed that it would be useful to have a provision to this effect. It was felt that a general provision specifying that meetings could be held without everyone being present would be advantageous. However, the group felt that the provision should refer to “any other means of instantaneous communication” to make it clear that the communications must be made at the same time. Any disputes about the authenticity of the communication could be challenged if anyone suspected that there was an irregularity. The provision should make it clear that participation in meetings by other means of communication would only be permitted if the body or tribunal concerned agreed to it. It was proposed that the provision be included but that it be specified that “voting may take place by using electronic means, unless the context indicates otherwise”.

8.67 The Commission proposes that the following provisions be included in the Bill dealing with decisions of bodies consisting of members, quorums for meetings, and distant participation by members: (Comment is requested in particular on the proposed wording requiring that decisions must be taken at a *meeting* of the body.)

Decisions of bodies consisting of members

43. If legislation provides for decisions to be taken by a body consisting of members –

- (a) a decision of the body must be taken at a meeting of the members of the body; and
- (b) the validity of a decision taken by the requisite number of members at a meeting of the body is not affected merely because –
 - (i) of a vacancy in the membership of the body; or
 - (ii) a person who is not a member participated in the meeting.

Quorums for meetings and decisions of bodies consisting of members

44. (1) If legislation provides for the exercise of a power or function by a body –

- (a) consisting of two members, a matter before a meeting of the body is decided by a unanimous vote; or
- (b) consisting of at least three members –
 - (i) a majority of the persons serving as members of the body at the time the meeting is held constitutes a quorum for a meeting of the body;
 - (ii) a matter before a meeting of the body is decided by a supporting vote of a majority of the members present at the meeting; and
 - (iii) the member presiding at the meeting may in the event of an equality of votes exercise a casting vote in addition to that person's vote as a member.

(2) A member of a body who participates in a meeting of the body in accordance with section 45 must for the purpose of subsection (1) (b) (ii) of this section be regarded as being present at the meeting.

(3) All decisions by a body consisting of members must be recorded, but noncompliance with this subsection does not invalidate the decision.

Distant participants in meetings

45. If legislation provides that decisions of a body established in terms of legislation must be taken at a meeting of members of the body, a member or other person entitled to participate in a meeting who is not present at a meeting, may participate in the meeting by telephone, radio, closed-circuit television, the internet or any other audio-visual or any other medium of instantaneous communication, provided that –

- (a) a facility for such communication is available;
- (b) the body has agreed to allow such participation;
- (c) such participation is in accordance with any conditions subject to which the body allows such participation; and
- (d) the distant participant and the persons physically present at the meeting are all –
 - (i) audible to one another, if participation is by telephone, radio, the internet or other audio medium of communication; or

- (ii) audible and visible to one another, if participation is by closed-circuit television or other audio-visual medium of communication.

G. EFFECT OF WORDS OF INCORPORATION

8.68 The Canadian Federal Interpretation Act contains a section which sets out the basic powers, capacities and restrictions affecting corporations, such as the power to sue and be sued; the right of perpetual succession; the use of the corporate name; and the establishment of limited liability for shareholders.⁴²

21(1) Words establishing a corporation shall be construed

- (a) as vesting in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property for the purposes for which the corporation is established and to alienate that property at pleasure;
 - (b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, as vesting in the corporation power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;
 - (c) as vesting in a majority of the members of the corporation the power to bind the others by their acts; and
 - (d) as exempting from personal liability for its debts, obligations or acts individual members of the corporation who do not contravene the provisions of the enactment establishing the corporation.
- (2) Where an enactment establishes a corporation and in each of the English and French versions of the enactment the name of the corporation is in the form only of the language of that version, the name of the corporation shall consist of the form of its name in each of the versions of the enactment.
- (3) No corporation is deemed to be authorized to carry on the business of banking unless that power is expressly conferred on it by the enactment establishing the corporation.⁴³

8.69 The Companies Act 61 of 1973 deals comprehensively in sections 32 to 73D with the formation, objects, capacity, powers, names, registration and incorporation of companies, matters incidental thereto and deregistration. The Close Corporations Act 69 of 1984 deals with the formation and juristic personality of close corporations, registration, deregistration and conversion of corporations, membership, disposal of

⁴² Keeshan and Steeves *The 1996 Annotated Federal and Ontario Interpretation Acts* 22

⁴³ Prof Crabbe proposes a similar provision in his Bill for an Interpretation Act in Crabbe *Understanding Statutes* 206.

interest of insolvent members, disposal of interest of deceased members, cessation of membership by order of court, maintenance of aggregate of members' interests, etc.

8.70 It therefore does not seem necessary to include in our Interpretation Act a provision similar to that in the Canadian Act on the basic powers, capacities and restrictions affecting corporations.

H. OFFENCES AND PENALTIES

8.71 The South African Interpretation Act does not deal with offences and penalties. A number of foreign jurisdictions deal with this issue in their interpretation statutes. The Interpretation Act of England and Wales contains the following provision:

18. Duplicated offences

Where an act or omission constitutes an offence under two or more Acts, or both under an act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished more than once for the same offence.

8.72 Section 20(1) of the similarly worded Northern Ireland Interpretation Act provides as follows: "Where any act or omission constitutes an offence under two or more than two statutory provisions or under a statutory provision and at common law, the offender shall be liable to be prosecuted and punished under either or any of those provisions or at common law, but shall not be liable to be punished twice for the same offence". Professor Crabbe's proposed Bill for an Interpretation Act contains a similar provision.

8.73 It is considered that the Criminal Procedure Act 51 of 1977 deals comprehensively with issues such as charges to be met by accused persons and sentencing. It would therefore seem unnecessary to include provisions dealing with offences and penalties in the revised Interpretation Act.

I. ADDITIONAL STANDARD PROVISIONS

8.74 There are many other standard provisions which are contained in Acts in the South African statute book. Proposals as to other standard provisions which might be suitable for insertion in the Interpretation of Legislation Bill are welcomed.

INTERPRETATION OF LEGISLATION BILL, 2006

To give effect to the principle of constitutional supremacy in the interpretation of legislation; to provide certain rules and practices for the interpretation of legislation; to promote uniformity in the language of legislation; and to provide for incidental matters.

PREAMBLE

WHEREAS the Constitution requires legislation to be accessible;

AND WHEREAS rules and practices for the interpretation of legislation are an important aid to facilitate access to legislation not only by courts, but also by the administrators of legislation and by ordinary citizens;

AND WHEREAS the Constitution requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation;¹

AND WHEREAS current legislation providing general rules for the interpretation of legislation does not serve the new order of constitutional supremacy,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

ARRANGEMENT OF SECTIONS

CHAPTER 1

INTERPRETATION, PURPOSE AND APPLICATION OF THIS ACT

1. Interpretation of this Act
2. Purpose of this Act
3. Application of this Act

CHAPTER 2

PRINCIPLES OF INTERPRETATION

4. Supremacy of Constitution
5. Determination of meaning of legislation
6. Reading legislation as a whole
7. Legislation to be interpreted in the light of changing circumstances
8. Extrinsic information

¹ The Commission is of the view that there is no need for the following two preambular paragraphs:

AND WHEREAS the Constitutional Court is in terms of the Constitution the highest court in all constitutional matters, including the interpretation of the Constitution;

AND WHEREAS there is a need for rules and practices of interpretation to be enacted for ordinary legislation to reflect the new order of constitutional supremacy in the Republic;

9. Inconsistencies between provisions in same legislation

CHAPTER 3

PUBLICATION, COMMENCEMENT, AMENDMENT AND REPEAL OF LEGISLATION

Part 1: Publication of legislation

10. Publication of legislation precondition for its enforcement
11. Publication of legislation in Gazette
12. Alternative manner of publication
13. Subordinate legislation to be submitted to Parliament and provincial legislatures

Part 2: Commencement of legislation

14. Definition
15. Commencement of legislation not subject to commencement provisions
16. Commencement of legislation subject to commencement provisions
17. Different commencement dates for different provisions
18. Application of legislation before its commencement

Part 3: Amendment and repeal of legislation

19. Definitions
20. Effect of repeal of legislation
21. Effect of repeal and replacement of legislation
22. Effect of repeal of enabling legislation on assigned or subordinate legislation
23. Effect of repeal or amendment of legislation on references in other legislation
24. Amendments

CHAPTER 4

WORDS AND EXPRESSIONS OFTEN USED IN LEGISLATION

25. General definitions for words and expressions often used in legislation
26. Derivatives and other grammatical forms of defined words and expressions
27. Reference to "person" includes reference to organ of state
28. Gender
29. Number
30. Words and expressions in assigned or subordinate legislation

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RECKONING OF TIME AND MEASUREMENT OF DISTANCES

Part 1: Reckoning of time

31. Definition
32. When period of reckoning starts for purposes of reckoning
33. When period ends for purposes of reckoning
34. Periods expressed in calendar months or calendar years
35. Reasonable time

Part 2: Measurement of distances

36. Measurement of distances

CHAPTER 6

STANDARD PROVISIONS

37. Use of official forms
38. Methods of serving, delivering, sending or submitting documents
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41. Consultation procedures
42. Exercise of powers, duties or functions by persons other than natural persons
43. Decisions of bodies consisting of members
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CHAPTER 7

EXERCISE OF POWERS, DUTIES AND FUNCTIONS

46. Notification in Gazette of official acts in terms of legislation
47. Words indicating whether legislation directory or peremptory
48. Implied powers
49. Amendment or repeal of subordinate legislation
50. Amendment or repeal of decisions
51. Exercise of powers and performance of duties
52. Power to appoint persons
53. Power to differentiate when issuing subordinate legislation
54. Delegation of powers and duties
55. Transfer of legislation, powers and functions by President to other Cabinet members
56. Transfer of legislation, powers and functions by Premiers to other members of Executive Council

CHAPTER 8

OTHER MATTERS

57. Extent to which legislation binds the state
58. Short title and commencement

CHAPTER 1

INTERPRETATION, PURPOSE AND APPLICATION OF THIS ACT

Interpretation of this Act

1. (1) In this Act, unless inconsistent with the context or clearly inappropriate –

"assigned legislation" means –

- (a) a provincial Act passed by a provincial legislature in terms of a power assigned to it by national legislation, and includes a provincial Act envisaged in section 104 (1) (b) (iii) of the Constitution, but excludes a provincial Act which is original legislation; or
- (b) a municipal by-law passed by a municipal council in terms of a power assigned to local government by national or provincial legislation in terms of section 156 (1) (b) of the Constitution, but excludes a municipal by-law which is original or subordinate legislation;

"duty" includes an obligation or responsibility to do something;

"extrinsic information" means any report, submission, comment or any other information which sheds light on the background to, or the purpose or scope of, legislation;

"function" means a matter consisting of powers and duties;

"intrinsic information" means any marginal note, footnote, endnote, information statement, memorandum or other information published in or together with the text of legislation aimed at explaining the text;

"legislation" means –

- (a) a specific legislative enactment including this Act but excluding the Constitution; or
- (b) a provision of such a legislative enactment,

whether enacted before or after the commencement of this Act;

"national legislation" means an Act of Parliament, and includes –

- (a) legislation which was in force when the Constitution took effect and which is administered by the national government; or
- (b) subordinate legislation issued by a national executive organ of state in terms of a legislative power conferred by –
 - (i) an Act of Parliament; or
 - (ii) legislation referred to in paragraph (a);

"old order legislation" means legislation enacted before the previous Constitution took effect;

"organ of state" has the meaning assigned to it in section 239 of the Constitution;

"original legislation" means –

- (a) legislation enacted in terms of a power derived directly from the Constitution, and includes –
 - (i) an Act of Parliament passed in terms of section 44 of the Constitution;
 - (ii) a provincial Act passed in terms of section 104(1)(a) or (b)(i),(ii) or (iv) of the Constitution; and
 - (iii) a by-law passed by a municipal council in terms of section 156(2) of the Constitution regarding a local government matter referred to in section 156 (1) (a) of the Constitution;
- (b) legislation enacted in terms of a power derived directly from the previous Constitution, and includes –
 - (i) an Act of Parliament passed in terms of section 37 of the previous Constitution; and
 - (ii) a provincial Act passed in terms of section 126 (1) of the previous Constitution; or
- (c) any old order legislation that was regarded as original legislation before the previous Constitution took effect;

"power" includes a right, entitlement, authority or competence to do something;

"previous Constitution" means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993);

"provincial legislation" means a provincial Act, and includes –

- (a) legislation which was in force when the Constitution took effect and which is administered by a provincial government; and
- (b) subordinate legislation issued by a provincial executive organ of state in terms of a legislative power conferred by –
 - (i) a provincial Act;
 - (ii) legislation referred to in paragraph (a); or
 - (iii) national legislation;

"provision", in relation to legislation, means any of the constituent parts of the legislation, including –

- (a) the short or long title of the legislation;
- (b) the enacting statement;
- (c) the preamble;
- (d) the table of contents;
- (e) any of the segments into which the text of the legislation is divided;
- (f) a segment heading;

- (g) a schedule or annexure to the legislation; or
- (h) any distinct part of or phrase contained in any of the constituent parts,

but excludes any marginal note, foot note, end note, information statement, memorandum or any explanatory or other information published in or together with the text of legislation;

"subordinate legislation" means –

- (a) a proclamation, regulation, rule, notice, determination or any other secondary legislative enactment issued by an organ of state in terms of a legislative power conferred on it by national or provincial legislation;
- (b) a municipal by-law enacted before the Constitution took effect; or
- (c) any old order legislation that was not regarded as original legislation before the previous Constitution took effect;

(2) A definition of a word or expression in subsection (1) does not apply to legislation other than this Act except as part of another provision of this Act in which that word or expression is used.

(3) This Act must be interpreted in accordance with the provisions of this Act.

Purpose of this Act

2. The purpose of this Act is –

- (a) to align the interpretation of legislation with constitutional supremacy as envisioned by the Constitution;
- (b) to facilitate the interpretation and understanding of legislation; and
- (c) to promote uniformity in the use of language in legislation.

Application of this Act

3. (1) This Act applies to the interpretation of all legislation.

(2) If a provision of this Act –

- (a) is inconsistent with any specific legislation, that provision must, to the extent of the inconsistency, be disregarded in the interpretation of that legislation; or
- (b) is excluded from applying to any specific legislation, that provision must, to the extent of its exclusion, be disregarded in the interpretation of that legislation.

(3) When interpreting legislation –

- (a) section 4 must be applied despite anything to the contrary in subsection (2) or any other legislation; and
- (b) all other provisions of this Act must be applied but only to the extent indicated in subsection (2).

CHAPTER 2

PRINCIPLES OF INTERPRETATION

Supremacy of Constitution

- 4.** When interpreting legislation –
- (a) the supremacy of the Constitution is paramount;
 - (b) the spirit, purport and objects of the Bill of Rights in Chapter 2 of the Constitution must be promoted; and
 - (c) any reasonable interpretation that is consistent with the Constitution must be preferred over any alternative interpretation that is inconsistent with the Constitution.

Determination of meaning of legislation

- 5.** (1) When interpreting legislation –
- (a) the meaning of a provision in that legislation must be determined by –
 - (i) its language; and
 - (ii) its context in the legislation read as a whole; and
 - (b) any reasonable interpretation of a provision in accordance with paragraph (a) that is consistent with the purpose and scope of that legislation must be preferred over any alternative interpretation of that provision that is inconsistent with the purpose and scope of that legislation.
- (2) A provision in assigned or subordinate legislation must for purposes of subsection (1) (a) be interpreted also in the context of its enabling legislation.

Reading legislation as a whole

- 6.** When reading legislation as a whole in order to determine the meaning of a provision –
- (a) all the provisions of the legislation must be taken into account, including –
 - (i) their sequence, segmentation and punctuation; and
 - (ii) the general organisation and structure of the legislation;
 - (b) any provisions of the legislation that have been repealed may be taken into account;
 - (c) any amended provisions of the legislation as they read before their amendment may be taken into account; and
 - (d) any intrinsic information may be taken into account, but only as an opinion on the information it conveys.

Legislation to be interpreted in the light of changing circumstances

- 7.** (1) Legislation must be interpreted –
- (a) as applying to circumstances as they arise; and
 - (b) in accordance with the contemporary meaning of its language.
- (2) Any interpretation of legislation in terms of subsection (1) must be consistent with the purpose and scope of the legislation.

Extrinsic information

8. When interpreting legislation extrinsic information may be taken into account but only –

- (a) as an opinion on the information it conveys; and
- (b) for the purpose of –
 - (i) establishing the background to, or the purpose or scope of, the legislation or any of its provisions, if such background, purpose or scope cannot be established from the text of the legislation or provision;
 - (ii) to resolve any ambiguity or obscurity in the legislation or provision, if the ambiguity or obscurity cannot be resolved from the text of the legislation or provision; or
 - (iii) to confirm the meaning of the legislation or provision determined in accordance with section 5.

Inconsistencies between provisions in same legislation

9. In the event of any inconsistency between a long title, enacting statement, preamble, table of contents, segment heading, schedule or annexure in any legislation and any other provision of that legislation, that other provision prevails.

CHAPTER 3

PUBLICATION, COMMENCEMENT, AMENDMENT AND REPEAL OF LEGISLATION

Part 1: Publication of legislation

Publication of legislation precondition for its enforcement

- 10.** (1) All legislation must be published –
- (a) in the Gazette in accordance with section 11; or
 - (b) in an alternative manner provided for in section 12, but only if that alternative manner of publication is permissible in the circumstances.
- (2) No legislation takes effect unless subsection (1) has been complied with.

Publication of legislation in Gazette

- 11.** (1) National legislation must be published in the national Government Gazette.
- (2) Provincial legislation must be published in the official Gazette of the province concerned.
- (3) Municipal by-laws must be published in the official Gazette of the province in which the municipality issuing the by-law is situated or, in the case of a cross-border municipality, in the official Gazettes of the provinces in which the municipality is situated.

Alternative manner of publication

- 12.** (1) The President may by proclamation in the Gazette, or if this is not possible, in a manner determined by the President, determine an alternative manner in which legislation may be published –
- (a) during any period when –

- (i) the Gazette cannot be printed; or
- (ii) the ordinary printing schedules of the Gazette is disrupted or delayed; or
- (b) when publication in the Gazette of any specific kind of legislation is impractical.
- (2) A proclamation in terms of subsection (1) may –
 - (a) be issued in relation to –
 - (i) the national Government Gazette only;
 - (ii) the provincial official Gazettes only;
 - (iii) a specific provincial official Gazette only; or
 - (iv) all Gazettes; or
 - (b) differentiate between –
 - (i) the national Government Gazette and the provincial official Gazettes; or
 - (ii) different provincial official Gazettes.
- (3) Legislation published in accordance with subsection (1) during a period referred to in paragraph (a) of that subsection must upon expiry of that period promptly be published for general information in the Gazette if that legislation is at that stage still in force.

Subordinate legislation to be submitted to Parliament and provincial legislatures

- 13.** (1) Within 14 days after its publication in accordance with section 10, subordinate legislation must be submitted to –
- (a) both Houses of Parliament, in the case of subordinate national legislation; or
 - (b) the relevant provincial legislature, in the case of subordinate provincial legislation.
- (2) Non-compliance with subsection (1) does not effect the validity, commencement or enforcement of such subordinate legislation.

Part 2: Commencement of legislation

Definition

- 14.** (1) In this Part –

“commencement provision” means a provision in legislation which regulates the commencement of that or any other specific legislation by –

- (a) specifying a date on which the legislation will take effect or must be regarded as having taken effect; or
 - (b) conferring a power on an executive organ of state to determine the date on which the legislation will take effect or must be regarded as having taken effect.
- (2) A commencement provision takes effect at the beginning of the day on which it is published in accordance with section 10.

Commencement of legislation not subject to commencement provisions

15. Legislation which is not subject to a commencement provision takes effect immediately after the end of the day on which the legislation is published in accordance with section **10**.

Commencement of legislation subject to commencement provisions

16. Legislation which is subject to a commencement provision takes effect or must be regarded as having taken effect at the beginning of the day –

- (a) specified in that commencement provision; or
- (b) determined by an executive organ of state in terms of that commencement provision.

Different commencement dates for different provisions

17. If legislation is subject to a commencement provision which confers a power on an executive organ of state to determine the date on which that legislation will take effect or must be regarded as having taken effect, that executive organ of state may determine different dates on which different provisions of that legislation will take effect or must be regarded as having taken effect.

Application of legislation before its commencement

18. (1) A power or duty contained in any legislation that has been published in accordance with section **10** may be exercised or carried out before the commencement of that legislation but only insofar as the exercise of the power or the carrying out of the duty is necessary to bring that legislation into effect.

(2) Nothing done in terms of subsection (1) takes effect before the commencement of the legislation in terms of which it was done.

Part 3: Amendment and repeal of legislation

Definitions

19. (1) In this Part –

"amendment" means to change by means of legislation, either expressly or by implication;

"repeal" means to abolish by means of legislation, either expressly or by implication.

- (2) For the purposes of this Part legislation which –
 - (a) is enacted for a period or until a specific condition is met must be regarded as having been repealed when it lapses –
 - (i) at the end of the period; or
 - (ii) when the condition is met; or
 - (b) is restricted in its scope, application or effect through or as a result of an amendment must be regarded as having been repealed to the extent of the restriction.

Effect of repeal of legislation

20. (1) If legislation is repealed the mere fact of its repeal does not –

- (a) affect the operation or application of that legislation when it was in force;

- (b) affect the consequences of such operation or application, including –
 - (i) any status, right, privilege, interest, title or immunity acquired in terms of that legislation; or
 - (ii) any obligation, liability, forfeiture, punishment or penalty imposed in terms of that legislation;
 - (c) affect the institution or completion of any judicial, administrative or other proceedings arising from the operation or application of that legislation or any consequences of that legislation;
 - (d) affect the prosecution of a person charged with having committed an offence under that legislation when that legislation was in force, subject to section 35(3)(n) of the Constitution;
 - (e) revive anything repealed, abolished or cancelled in terms of that legislation; or
 - (f) affect any previous amendments effected by that legislation to other legislation.
- (2) Any provisions in the repealed legislation pertaining to proceedings referred to in subsection (1)(c) or to an offence referred to in subsection (1)(d) may for purposes of such proceedings or the prosecution of such offence be applied as if that legislation has not been repealed.
- (3) This section does not apply to legislation –
- (a) declared unconstitutional or invalid; or
 - (b) repealed following a declaration of unconstitutionality or invalidity.

Effect of repeal and replacement of legislation

- 21.** If legislation is repealed and simultaneously replaced by new legislation –
- (a) the repealed legislation remains in force until the new legislation takes effect; and
 - (b) anything issued or done in terms of the repealed legislation which may or must be issued or done in terms of the new legislation and which was in force immediately before the repeal –
 - (i) remains in force; and
 - (ii) must be regarded as having been issued or done in terms of the new legislation.

Effect of repeal of enabling legislation on assigned or subordinate legislation

- 22.** (1) If legislation enabling the enactment of assigned or subordinate legislation is repealed, all assigned or subordinate legislation enacted in terms of the enabling legislation must be regarded as having simultaneously been repealed.
- (2) Subsection (1) does not apply in a case where section **21(b)** applies.

Effect of repeal or amendment of legislation on references in other legislation

- 23.** (1) (a) If legislation is repealed and, whether simultaneously or not, replaced by any new legislation, a reference in any other legislation to the repealed legislation must be read as a reference to the new legislation.

(b) If legislation referred to in other legislation is repealed and not simultaneously replaced by any new legislation, the reference to the repealed legislation in that other legislation becomes ineffective but paragraph (a) becomes applicable if replacing legislation is enacted at any time after the repeal.

(2) If legislation is amended, a reference in any other legislation to the legislation that is amended must be read as a reference to the legislation as amended.

(3) (a) Subsections (1) and (2) also apply to legislation that has been incorporated by reference into other legislation except when the context of that other legislation read as a whole indicates that the incorporation was specifically confined to the legislation as it existed at the time it was incorporated.

(b) If the exception in paragraph (a) applies, the repeal or amendment of the incorporated legislation does not affect its continued application –

- (i) as part of the legislation into which it was incorporated; and
- (ii) in the form it was originally incorporated.

Amendments

24. If legislation is amended the amendment becomes part of the legislation that is amended.

CHAPTER 4

WORDS AND EXPRESSIONS OFTEN USED IN LEGISLATION

General definitions for words and expressions often used in legislation

25. (1) When a word or expression defined in this section occurs in legislation, that word or expression has the meaning as defined in this section except in legislation where –

- (a) that word or expression is defined differently;
- (b) the context in which that word or expression occurs indicates another meaning; or
- (c) the definition is clearly inappropriate:

“Act of Parliament” means an Act passed by Parliament;

“affidavit” means a voluntary statement of facts written down and sworn to, or affirmed or declared to be the truth by the person making the statement in the presence of a person authorised to administer oaths or affirmations;

“affirmation” means a formal declaration confirming the truth of a statement made by a person who, for moral or religious reasons, objects to taking an oath;

“aircraft” means a craft of any kind whatsoever which is capable of flying, whether self-propelled or not, and includes the fittings, furnishings and equipment of such craft;

“Auditor-General” means the Auditor-General referred to in section 188 in the Constitution;

“Cabinet” means the Cabinet referred to in section 91 (1) of the Constitution;

“calendar month” means one of the twelve months of a calendar year;

“calendar year” means a year commencing 1 January;

“commence” or “take effect”, in relation to legislation or a provision in legislation, means to become operational or enforceable as a law;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

“constitutional institution” means an institution established in terms of section 6(5), 155(3)(b), 178(1), 179(1), 181(1), 196(1), 220(1) or 223 of the Constitution;

“consult” means to seek the views of another person and to consider any views expressed by that other person, whether such views were sought or expressed –

- (a) orally or in writing;
- (b) in discussions; or
- (c) in any other form of communication;

"continental shelf" has the meaning assigned to it in the Maritime Zones Act, 1994 (Act 15 of 1994);

“delegation”, in relation to a duty, includes an instruction or request to perform or to assist in the performance of the duty;

"Deputy President" means the Deputy President of the Republic appointed by the President in terms of section 91(2) of the Constitution;

"district" means an area established by the Cabinet member responsible for the administration of justice in terms of section 2 of the Magistrates Court Act, 1944 (Act No. 32 of 1944);

“document” includes –

- (a) any paper or other object on or in which there is –
 - (i) writing;
 - (ii) images; or
 - (iii) perforations, indentations or raised text having meaning;
- (b) any object from which writing, sounds or images can be reproduced or retrieved with or without the aid of any device; or
- (c) any electronically stored information that is transmittable;

“enact”, in relation to legislation, means to pass, make or issue legislation, whether or not the legislation has taken effect;

"exclusive economic zone" has the meaning assigned to it in the Maritime Zones Act, 1994 (Act 15 of 1994);

"Executive Council", with reference to a province, means a provincial Executive Council referred to in section 132 (1) of the Constitution;

“Gazette” –

- (a) in relation to national legislation, means the national Government Gazette;
- (b) in relation to provincial legislation, means the official Gazette of the relevant province; or
- (c) in relation to a municipal by-law, means the official Gazette of the province in which the relevant municipality is situated, or , in the case of a cross-border

municipality, the official Gazettes of the provinces in which the municipality is situated;

"individual", with reference to a person, means a natural person;

"juristic person" means an entity, other than a natural person, having the capacity to perform legal acts and to sue or be sued in a court in its own name;

"MEC", with reference to a province, means a member of the Executive Council of a province appointed by the Premier of the province in terms of section 132 (2) of the Constitution;

"Minister" means a Minister appointed by the President in terms of section 91 (2) of the Constitution;

"month" means a period which –

- (a) if it begins on the first day of a calendar month, ends at the end of the last day of that calendar month; or
- (b) if it begins on any other day during a calendar month, ends at the end of the day preceding the corresponding day in the next calendar month;

"municipal by-law" means legislation passed by –

- (a) a municipal council in terms of section 256 (2) of the Constitution; or
- (b) a municipality or other local authority before the Constitution took effect;

"municipality", when referred to as –

- (a) an entity, means a municipality as described in section 2 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000); and
- (b) a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998);

"name" –

- (a) in relation to a natural person, means that person's name as it appears on that person's birth certificate, identity document or passport or other official document from which that person's identity can be determined; or
- (b) in relation to a person which is not a natural person, means –
 - (i) the name of the person registered in terms of legislation whether in the Republic or elsewhere, and includes any registered literal translation of that name into any official language of the Republic and any registered shortened form of that name or translation of that name; or
 - (ii) if the person has no such registered name, the name under which that person conducts its affairs;

"oath" means –

- (a) a confirmation of the truth of a statement by swearing to it; or
- (b) an affirmation;

"ordinary post" means the mail delivery service of the South African Post Office Ltd or any other postal service recognised or registered in terms of legislation;

"Parliament" means the Parliament of the Republic referred to in section 42(1) of the Constitution;

"person" or any other word denoting a person, such as **"someone"**, **"anyone"**, **"no-one"**, **"nobody"**, **"one"**, **"another"** or **"whoever"**, means a natural or juristic person, and includes –

- (a) a company, close corporation or co-operative incorporated or registered in terms of legislation whether in the Republic or elsewhere;
- (b) a body of persons corporate or unincorporated;
- (c) an estate of a deceased or insolvent person; or
- (d) a partnership, trust or trust fund,

but excludes an organ of state unless section 27 applies;

"Premier" means the Premier of a province referred to in section 128 of the Constitution, and includes any acting Premier referred to in section 131 of the Constitution;

"premises" includes –

- (a) an erf, plot, site, stand, smallholding, farm or other piece of land, whether surveyed or not; or
- (b) a building or other fixed structure, whether above or beneath the surface of the land;

"President" means the President of the Republic referred to in section 86 of the Constitution, and includes any acting President referred to in section 90 of the Constitution;

"Prince Edward Islands" means the Prince Edward Islands referred to in the Prince Edward Islands Act, 1948 (Act No. 43 of 1948);

"province" means any of the nine provinces of the Republic listed in section 103 of the Constitution;

"provincial Act" means an Act passed by a provincial legislature;

"public holiday" means a day declared as a public holiday in terms of national legislation;

"record" means information preserved, kept or stored regardless of the form in or medium by which it is preserved, kept or stored;

"state" includes all organs of state in all three spheres of government referred to in section 40(1) of the Constitution, including all constitutional institutions;

"territorial waters" has the meaning assigned to it in the Maritime Zones Act, 1994 (Act No. 15 of 1994);

"the Republic", when referred to as –

- (a) a state, means the Republic of South Africa referred to in section 1 of the Constitution; or
- (b) a geographic area, means the territory of the Republic of South Africa, including its territorial waters and the airspace above its territory and territorial waters;

"vehicle" means –

- (a) any motor car, van, truck, trailer, motor cycle, wagon, cart, cycle, wheelbarrow or other means of conveyance of any kind whatsoever capable of moving on land, whether self-propelled or not, including its fittings, furnishings and equipment; or
- (b) any pack animal, including its harness and tackle,

but excludes any aircraft, vessel or railway train;

"vessel" means a craft of any kind whatsoever, including a hovercraft, capable of moving in, on or under water, whether self-propelled or not, and includes the fittings, furnishings and equipment of such craft, but excludes a permanently moored floating structure which is not a ship or a boat;

"working day" means any day except a Saturday, Sunday or public holiday;

"week" means a period of seven consecutive days;

"word" includes any lettering, figure, character or symbol;

"writing" means expressing words in a visible form, whether by means of handwriting, type-writing, electronic word processing, printing, photocopying, telegraphic or electronic messaging, faxing, photographing, filming or any other medium;

(2) Subsection (1) must be read subject to Item 3 of Schedule 6 of the Constitution.

Derivatives and other grammatical forms of defined words and expressions

26. A word or expression which is a derivative or other grammatical form of a word or expression defined in legislation, including this Act, has a corresponding meaning in the same legislation.

Reference to "person" includes reference to organ of state

27. A reference in any legislation to a **"person"** or to any other word denoting a person, such as **"someone"**, **"anyone"**, **"no-one"**, **"nobody"**, **"one"**, **"another"** or **"whoever"**, includes a reference to an organ of state if the provision which contains the reference binds the state or is otherwise applicable to that organ of state.

Gender

28. In any legislation a word denoting the masculine, feminine or neuter gender includes the other genders.

Number

29. In any legislation a word denoting the singular includes the plural and a word denoting the plural includes the singular.

Words and expressions in assigned or subordinate legislation

30. (1) A word or expression used in assigned or subordinate legislation and which is defined in the legislation enabling such assigned or subordinate legislation has the meaning ascribed to it in the enabling legislation.

(2) Subsection (1) does not preclude assigned or subordinate legislation from having a different definition for a word or expression defined in the enabling

legislation provided that such different definition falls within the scope of the enabling legislation.

(3) A reference in subordinate legislation to “the Act” must be read as a reference to the enabling legislation in terms of which that subordinate legislation was enacted.

CHAPTER 5

RECKONING OF TIME AND MEASUREMENT OF DISTANCES

Part1: Reckoning of time

Definition

31. In this Part –

"excluded day" means a Saturday, Sunday or public holiday;

"period" means a period expressed as –

- (a) a number of days;
- (b) one week or a number of weeks;
- (c) one month or a number of months; or
- (d) one year or a number of years,

but excludes a period expressed as a calendar month or calendar year or a number of calendar months or calendar years.

When period starts for purposes of reckoning

32. (1) When a period mentioned in legislation must be reckoned forward –

- (a) from or after a particular day, the period must be reckoned forward as from the start of the next day;
- (b) from or after the end of a particular day, week, month or year, the period must be reckoned forward as from the start of the day immediately after that day, week, month or year has ended; or
- (c) from or after the happening of a particular act or event, the period must be reckoned forward as from the start of the day immediately after the day on which the act or event has happened.

(2) When a period mentioned in legislation must be reckoned backward –

- (a) from a particular day, the period must be reckoned backward as from the end of the previous day;
- (b) from the end of a particular day, week, month or year, the period must be reckoned backward as from the end of the day immediately before that day, week, month or year has ended; or
- (c) from the happening of a particular act or event, the period must be reckoned backward as from the end of the day immediately before the day on which the act or event has happened.

When period ends for purposes of reckoning

33. When a period mentioned in legislation must be reckoned either forward or backward, that period must be reckoned to the end of the last day of the period, but if

the last day of the period falls on an excluded day, that period must be extended to the end of the next day which is not an excluded day.

Periods expressed in calendar months or calendar years

34. When a period mentioned in legislation is expressed in calendar months or calendar years, that period must be reckoned from the start of the first calendar month or year in that period until the end of the last calendar month or year in that period.

Reasonable time

35. (1) If legislation states that something may or must be done within a reasonable time, the time within which it may or must be done must be determined in accordance with what is reasonable in the circumstances of the particular case.

(2) Legislation which states that something must be done without stating the time within it must be done, must be read as implying that it must be done within a reasonable time.

Part 2: Measurement of distances

Measurement of distances

36. (1) When a distance must or may be measured for the purpose of any legislation, that distance must be measured in a straight line on a horizontal plane.

(2) If it is not possible to measure a distance in terms of subsection (1) by means of a measuring appliance, the distance may be measured by means of –

- (a) beacons on a map, diagram or plan; or
- (b) any other acceptable method of measuring distances in a straight line on a horizontal plane.

CHAPTER 6

STANDARD PROVISIONS

Use of official forms

37. Legislation which states that a specific form may or must be used for any specific purpose, does not preclude the use of a form which –

- (a) is substantially the same as the official form;
- (b) has the same effect as the official form; and
- (c) is not misleading.

Methods of serving, delivering, sending or submitting documents

38. If legislation provides that a document may or must be served on or delivered, sent or submitted to a person without indicating how the document may or must be served, delivered, sent or submitted, the document may or must be served, delivered, sent or submitted by –

- (a) posting it to that person;
- (b) handing it to that person; or
- (c) leaving it at that person's last known place of residence or business with a person apparently older than 16 years.

Methods of posting documents

39. If legislation provides that a document may or must be posted, or served, delivered, sent, submitted or transmitted by post, the document may or must be posted, served, delivered, sent, submitted or transmitted –

- (a) by ordinary post;
- (b) by courier; or
- (c) by fax or electronic means, but only if the receiver is equipped for the receipt of documents by fax or electronic means.

Serving of documents by post

40. (1) If legislation provides that a document may or must be served by post on a person, whether “serve”, “deliver”, “sent” or any other word is used, the action of serving that document–

- (a) if done by ordinary post, is accomplished if a letter containing the document was –
 - (i) addressed to the last known postal address of that person; and
 - (ii) posted at the South African Post Office Ltd by registered post; or
- (b) if done by electronic means, is accomplished if an electronic copy of the document was –
 - (i) sent by electronic means to the South African Post Office Ltd;
 - (ii) registered by the South African Post Office Ltd; and
 - (iii) sent by the South African Post Office Ltd to an electronic address provided by the sender as the last known electronic address of that person.

(2) Unless the contrary is proved, a document served in accordance with subsection (1) must be regarded as having been served on the addressee at the time at which the document would normally be delivered in the course of ordinary or electronic post, as the case may be.

Consultation procedures

41. (1) A requirement in terms of legislation that a decision or action may be taken only after consultation with another, is complied with when that other person has been consulted on the decision or action and the views of that other person have been considered.

(2) A requirement in terms of legislation that a decision or action may be taken only in consultation with another, is complied with if that other person has been consulted on the decision or action and has agreed to the decision or action.

Exercise of powers, duties or functions by persons other than natural persons

42. (1) If legislation provides for a person which is not a natural person to exercise a power, duty or function, the power, duty or function must or may only be exercised by the natural person or body of natural persons entitled to act on behalf of that person.

(2) If legislation requires a signature by a person which is not a natural person, the signature of a natural person entitled to act on behalf of that person is the signature of that person.

Decisions of bodies consisting of members

43. If legislation provides for decisions to be taken by a body consisting of members –

- (a) a decision of the body must be taken at a meeting of the members of the body; and
- (b) the validity of a decision taken by the requisite number of members at a meeting of the body is not affected merely because –
 - (i) of a vacancy in the membership of the body; or
 - (ii) a person who is not a member participated in the meeting.

Quorums for meetings and decisions of bodies consisting of members

44. (1) If legislation provides for the exercise of a power, duty or function by a body –

- (a) consisting of two members, a matter before a meeting of the body is decided by a unanimous vote; or
- (b) consisting of at least three members –
 - (i) a majority of the persons serving as members of the body at the time the meeting is held constitutes a quorum for a meeting of the body;
 - (ii) a matter before a meeting of the body is decided by a supporting vote of a majority of the members present at the meeting; and
 - (iii) the member presiding at the meeting may in the event of an equality of votes exercise a casting vote in addition to that person's vote as a member.

(2) A member of a body who participates in a meeting of the body in accordance with section **45** must for the purpose of subsection (1) (b) (ii) of this section be regarded as being present at the meeting.

(3) All decisions by a body consisting of members must be recorded, but non-compliance with this subsection does not invalidate the decision.

Distant participants in meetings

45. If legislation provides that decisions of a body established in terms of legislation may or must be taken at a meeting of members of the body, a member or other person entitled to participate in a meeting who is not present at a meeting, may participate in the meeting by telephone, radio, closed-circuit television, the internet or any other audio-visual or other medium of instantaneous communication, provided that –

- (a) a facility for such communication is available;
- (b) the body has agreed to allow such participation;
- (c) such participation is in accordance with any conditions subject to which the body allows such participation; and

- (d) the distant participant and the persons physically present at the meeting are all –
- (i) audible to one another, if participation is by telephone, radio, the internet or other audio medium of communication; or
 - (ii) audible and visible to one another, if participation is by closed-circuit television or other audio-visual medium of communication.

CHAPTER 7

EXERCISE OF POWERS, DUTIES AND FUNCTIONS

Notification in Gazette of official acts in terms of legislation

46. Notification of anything done or to be done in terms of legislation may be given in the Gazette.

Words indicating whether legislation directory or peremptory

47. (1) If legislation states that a person may do, or is entitled to do, or has or shall have the power, authority or right to do a particular thing, that legislation must be read as implying that that person has the freedom of choice whether or when or how to do that thing.

(2) If legislation states that a person must or shall do, or has or shall have the duty, obligation or responsibility to do a particular thing, that legislation must be read as implying that that person has no freedom of choice whether to do that thing and that that thing must be done.

Implied powers

48. A power conferred in terms of legislation to perform an act must be read as implying to confer all powers that are –

- (a) necessary for the performance of that act; or
- (b) incidental to the performance of that act.

Amendment or repeal of subordinate legislation

49. (1) Legislation which provides for subordinate legislation to be issued, must be read as including a power to amend or repeal that subordinate legislation.

(2) If the issuing of subordinate legislation is subject to compliance with specific conditions, that subordinate legislation may only be amended or repealed subject to the same conditions.

(3) Subordinate legislation may be amended or repealed in terms of subsection (1) with effect from a date before, on which or after the decision to amend or repeal the legislation was taken.

Amendment or repeal of decisions

50. (1) If legislation confers a power or imposes a duty, that legislation must be read as implying that any decision taken in the exercise of the power or the performance of the duty may, subject to subsections (2) and (3), be reconsidered and either be confirmed, altered or repealed –

- (a) by the person on whom the power is conferred or the duty is imposed; or

(b) either by that person or the person who took the decision, if the decision was taken by another person in terms of a power or duty delegated to that other person.

(2) A decision may be altered or repealed in terms of subsection (1) with effect from a date determined by the person altering or repealing the decision, which may be a date before, on or after the decision to alter or repeal was taken.

(3) If the person to whom a decision relates has been notified, the decision may not be altered or repealed if the alteration or repeal will detract from any rights that have accrued or any legitimate expectations that have arisen as a result of the decision, but this subsection does not apply if –

(a) the affected person agrees in writing to the alteration or repeal of the decision;

(b) the decision was procured by fraudulent, dishonest or any other illegal means; or

(c) the decision is for other reason invalid.

(4) The following decisions may not be altered or repealed in terms of this section:

(a) a decision which is the subject of –

(i) internal or administrative appeal proceedings;

(ii) alternative dispute resolution proceedings; or

(iii) judicial proceedings; or

(b) a decision taken to decide an internal or administrative appeal.

Exercise of powers and performance of duties

51. (1) If legislation confers a power or imposes a duty, that power may be exercised and that duty must be performed –

(a) by the person on whom the power is conferred or the duty is imposed;

(b) if the power is conferred or the duty is imposed on the holder of a specific office –

(i) by the holder of that office; or

(ii) by a person acting in the capacity of the holder of that office; or

(c) if the power or duty, or any part of the power or duty, is delegated –

(i) by the person who delegated the power or duty, or that part of the power or duty;

(ii) by the person to whom the power or duty, or that part of the power or duty, is delegated; or

(iii) by the holder of the office to whom the power or duty, or that part of the power or duty, is delegated or the person acting in the capacity of the holder of that office.

(2) A power may be exercised and a duty must be performed whenever –

- (a) the time or circumstances for the exercise of the power or the performance of the duty arise; or
 - (b) if the time or circumstances for the exercise of the power or the performance of the duty is not determinable, from time to time at the discretion of a person referred to in subsection (1).
- (3) A reference in any legislation to the holder of an office includes a reference to an acting holder of that office.
- (4) Something done –
- (a) by the holder of an office or an acting holder of an office, is not affected merely because –
 - (i) the person who held office at the time that thing was done has ceased to hold office; or
 - (ii) the person who acted as the holder of the office at the time that thing was done has ceased to act as holder of the office; or
 - (b) by a person in terms of a delegation, is not affected merely because of the repeal of the delegation.

Power to appoint persons

52. (1) Legislation which confers the power to appoint a person to an office, whether the word “appoint”, “designate” or any other word is used, must be read as including the power –

- (a) to determine the duration and the terms and conditions of the appointment;
 - (b) to suspend or remove a person from office in the event of misconduct, incapacity or incompetence;
 - (c) to re-appoint a person previously appointed; and
 - (d) to appoint a person in an acting capacity if there is a vacancy or the holder of the office is absent or not available for the performance of the duties of office.
- (2) The powers contained in subsection (1) (a), (b) and (c) may be exercised also in relation to a person appointed in an acting capacity.

Power to differentiate when issuing subordinate legislation

53. (1) Legislation which confers a power to issue subordinate legislation, must be read as including the power –

- (a) to limit the application of such subordinate legislation to –
 - (i) a particular category of persons;
 - (ii) a particular matter or category of matters; or
 - (iii) a particular area or category of areas; or
- (b) to differentiate between –
 - (i) different categories of persons;
 - (ii) different matters or categories of matters; or
 - (ii) different areas or different categories of areas.

- (2) Subsection (1) does not permit unfair discrimination.

Delegation of powers and duties

54. (1) If legislation provides for the delegation of a power or duty contained in that or any other legislation, the delegation –

- (a) must be in writing;
- (b) is subject to any conditions, limitations or directions as may be determined by the person delegating the power or duty or part of the power or duty;
- (c) may provide for the subdelegation of the delegated power or duty or part of a power or duty;
- (d) does not divest the person delegating the power or duty, or part of the power or duty, of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty; and
- (e) may at any time be amended or repealed by the person delegating the power or duty.

(2) If legislation provides for the delegation of a power or duty contained in that or any other legislation without indicating to whom the power or duty may be delegated, that power or duty, or any part of that power or duty, may be delegated to a specific person or persons or the holder of a specific office or offices performing their functions under the control or supervision of the person delegating the power or duty or part of the power or duty.

(3) A power or duty, or a part of a power or duty, delegated in terms of legislation –

- (a) may, despite such delegation, be exercised or performed by the person delegating the power or function; and
- (b) may in the absence of express authority not be subdelegated.

Transfer of legislation, powers and functions by President to other Cabinet members

55. If the administration of legislation entrusted to a Cabinet member, or a power or function entrusted by legislation to a Cabinet member, is transferred by the President in terms of section 97 of the Constitution to another Cabinet member –

- (a) a reference in that legislation to –
 - (i) the Cabinet member entrusted with the legislation, power or function, must be read as a reference to the Cabinet member to whom the legislation, power or function is transferred;
 - (ii) a department or office under the control of the Cabinet member entrusted with the legislation, power or function, must be read as a reference to a department or office under the control of the Cabinet member to whom the legislation, power or function is transferred; and
 - (iii) a person employed or holding a specific post in a department under the control of the Cabinet member entrusted with the legislation, power or function, must be read as a reference to a person employed or holding a corresponding post in a department under the control of the Cabinet member to whom the legislation, power or function is transferred;

- (b) a role or responsibility given to a person employed or holding a specific post in a department under the control of the Cabinet member entrusted with the legislation, power or function, must be read as having been given to a person employed or holding a corresponding post in the department under the control of the Cabinet member to whom the legislation, power or function is transferred; and
- (c) nothing done in terms of such legislation or in the exercise or performance of such power or function before the transfer is affected merely because the transfer.

Transfer of legislation, powers and functions by Premiers to other members of Executive Council

56. If the administration of legislation entrusted to an MEC, or a power or function entrusted by legislation to an MEC, is transferred by the Premier in terms of section 137 of the Constitution to another MEC –

- (a) a reference in that legislation to –
 - (i) the MEC entrusted with the legislation, power or function, must be read as a reference to the MEC to whom the legislation, power or function is transferred;
 - (ii) a department or office under the control of the MEC entrusted with the legislation, power or function, must be read as a reference to a department or office under the control of the MEC to whom the legislation, power or function is transferred; and
 - (iii) a person employed or holding a specific post in a department under the control of the MEC entrusted with the legislation, power or function, must be read as a reference to a person employed or holding a corresponding post in a department under the control of the MEC to whom the legislation, power or function is transferred;
- (b) a role or responsibility given in that legislation to a person employed or holding a specific post in a department under the control of the MEC entrusted with the legislation, power or function, must be read as having been given to a person employed or holding a corresponding post in the department under the control of the MEC to whom the legislation, power or function is transferred; and
- (c) nothing done in terms of such legislation or in the exercise or performance of such power or function before the transfer, is affected merely because the transfer.

CHAPTER 8

OTHER MATTERS

Extent to which legislation binds the state

- 57.** (1) Old order legislation does not bind the state except to the extent that the legislation expressly or by implication indicates that the state is bound.
- (2) Legislation enacted after 28 April 1994 binds the state except to the extent that –
- (a) it cannot be applied to the state or its application to the state is clearly inappropriate;

- (b) its application to the state may impede the state in the exercise of its statutory functions; or
 - (c) the legislation expressly or by implication indicates that the state is not bound.
- (3) Assigned or subordinate legislation does not bind the state unless the enabling legislation in terms of which that assigned or subordinate legislation was enacted –
- (a) binds the state; or
 - (b) indicates that that assigned or subordinate legislation binds the state.
- (4) In this section “state” includes –
- (a) organs of state; and
 - (b) persons in the service of organs of state acting in their official capacity.

Repeal and amendment of laws

58. The laws mentioned in Schedule 1 are repealed or amended to the extent set out in the fourth column of that Schedule.

Short title and commencement

59. This Act is called the Interpretation of Legislation Act, 2006, and takes effect on a date determined by the President by proclamation in the Gazette.

SCHEDULE 1

LAWS AMENDED OR REPEALED BY SECTION 58

Item No.	No. and year of law	Short title	Extent of repeal or amendment
1.	Act No. 47 of 1937	Deeds Registries Act	<p>1. The amendment of section 9 by the substitution for subsection (10) of the following subsection:</p> <p>“(10) The provisions of section [17] <u>13</u> of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, shall apply mutatis mutandis with reference to regulations approved by the Minister and published in the Gazette under subsection (9).”.</p>
2.	Act No. 33 of 1957	Interpretation Act	1. The whole
3.	Act No. 28 of 1974	International Health Regulations Act	<p>1. The amendment of section 3 by the substitution for subsection (5) of the following subsection:</p> <p>“(5) Any notice or regulation referred to in subsection (4) or any provision thereof may by resolution passed by both Houses of Parliament during the session in which such notice or regulation has been laid upon the Tables, be disapproved of and thereupon the provisions of section [12 (2)] <u>20</u> of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, shall apply as if such resolution were a law repealing such notice, regulation or provision.”.</p>
4.	Act No. 11 of 1985	International Convention for Safe Containers Act	<p>1. The amendment of section 3 by the substitution for subsection (4) of the following subsection:</p> <p>“(4) Any regulation referred to in subsection (3) or any provision thereof may, by resolution passed by the respective Houses of Parliament during the session in which such regulation has been laid upon the Table, be disapproved of, and if the said regulation or provision is so disapproved of by all three Houses of Parliament, the provisions of section [12 (2)] <u>20</u> of the [Interpretation Act, 1957] (Act 33 of 1957) <u>Interpretation of Legislation Act, 2006</u>, shall apply as if such resolution were a law repealing the regulation or provision in question.”.</p>

5.	Act No. 2 of 1986	International Convention for the Prevention of Pollution from Ships Act	<p>1. The amendment of section 3 by the substitution for subsection (4) of the following subsection:</p> <p>(4) Any regulation referred to in subsection (3) or any provision thereof may, by resolution passed by the respective Houses of Parliament during the session in which such regulation has been laid upon the Table, be disapproved of, and if the said regulation or provision is so disapproved of by all three Houses of Parliament, the provisions of section [12 (2)] 20 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, shall apply as if such resolution were a law repealing the regulation or provision in question.”.</p>
6.	Act No. 4 of 1986	Convention on Agency in the International Sale of Goods Act	<p>1. The amendment of section 3 by the substitution for subsection (4) of the following subsection:</p> <p>“(4) Any regulation referred to in subsection (3) or any provision thereof may, by resolution passed by the respective Houses of Parliament during the session in which such regulation has been laid upon the Table, be disapproved of, and if the said regulation or provision is so disapproved of by all three Houses of Parliament, the provisions of section [12 (2)] 20 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, shall apply as if such resolution were a law repealing the regulation or provision in question.”.</p>
7.	Act No. 27 of 1989	Liquor Act	<p>1. The amendment of section 9 by the substitution for subsection (2) of the following subsection:</p> <p>“(2) In the application of subsection (1) of this section and of sections [12] 20 and 21 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, a reference to the Board in a law so repealed shall be construed as a reference to the Board as constituted in terms of this Act.”.</p>
8.	Act No. 94 of 1990	Bank Act	<p>1. The amendment of section 1 by the substitution in subsection (2) for paragraph (b) of the following paragraph:</p> <p>(b) Every regulation made under paragraph (a) shall be of force and effect unless and until, during the</p>

			<p>session in which the relevant list has been laid upon the Tables in Parliament in accordance with the provisions of section [17] <u>13</u> of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, every House of Parliament has by resolution disapproved of the regulation, in which event the regulation shall lapse as from a date to be specified in the resolution, but such lapsing of the regulation shall not affect the validity of anything done under such regulation before the date specified in the resolution, and nothing contained in this paragraph shall affect the power of the Minister to make a new regulation as to the subject matter of the regulation which has so lapsed.”.</p>
9.	Act No. 108 of 1991	Abolition of Racially Based Land Measures Act	<p>1. The substitution for section 88 of the following section:</p> <p>“88. A list of proclamations issued by the [State] President under sections 12 and 87 shall be laid upon the Table of Parliament in the same manner as the list referred to in section [17] <u>13</u> of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, and if Parliament by resolution disapproves of any such proclamation or any provision thereof, such proclamation or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such provision before it so ceased to be of force and effect.”.</p> <p>2. The substitution for section 107 of the following section:</p> <p>“107. The [State] President may, by proclamation in the Gazette, designate the Minister and the Department responsible for the administration of the Agricultural Credit Act, 1966 (Act 28 of 1966), and the Conservation of Agricultural Resources Act, 1983 (Act 43 of 1983), and upon such assignment the provisions of section [10 (5)] <u>55</u> of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, shall apply mutatis mutandis.”.</p>

10.	Act No. 112 of 1991	Upgrading of Land Tenure Rights Act, 1991	<p>1. The amendment of section 24A by the substitution for subsection (10) of the following subsection:</p> <p>“(10) The provisions of section [10 (5) and (5A)] <u>55 and 56</u> of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, shall apply mutatis mutandis to the administration of this Act or any provision of this Act assigned under subsection (5) (a) or reassigned to a Minister under subsection (5) (b).”.</p>
11.	Act No. 90 of 1993	Magistrates Act	<p>1. The amendment of section 16 by the substitution for subsection (2) of the following subsection:</p> <p>“(2) (a) A regulation made under this section shall be in force unless and until Parliament during the session in which the list referred to in section [17] 13 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, which relates to that regulation, has been laid upon the Table in Parliament, by resolution disapproves the regulation, in which event the regulation shall lapse with effect from a date to be specified in the resolution.”.</p>
12.	Act No. 172 of 1993	Application of Resolutions of the Security Council of the United Nations Act	<p>1. The substitution for section 3 of the following section:</p> <p>“3. A proclamation issued by the State President under section 1 shall be laid upon the Table in Parliament in the same manner as the list referred to in section [17] 13 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u>, and if Parliament by resolution disapproves any such proclamation or any provision thereof, such proclamation or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such provision before it so ceased to be of force and effect.”.</p>
13.	Act No. 2 of 1995	Land Administration Act	<p>1. The amendment of section 2 by the substitution for subsection (6) of the following subsection:</p> <p>“(6) The provisions of section [10 (5)</p>

			and (5A)] 55 and 56 of the [Interpretation Act, 1957 (Act 33 of 1957)] Interpretation of Legislation Act, 2006 , shall apply mutatis mutandis to the administration of a law or any provision of any law assigned under subsection (2) (a) or reassigned to a Minister under subsection (2) (b).”.
14.	Act No. 67 of 1995	Development Facilitation Act	<p>1. The amendment of section 3 by the substitution in subsection (4) for paragraph (b) of the following paragraph:</p> <p>“(b) A list of principles prescribed under subsection (2) shall be laid upon the Table of Parliament in the same manner as the list referred to in section [17] 13 of the [Interpretation Act, 1957 (Act 33 of 1957)] Interpretation of Legislation Act, 2006, and if Parliament by resolution disapproves of any such principles or any provision thereof, such principles or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such principles or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such principles or such provision before it so ceased to be of force and effect.”.</p> <p>2. The amendment of section 46 by the substitution for paragraph (b) of the following paragraph:</p> <p>“(b) A list of regulations made under subsection (1) shall be laid upon the Table of Parliament in the same manner as the list referred to in section [17] 13 of the [Interpretation Act, 1957 (Act 33 of 1957)] Interpretation of Legislation Act, 2006, and if Parliament by resolution disapproves of any such regulations or any provision thereof, such regulations or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such regulations or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such regulations or such provision before it so ceased to be of force and effect.”.</p>
15.	Act No. 72 of 1996	Hague Convention on the Civil Aspects of International Child Abduction Act	<p>1. The amendment of section 5 by the substitution for subsection (4) of the following subsection:</p> <p>“(4) Any regulation referred to in</p>

			subsection (3) or any provision thereof may, by resolution passed by both Houses of Parliament during the session in which such regulation has been laid upon the Table, be rejected, and if the said regulation or provision is so rejected the provisions of section [12 (2)] 20 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u> , shall apply as if such resolution were a law repealing the regulation or provision in question.”.
16.	Act No. 4 of 1999	Broadcasting Act	1. Amendment of section 1 by the substitution for the definition of "person" of the following definition: “person' has the meaning assigned to it in section [2] 25 of the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u> , [and includes any department of state or administration in the national, provincial or local spheres of government]; ”.
17.	Act No. 41 of 2002	National Conventional Arms Control Act	1. Amendment of section 1 by the substitution for the definition of "person" of the following definition: “person' has the meaning assigned to it in the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u> , and includes an organ of state as defined in the Constitution;”.
18.	Act No. 36 of 2003	Anti-Personnel Mines Prohibition Act	1. Amendment of section 1 by the substitution for the definition of "person" of the following definition: “person' has the meaning assigned to it in the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u> , and, except in section 30, includes an organ of state;”.
19.	Act No. 59 of 2003	Liquor Act	1. Amendment of section 1 by the substitution for the definition of "person" of the following definition: “person' includes a trust, and any other entity mentioned in the definition of 'person' set out in the [Interpretation Act, 1957 (Act 33 of 1957)] <u>Interpretation of Legislation Act, 2006</u> ;”.

PARTICIPANTS AT EXPERT MEETINGS HELD IN AUGUST 2004**Pretoria on August 2004**

Judge L Harms: Supreme Court of Appeal, Bloemfontein

Judge C Lewis: Supreme Court of Appeal, Bloemfontein

Prof M Wiechers: Emeritus Professor of Law of the University of South Africa

Mr F Mdumbe: Law Faculty, University of South Africa

Prof Dawid van Wyk: Law Faculty, University of South Africa

Prof Rassie Malherbe: Law Faculty, University of Johannesburg (formerly Rand Afrikaans University)

Prof Christa Rautenbach: Law Faculty, Northwest University (Potchefstroom Campus)

Ms Jakkie Wessels: Regional Court Magistrate, Pretoria

Ms N Jadezweni: Senior Magistrate, Criminal Courts, Johannesburg

Mr PA Koen: Senior Magistrate, Civil Courts, Johannesburg

Advocate Abraham Louw S.C., representing the General Council of the Bar

Advocate Marius Ackerman S.C., representing the General Council of the Bar

Mr Werner Krull

Mr TJ Monyemamgeme: Magistrate Pretoria North

Mr J Tsopane: Magistrate, Pretoria North

Mr SG Nel, Office of the National Prosecuting Authority, Pretoria

Mr W Henegan: SA Law Reform Commission

Mr Pierre van Wyk, SA Law Reform Commission

Ms Clair Hartley: SA Law Reform Commission

Prof Christo Botha: Law Faculty, University of Pretoria

Prof Cora Hoexter: Wits Law School, University of the Witwatersrand (Project Leader at the time)

Ms Claudia Lange: at the time of the GTZ Legislative Drafting project

Mr Gerhard Grove: legal consultant, Pretoria

Durban on 16 August 2004

Judge AN Jappie: High Court, Durban

Mr IP Cooke: Office of the Director of Public Prosecutions Pietermaritzburg

Mr Dave Damerell: Office of the Director of Public Prosecutions Durban

Mr Mahendra Chetty: Legal Resources Centre

Prof George Devenish: Emeritus Professor of Law of the University of KwaZulu-Natal

Advocate N Singh S.C., Durban

Ms MKN Gwala: Magistrate, Durban

Mr T Ncube: Magistrate, Durban

Mr SS Luthuli: Magistrate, Durban

Mr Heinz Kuhn: Traditional and Local Government Affairs, Pietermaritzburg

Mr Feisal Abraham: Attorney, Durban

Prof Christo Botha: Law Faculty, University of Pretoria

Mr W Henegan: SA Law Reform Commission

Ms Clair Hartley: SA Law Reform Commission

Ms Claudia Lange: at the time of the GTZ Legislative Drafting project

Mr Pierre van Wyk: SA Law Reform Commission

Cape Town 17 August 2004

Judge CT Howie: Supreme Court of Appeal, Bloemfontein

Judge PB Fourie: High Court, Cape Town

Prof Julien Hofman: Law Faculty, University of Cape Town

Prof Francois du Bois: Law Faculty, University of Cape Town

Mr Anton Meyer: Legal Consultant, Cape Town

Advocate JC Gerber S.C., Office of the Director of Public Prosecutions, Cape Town

Mr Selwyn Hockey: Cape Law Society

Ms Chantel Fortuin: Legal Resources Centre

Adv Gary Oliver, representing the General Council of the Bar

Adv Rob Petersen S.C., representing the General Council of the Bar

Prof Halton Cheadle: Law Faculty, University of Cape Town

Prof Jacques de Ville: Law Faculty, University of the Western Cape

Prof Cora Hoexter: Wits Law School, University of the Witwatersrand (Project Leader at the time)

Prof Christo Botha: Law Faculty, University of Pretoria

Mr W Henegan: SA Law Reform Commission

Ms Claudia Lange: representative of the GTZ

Ms Clair Hartley: SA Law Reform Commission

Mr Pierre van Wyk: SA Law Reform Commission