SUPREME COURT
OF QUEENSLAND

Australia and New Zealand Scrutiny of Legislation Conference
Parliament House, Brisbane
Tuesday 26 July 2011

The Hon Paul de Jersey AC
Chief Justice

I am grateful for the opportunity to speak at the Conference. It is significant for the opportunity provided since 1980 for members of parliamentary committees, academics, politicians and others to exchange experiences in relation to this important subject.

The role and function of scrutiny of legislation committees has recently shot to prominence in this country. Last year the Senate referred to a standing committee an inquiry into their role and direction. Although that inquiry lapsed with the federal election, another inquiry on the same terms was established early this year, and is still ongoing.

Submissions made to such inquiries suggest the most controversial issue is the role the Committees should play in protecting and enforcing human rights, through bringing potential infringements to the attention of the Parliament.

I will not today address the implementation of that role. Instead I seek to focus on the importance of the accessibility of legislation, and more broadly, how the oversight provided by these committees can enhance the operation of our democracy.

There has long been recognition, by parliamentarians, lawyers and drafters alike, that legislation must not only be comprehensive, but equally importantly, comprehensible.

To that end there has since the 1970s been a substantial move towards “plain English” drafting, with rejection of the legalese commonly derided inside and outside the legal

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* I am indebted to my Associate, Ms Stacey McEvoy, for her assistance in the preparation for this address.

community. The perceived benefit is of course greater comprehensibility, thence accessibility.

Consistently, a number of Commonwealth statutes have been largely revised, in the areas of sales tax (1992), corporations law (1995-2000), income tax (1995-2000), aged care (1997) and the public service (1999)[*].

I would not pretend to favour all examples of plain English legislative drafting, but as with a number of my colleagues[†] I would applaud most of these thrusts towards greater clarity. The reality is, however, that the precise expression of difficult concepts sometimes necessitates the use of less than straightforward terminology. The ultimate challenge is to match exactitude with brevity.

At law school I used a text entitled "The Elements of Drafting"[‡]. The author cautioned that "brevity is not always to be attained with safety" and went on to offer this example. You wish to establish a trust for the benefit of "charitable institutions or organizations". That expression, one may think, is plain enough. But the enterprising lawyer asks, does "charitable institutions or organizations" mean charitable institutions or any organizations, charitable or not, or on the other hand, charitable institutions or charitable organizations. The court concluded it was the latter[§]. The author suggests that the addition of another word before "organizations" would render that interpretation doubtful: such as, "charitable institutions or incorporated organizations". The author suggests that for the avoidance of any uncertainty, the better drafting would be "charitable institutions or incorporated charitable organizations", or "institutions or incorporated organizations (the institutions or organizations being charitable)". I suggest a degree of patience should be extended to lawyers in their quest for precision.

[*] M Asprey, Plain Language for Lawyers, Federation Press, 2003 pp70
[†] K O'Brien, *Judicial Attitudes to Plain Language and the Law* (2009) 32 Australian Bar Review 204
[‡] 1968, The Law Book Company Ltd
[§] *Re Griffiths* [1926] VLR 212

The 1975 "Renton report on the preparation of legislation", a UK production, made the obvious but nevertheless important observation that "the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain; or the courts may hold, or a government department be driven to conclude, that the Act which was intended to mean one thing does not mean that thing but something else."[**]

Another obstacle to guaranteed clarity in legislative expression is the truth universally held that well-informed minds may nevertheless reasonably differ when confronted with the same issue. The appeal process exemplifies this, when majority decisions prevail. A good example is provided by the first Queensland hijacking case, *R v Sillery*[††].

In the 1980's Mr Sillery was convicted of attempting to take control of an aircraft being flown from Coolangatta to Brisbane: he menaced the crew with a loaded sawn-off shotgun. The division of judicial view concerned whether the relevant Commonwealth legislation obliged the court to sentence Mr Sillery to life imprisonment, or whether the prescription of life imprisonment was simply the maximum penalty applicable.

Section 8(3) of the *Crimes (Hijacking of Aircraft) Act 1972* provided, with apparently beguiling simplicity:

> "The punishment for an offence against this section is imprisonment for life"

The trial Judge took the view that he was obliged to sentence Sillery to life imprisonment. The Court of Criminal Appeal[‡‡] unanimously agreed, saying: "Nothing, in (our) view, could be plainer than the words of section 8(3) of the Act."

[**] Renton, *The Preparation of Legislation: Report of a Committee Appointed by Lord President of the Council* (HMSO, London, 1975) at para 11.5
[††] As mentioned in I Turnbull, *Problems of Legislative Drafting* (1986) 67 Statute Law Review 67, 69
[‡‡] [1980] Qd R 374

Yet three of five High Court Judges disagreed, saying[§§] "the words…are not unambiguous", and that "…on its proper construction, (the sub-section) provides for a maximum punishment and not a mandatory punishment."[***]

The 3:2 majority in the High Court relied on the presumption that legislation will not limit rights and freedoms except by unambiguous language. As Murphy J put it[†††]:

> "The policy of maximum and not mandatory penalties is so pervasive that it should be presumed that any penalty is intended as a maximum: very clear words would be necessary to displace this presumption."

Otherwise the law would be draconian, recalling the ancient code devised by the Athenian Draco, who reputedly imposed the death penalty for most offences regardless of gravity or lack of gravity.

These days the court would of course have regard to the Second Reading Speech in relation to that legislation, where the then Attorney-General informed the Senate that "the Bill provides that the maximum punishment for hijacking is imprisonment for life".[‡‡‡]

In this contemporary era, the work of the Scrutiny of Legislation Committee would have forestalled that imbroglio. Coincidentally, the first such committee in the nation was established by the Senate but five months after the High Court's judgment in *Sillery*.

That criminal proceeding provides an illustration of the potential significance of the work of these committees. The outcome was of course of vital significance for the prisoner. But having regard to a broader public interest, the outcome provides an illustration of judicial difference which some, perhaps many members of the community, would consider unsatisfactory, unsatisfactory because it betrayed uncertainty. Laws should be clear and their application predictable. Courts do not relish the construing of doubtful provisions. The work of these committees can be vital in avoiding such doubt.

[§§] (1981) 180 CLR 353
[***] Gibbs CJ at pp 357
[†††] At pp 359
[‡‡‡] Parliamentary Debates Vol S54, p 1416

The Queensland Committee is statutorily charged with monitoring the application of "fundamental legal principles" to all bills and subordinate legislation. Those principles include having sufficient regard for the "rights and liberties of individuals", in turn dependent on whether the proposed legislation is "unambiguous and drafted in a sufficiently clear and precise way". In reporting apparent breaches to the relevant Minister or member or the Legislative Assembly, the Committee can play an important role in ensuring that if the parliament intends to diminish basic rights, it will do so with full knowledge of what it is doing, and that bears significantly on parliamentary accountability.

The committees are of course not law reform commissions. The role of the committees is more attenuated. But just as law reform commissions take comprehensive steps to consult with interested members of the public in relation to possible reform, one wonders whether scrutiny of legislation committees might not usefully themselves embrace communication with the public, greatly facilitated in this era by electronic on-line mechanisms. I understand this does not presently occur.

The Supreme Court, through me, contributes to the development of draft legislation which may affect the operation of the court, drawing attention to any perceived problem. That is a productive and beneficial approach to things.

I wonder whether public participation in the processes in the scrutiny of legislation committees might have some use, in identifying areas of concern, and if so, that participation could be facilitated on-line. It is much better that potential problems be forestalled, rather than left for subsequent ventilation in the courts of law, and if the committees could be assisted by measured public contribution to their work, then that should probably be fostered. I am not sure that the important work of these committees is generally understood or appreciated in the public realm.

I return in conclusion to *Sillery's* case. The equivalent section today is contained in the *Crimes (Aviation) Act 1991*, s 13(3). It provides: "An offence against sub-section (1) or (2)

is punishable on conviction by imprisonment for life." I leave you to answer the question whether the legislature has clearly removed the ambiguity identified by the High Court.