THE 'JUST DO IT' APPROACH TO USING PARLIAMENTARY HISTORY MATERIALS IN STATUTORY INTERPRETATION

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I. Introduction

Traditionally, a court was restricted in the kinds of evidence it could consider when interpreting a statute. Particularly, it was denied the ability to consult most of the material that described the parliamentary history of the legislation in question. This has been known as the exclusionary rule.

Over the years, the exclusionary rule has been relaxed gradually in respect of different materials at different times. Interestingly, it has been relaxed at different rates in different jurisdictions, and with different resulting rules for the uses of these materials.

The purpose of this paper is to consider the current state of the rule(s) surrounding the use of parliamentary history materials in New Zealand courts. In order to do so, it first considers the origin and history of the rule, in the UK and New Zealand, including its justifications and the debates over uses of such materials. It then describes the findings of a project which considered the relevant cases from the New Zealand Court of Appeal and Supreme Court.

In summary, the exclusionary rule no longer applies in New Zealand in respect of parliamentary history materials. New Zealand courts will admit evidence of parliamentary history that is relevant to interpreting a statute. However, they are careful to ascribe an appropriate weight to such materials. In most cases, such materials will only be used to provide evidence of the background circumstance of the legislation, and to confirm an interpretation reached by other means. It is rarely the case that parliamentary history materials will provide the central reason for choosing an interpretation, and it is extremely rare that such evidence would trump an interpretation based on the face of the text itself, though even that has occurred on occasion.

Interestingly, New Zealand practice has diverged from that of the House of Lords and is more similar to that of Australia. Thus, despite the Australian regime being based on statute, New Zealand practitioners may find more of use in terms of relevant arguments on the uses of parliamentary history materials in Australian cases than in decisions from the House of Lords.

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II. Preliminary

Parliamentary History Materials

There are a number of different types of materials that are created in the course of developing and passing legislation. The phrase 'parliamentary history materials' may refer to any or all of the following categories.[1]

1. Law Reform Materials

These consist of reports of law reform bodies recommending that law be passed in order to solve a particular problem (or address a 'mischief'). In New Zealand, this may include Royal Commission reports, reports of the (previous, part-time) Law Revision Commission and Law Reform Committees, departmental Green Papers and White Papers,[2] reports of the (current, permanent) NZ Law Commission.[3] Strictly, these are pre-parliamentary history materials that are relevant to the development of a law and, historically, they have been regarded differently from other parliamentary history materials.

2. Explanatory Note

An explanatory note accompanies each Bill as introduced in Parliament.[4] This explanatory note is not amended even when a Bill is later amended. Thus, it only represents the Bill as introduced.[5] A Supplemental explanatory note is often produced to accompany a Supplementary Order Paper setting out proposed amendments to a Bill.[6]

3. Amendments Made to a Bill During its Passage Through Parliament

4. Select Committee Comments on a Bill

A Bill is referred to a select committee after its first reading in the House. Since the introduction of MMP in 1996, select committees must produce a written commentary on the Bill, including whether proposed amendments are supported unanimously or by majority only. The commentary is attached to a reprinted copy of the Bill showing the amendments recommended by

1 In addition to these listed below, Burrows and Carter include reports by the Attorney-General under s 7 of the *New Zealand Bill of Rights Act 1990* as parliamentary history materials. John F Burrows and Ross I Carter, *Statute Law in New Zealand* (4th ed, 2009) 258. Because these arise in only this particular situation, and are not common to other legislation, I have left these out of my consideration.

2 A White Paper is a publicly-released statement of the government policy on a particular issue of law reform. It is arrived at after consideration of law reform proposals (perhaps preceded by a Green Paper, which is more of a public discussion document). It is thus a firm and clear statement of the government's intentions in respect of the law reform in question.

3 The Law Commission was established in 1985 as New Zealand's first permanent, full-time law reform body. Burrows & Carter describe in more detail the various law reform bodies which have existed over the years, including analysis of their advantages and disadvantages, and of the work of the Law Commission. Burrows & Carter, above n 1, 43-57.

4 Explanatory notes have been required of all Bills since 2000. They usually have both a general, overall policy statement as well as analysis of each clause (or sometimes each Part). The analysis is drafted by the Parliamentary Counsel Office.

5 Burrows & Carter, above n 1, 67.

6 These supplementary explanatory notes are not legally required, though are often produced. They are similarly written by Parliamentary Counsel Office.

the committee.[7] Before 1996, some reports included such commentaries; but, even if not, the speech to the House from the chair of the committee often contained comments on the committee's recommendations, such as on amendments to a Bill.[8]

5. The debates in Parliament during the passage of a Bill[9]

The First Reading speech by the Minister introducing the Bill, plus the initial debate at First Reading, has always been recorded in Hansard. Before 1996, the debates during the committee of the whole House stage were not recorded. Only 'the amendments moved, and the voting on them',[10] were recorded. However, since 1996, these whole House debates are also fully recorded in Hansard.[11]

6. Other Materials

Occasionally, other materials may contain information relevant to understanding the decisions taken in drafting legislation. For example: Cabinet memos and minutes discussing the proposed legislation; departmental submissions to select committees; the summaries of submissions to select committees; departmental memos and/or public documents explaining the departmental understanding of the effect of the legislation (for example, on interpretation of tax laws). While these materials may be relevant to the parliamentary history of a law, they are not usually regarded as parliamentary history materials, and have been treated differently.

III. Legislative History

Legislative history is also often used by judges in statutory interpretation cases. However, this most typically refers to the enacted legislative provisions (ie, as opposed to proposed amendments which were defeated) that existed prior to, or post, the legislation in question. The reference to previous legislative provisions on their own has not been contentious. It is when such reference is combined with other parliamentary history material, such as proposed amendments or select committee reports explaining changes, that the boundary becomes blurred.[12] When I refer to legislative history in this paper, it is in the narrow sense, not including the parliamentary history materials listed above.

One contentious aspect of legislative history is whether later amendments can affect the interpretation of an earlier statute – for example, where an amendment was clearly predicated on a particular understanding of what the

7 Select committees are discussed in more detail in Burrows & Carter, above n 1, 75-76, 87-95, 97-98, and 100-101.

8 Burrows & Carter, above n 1, 120.

9 'Hansard' is the name colloquially given to the official reports of proceedings in the House, officially called New Zealand Parliamentary Debates. The name 'Hansard' came from the British reference which arose because Thomas Hansard's family firm printed the British proceedings for over 60 years in the 1800s. The UK, Canada and Australia also still use 'Hansard' (unofficially) to refer their records of parliamentary debates.

10 Burrows & Carter, above n 1, 131.

11 Ibid 78.

12 See, for example, the discussion of this below Part VIII C.

law was under the earlier statute. Another instance is whether a court can look at proposed amendments to a provision that were defeated. This latter aspect is sometimes more properly considered under parliamentary history materials but its treatment is likely to vary depending on the surrounding circumstances.

IV. Parliamentary Intent

The reason for looking at parliamentary history materials is often said to be in order to better determine the intent of parliament. The enacted intention is ostensibly clear, in that the legislation itself is the product and expression of this intention. But when the meaning and/or application about enacted intention is unclear, or perhaps leads to absurd, unreasonable or undesirable results, then lawyers and judges often want to search for some other expression of parliamentary intent. This is what one writer refers to as 'unenacted intentions'.[13] Reference may also be made to the presumed intention of parliament[14] and/or to their purpose in passing legislation.

The concept of parliamentary intent is often criticised as being non-existent in practice and thus unworkable in theory. For example, a common reason given is that there is no common parliamentary intent because every parliamentarian may have a different intention or reason for voting to approve a piece of legislation. Firstly, I note that this criticism must be confined to the unenacted intentions. I suggest that even this criticism confuses the task of searching for 'intent'. What judges and lawyers are looking for in parliamentary history materials are the justifications for the law in question. Jim Evans argues that the search is for 'the public interest reasons in favour of the rule … that were thought to justify making it part of the law'.[15] He continues: [16]

> Whether these concerns actually motivated legislators is irrelevant. We can see this when we think how odd it would be for a lawyer to argue that the purpose of a particular provision was really to gain extra votes in a marginal electorate and that consequently it should be interpreted to best achieve that purpose.

It may be that referring to parliamentary purpose in enacting the legislation, or particular provision, is a much more accurate way of describing what lawyers and judges are searching for when they use parliamentary history materials. But the fact that it is referred to loosely as parliamentary intent should not sidetrack us from examining the reasons for and against its appropriate use.

V. Uses of Parliamentary Materials

There have been many reasons for and against the use of parliamentary history materials in statutory interpretation. These are canvassed in more detail in Part VI, below, so I will only refer to them by way of summary here.

13 Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 (1) *Oxford Journal of Legal Studies* 179, 181.

14 That is, that parliament cannot be presumed to have intended a particular consequence, such as violation of a fundamental common law right.

15 Jim Evans, 'Controlling the Use of Parliamentary History' (1998) 18 *New Zealand Universities Law Review* 1, 19.

16 Idem.

The reason for referring to them here is to highlight the types of problems which arise from the different types of uses of parliamentary history materials.

Parliamentary history materials may be used in various different ways in interpreting statutes. I suggest that there are two main categories of these ways in which they are used. Firstly, parliamentary history materials may be used simply to confirm that the meaning of the provision which has been arrived at using other statutory interpretation methods has produced a result that accords with the justification that parliament provided for the legislation. I also include in this category the situation where a mistake is clear on the face of the legislation – for example, because of some absurdity that arises from the combination of provisions – and parliamentary history materials are used to confirm that it is indeed a mistake, typically because it does not accord with the expressed justification of or expectations for the legislation.

Secondly, parliamentary history materials may be used as a method of statutory interpretation that may not accord with some of all of the other methods used. For example, parliamentary history materials may indicate an intention to legislate against an accepted presumption that courts apply in cases of doubt, but where that intention is not clearly expressed on the face of the statute. The issue will be whether the parliamentary history materials can be used to determine that Parliament's intention to go against that presumption was clear enough in order to rebut application of the presumption.[17] It may be that the evidence of parliamentary intent supports some interpretation methods but not others. The weight of the evidence may then be considered along with the weights of the other methods before a determination is made about which should prevail. In extreme cases, legislation may be clear on its face, but the words used may not implement the expressed reasons for its implementation or the stated expected coverage of the legislation. This may be because a Minister is thought to be wrong about what a term is expected to cover, or because the words chosen inadequately expressed the drafting intentions.

These different uses of parliamentary history materials give rise to different arguments for and against their use. The most vehement objections arise where parliamentary materials are used to identify a purpose which goes against the interpretation that appears clearly on the face of the words in question. Such evidence may suggest that there has been a mistake in expressing the drafting intentions. However, if the words are clear on their face while the mistake is not, then using this external evidence to show that the words should actually be interpreted to mean something different makes it hard to determine the law by reading solely the legislation. This is very likely to go against clarity and certainty of the law. It is not absolutely certain that clarity will be defeated – for example, it may have been very public knowledge what the expressed parliamentary intentions

17 The case of *R v Pora* [2001] 2 NZLR 37 (Court of Appeal) comes to mind. There the majority relied on the presumption against retrospectivity whereas Thomas J in dissent relied on Hansard to say that Parliament's intention to go against that presumption was clearly expressed and thus rebutted it.

were, and it may be that the wording goes against public expectations and understandings of the effect and application of the legislation. But I suggest that this kind of case will be very rare. Such use of parliamentary history materials will certainly frustrate clarity by making the meaning of the law harder to determine, if only because it will mean that another source will need to be consulted before the meaning can be finalised. Jim Evans suggests that in such a situation there would be two sources of law – the legislature as well as the legislation.[18]

One step removed from this type of situation is where a provision is unclear – whether it is vague or because a word is ambiguous in application to a particular set of facts – but where other accepted methods of statutory interpretation all point to one meaning. If the parliamentary history materials point to a different interpretation of the provision, this may also go against a reading which is the most likely to be achieved at purely by reading the statute itself, if only because many methods of interpretation are based on factors internal to the legislation. Thus, even though the words may not be clear on their face, the use of parliamentary history materials in such a situation may also go against clarity and certainty of the law.

Where different methods of interpretation produce different results, then the use of parliamentary history materials does not give rise to the same criticisms of frustrating certainty – if only because the provision is not clear in the first place. If the use of parliamentary history materials in such cases goes against the purpose as established from aids internal to the statute, then that may still give rise to the 'dual sources of law' criticism.[19] If it is used to support a purpose arrived at by other means, this does not fall foul of the same criticisms and is a more acceptable use to many commentators.

But the use of parliamentary history materials generally, even to confirm a result reached at by other means, has given rise to several other criticisms. For example, there is the fear of optional and thus selective use of parliamentary history materials, to support an interpretation favoured for other reasons, but leaving it out when not wanted.[20] Many fears have been expressed on practical grounds: that this particular method of interpretation requires much and

18 Jim Evans, 'Controlling the Use of Parliamentary History' (1998) 18 *New Zealand Universities Law Review* 1, 23-24. This criticism of dual sources of law was made primarily in relation to resolving ambiguities, not correcting mistakes; but it appears that the author would also hold this latter use to be a problem if parliamentary history materials are used to override clear words.

19 Idem. Jim Evans categorises the different uses of parliamentary history materials in interpretation using careful distinctions between various different types. He argues that the appropriateness of using parliamentary history materials differs according to whether it has the effect of making the parliamentary history materials a direct source of law in their own right, in tandem or competition with the statute. He suggests that many uses of parliamentary history materials rely on Ministerial or other statements to determine the purpose of the legislation. When this is done, it is effectively making these other statements sources for determining the meaning of the law, which means that they risk becoming a source of law in their own right. This makes it difficult to tell from looking at a statute whether the words mean what they appear to mean on their face.

20 Evans even goes as far as to suggest that a judge might hold that a word is ambiguous in order to use it, but say that wording is clear when they do not want to choose the meaning suggested by the parliamentary history materials. Ibid 45.

thus costly research and preparation of the arguments. Accordingly, court time will need to increase in order to deal with these arguments. This thus raises the cost to litigants, and thereby frustrates the provision of access to justice. This is further supported by arguments that the cost is not justified by the benefits because, in many cases, much of the parliamentary history material does not resolve the precise issue under consideration. This may be because the matter was not considered, and/or because amendments made parliamentary history material unreliable, and/or because of the nature of political debate in Parliament.[21] Where the issue of interpretation is clearly resolved by the parliamentary history material, there is clear benefit in terms of resolving the issue. But if it is the only method to offer a clear result, then it will fall foul of the dual sources complaint, described above.

The constitutional considerations surrounding the use of parliamentary history materials are complex. Against the use of parliamentary history materials are considerations of the separation of the power of the legislature and the executive. Much of the parliamentary history of legislation stems from the executive, whereas the legislation is the product of the legislature. Using the product of one to help interpret the product of the other can be argued to violate the separation of powers. Further, the separation of powers doctrine requires comity between the branches, which requires (inter alia) that the courts not inquire into or 'question' the legislature's internal processes.[22] Examining most parliamentary history materials – especially Hansard – can be argued to violate that comity. On the other hand, parliamentary sovereignty requires that the courts should try to uphold Parliament's purpose in enacting the legislation. Ignoring parliamentary history materials in statutory interpretation can frustrate that aim, which is another matter of constitutional principle. This latter factor is arguably even more important now that a purposive approach to interpretation is required of judges.[23]

The arguments expressed for and against using parliamentary history materials as aids to statutory interpretation have varied. Over time, different considerations have been felt to be more important, depending on the circumstances of the day. Arguments have also differed depending on the use to which the parliamentary history materials have been put. These different factors have resulted in the courts adopting different rules for the admissibility and use of parliamentary history materials over the years and in different jurisdictions. The history of the debates and rules adopted over the years in the United Kingdom and in Australia are addressed in the next sections because they provide useful comparisons by which to illustrate the position in New Zealand today.

21 For example, much parliamentary debate consists of political point-scoring rather than debate over precisely what some of the terms mean and what situations might be covered by a provision.

22 As required by Article 9 of the *Bill of Rights 1689*, for example.

23 See, most recently and most explicitly, *Interpretation Act 1991*, s5. But see also *Acts Interpretation Act 1954* s5(j) which, despite its less explicit wording, was also held to require a purposive approach.

VI. The United Kingdom

History of the Exclusionary Rule

The English Courts first refused to look at Parliamentary proceedings in any way and for any reason in 1769.[24] Over time, this became referred to as the exclusionary rule. The reasons given for exclusion were both constitutional and practical, though commentators of the day considered that the constitutional reasons were of fundamental importance and were thus primary.

These reasons were:

(a) a constitutional argument based on the *1689 Bill of Rights*, Article 9: 'That the freedom of speech, and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament'.[25] Judges and scholars decided that, in order to protect parliamentary debate, any record of it must not be reviewed nor analysed by a court, for fear of violating Article 9. This was a slippery slope argument: it was better to not do it at all than be faced with possibility that it might count as 'questioning' Parliament;

(b) a constitutional argument founding on the separation of powers and arguing firstly that allowing reference to these materials could confuse the roles of the executive and legislature by letting Ministerial statements of intent, for example, affect the meaning of the terms of legislation enacted by parliament as a whole, whereas Parliament as a whole may or may not have agreed with the Minister and/or enacted them with a different idea in mind;

(c) a constitutional argument, again in terms of separation of powers, but arguing that allowing reference to these materials affects the role of the courts in interpretation, in that statements by a minister or other legislators (whether seen to be from the executive or the legislature) affect the interpretation of a statute, which is the Court's role;[26] and

(d) an appeal to practicality as there was then no reliable reference material for parliamentary proceedings, let alone an official parliamentary record. Knowledge of parliamentary proceedings was only via publication as articles in newspapers, which did not necessarily report all debates nor changes to a Bill.

Commentators have also put forward another reason for adopting the exclusionary rule, even if this was not expressed at the time.[27] This reason is the prevailing attitude at the time toward interpretation of written documents generally. All documents – whether statutes, wills or contracts, for example – were expected to stand on their own, without reference to the drafter's intentions as determined from materials extrinsic to the document in question.

24 See *Pepper v Hart* [1993] 1 All ER 60-61 (Lord Browne-Wilkinson) citing *Millar v Taylor* (1769) 2 Burr. 2302, 2332 (Willes J) (KB).

25 1 W&M, sess2, c2.

26 See *Pepper v Hart* [1993] 1 All ER 63-64 (Lord Browne-Wilkinson).

27 For example, Burrows & Carter, above n 1, 259-60.

This attitude gave rise to the parol evidence rule, forbidding such evidence of intent.[28] This reason supports the constitutional arguments made at the time concerning comity and separation of powers: the statute, as the product of the legislature rather than of individual legislators, must stand alone and internal processes surrounding its passage must not be inquired into.

In the 1840s, the exclusion of court consideration of materials was widened to cover reports of Commissioners and other law reform materials, for similar reasons.[29] This particular exclusion was relaxed in 1898: courts allowed reference to reports of Commissions and White Papers,[30] but only to discover the general mischief of an Act or provision; not to interpret specific points at issue.[31]

In 1909 Hansard became an official record. However, it was still not widely subscribed to and was hard to use (such as not having indexing to help find discussion of legislation by name).

In 1969, the English and Scottish Law Commissions published a joint report recommending that the exclusion continue.[32] While all the various reasons for and against continuing the exclusionary rule were canvassed, the primary reason given for upholding the exclusion was the practical one of cost/benefit. Even though Hansard records were authoritative and now widely available, the Commissions thought that recourse to them would impose an unreasonable cost in time and expense on parties, given the likely (in)utility of the information to be found in parliamentary debates. They considered that the parliamentary statements were often vague in relation to the particular issues that arose for interpretation by the courts, and were thus not helpful for resolving the issue; better indications of the relevant meaning would be more likely to be found in the legislation itself.

There was, however, considerable academic and judicial criticism of the exclusionary rule, beginning in the 1970s. For example, in 1976 Lord Simon advocated using Hansard for determining mischief;[33] in 1979 Lord Denning used Hansard to help interpret an Act,[34] arguing that judges too often 'grope about in the dark for the meaning of an Act' because they are denied access to Hansard.[35] Further, he confessed to having looked at Hansard privately.[36] However, Lord Denning's comments were criticised by the House of Lords, which reaffirmed the exclusionary rule.[37]

28 See, for example, *Attorney-General v Powis* (1853) Kay 186, 207: 'in construing an Act of Parliament, a deed, will, or whatever other instrument may have to be construed by the Court' the only extrinsic evidence the Court could consider was relating to the surrounding circumstances, not of the parties' intentions.

29 See *Pepper v Hart* [1993] 1 All ER , 61 (per Lord Browne-Wilkinson), citing *Salkeld v Johnson* (1848) 154 ER 487, 495.

30 See above n 2 for description of a White Paper.

31 See *Pepper v Hart* [1993] 1 All ER 60-61 (Lord Browne-Wilkinson) citing *Eastman Photographic Materials Co Ltd* [1898] AC 571, 575 (Earl of Halsbury, LC).

32 English and Scottish Law Commissions, *The Interpretation of Statutes*, Law Commission Report No. 21 and Scottish Law Commission Report No. 11 (1969).

33 *Race Relations Board v Dockers' Labour Club & Institute* [1976] AC 285 at 299.

34 *Davis v Johnson* [1979] AC 284, 276-277.

35 Ibid.

36 Ibid.

37 Ibid 337 (Viscount Dilhorne) and at 349-50 (Lord Scarman).

Despite this position, from the late 1980s, exceptions began to be carved out of the exclusionary rule. The House of Lords allowed reference to Hansard in cases where delegated legislation was passed to comply with European law; this was justified partly because it was not part of the usual parliamentary process.[38] In 1991, in a case of judicial review of a statutory power, a parliamentary statement was held to be relevant to determine whether the Minister had exceeded his powers under the Act.[39]

In 1992, the House of Lords made a significant change and abolished the strict exclusionary rule. In the case of *Pepper v Hart* the court allowed a Minister's statements in Parliament to be used to decide the scope of application of legislation. However, the court was careful to place strict requirements on the admissibility of such evidence, holding that it would only be available in the narrow circumstances which met these requirements; such statements would thus still be excluded where these requirements were not met. These requirements were:[40]

(a) there must be an ambiguity, obscurity or absurdity on the face of the legislation. Hansard could not be used where there was clear wording, whether to confirm or deny this clear meaning;

(b) the statements to be relied upon must be made by the Minister or other promoter of Bill – it had to be someone who had the authority to make an official pronouncement on the justifications for the legislation; and

(c) the statement had to be clear in relation to the issue at hand – for example, it must not raise the same issue of interpretation as the legislation itself raises.

It is important to note the particular factual circumstances of this case. First, there were very clear statements in the House, by the Minister responsible for the Bill, precisely addressing the specific issue before the Court.[41] Second, this evidence was decisive. After hearing argument on the case without any reference to parliamentary history material, the court was about to decide the case in favour of the Crown's argued interpretation, based on traditional methods of statutory interpretation. However, while writing up their decision, parliamentary history material was brought to the judges' attention which indicated that the opposite interpretation should be taken. So the Court held a second hearing, before seven Law Lords, to consider whether to depart from the exclusionary rule (and what to make of the evidence, should they admit it). The evidence was admitted and caused the Court to decide against the Crown's interpretation. Third, the facts suggested the existence of a potential estoppel-type situation, where assurances made

38 For example, statements used to determine Parliament's intent in approving regulations to implement European Community law. See, for example, *Pickstone v Freemans plc* [1988] 2 ALL ER 803.

39 *Brind v Secretary of State* [1991] 1 All ER 720.

40 It is thus arguable that the rule was not abolished, just altered.

41 '[W]hat is persuasive in this case is a consistent series of answers given by the Minister, after opportunities for taking advice from his officials, all of which point the same way and which were not withdrawn or varied prior to the enactment of the [B]ill'. *Pepper*, above n 24, 66 (Lord Browne-Wilkinson).

by the Crown in relation to application of the new tax law were now being argued against by the IRD. However, importantly, the Court's reasoning was expressly not limited to this estoppel situation.

The history of and reasons for the exclusionary rule were canvassed by the court, and a variety of reasons given for change. Firstly, there was a constitutional argument in terms of parliamentary sovereignty, contending that the role of courts is 'to give effect to the intention of Parliament';[42] where the material provides 'a clear indication of what Parliament intended in using those words, then the courts should not 'blind themselves' to this material and possibly interpret the words so as to thwart parliament's intent.[43] Secondly, there was an appeal to consistency – both on the basis that courts could examine law reform materials to ascertain mischief to the extent that a Minister's statement in the House was similarly authoritative of mischief and, secondly, that the courts could already examine such statements made in relation to delegated legislation, so they should be able to do so for primary legislation. A third reason was transparency: judges admitted they were looking at these materials themselves, so it should be part of the open record of decision.[44] Allied to that was the argument of fairness: if judges were looking at these materials themselves, then parties should be allowed to submit arguments about what inferences to draw from them. Practical objections were dismissed on the basis that access to such materials, including indexing, had improved and lawyers have proven themselves able to cope with large amounts of other statutory materials, while costs would be contained by the strict admissibility rules. Their Lordships also rejected previous arguments based on the original Article 9 *Bill of Rights* on the basis this was not in reality a 'questioning' of proceedings in parliament. If it was, then so would all media reports that reviewed or commented on such proceedings.[45] Lastly, the original separation of powers argument was rejected on the ground that a wide range of extrinsic aids are now utilised by the Court to assist in interpretation, without being considered to be a breach of separation of powers. Accordingly, adding consideration of Hansard did not raise any new constitutional question in respect of such a breach.[46]

There was a dissenting judgment, but this dissent was made solely on the practical reasons of cost to litigants and to the justice system overall. In order to address the cost issue, the majority suggested that parties who tried to introduce material which did not meet the three threshold limits should be liable for a costs order. As a result of this, in 1994, a Practice Direction was established in relation to notice and service requirements. For example, five working days before hearing, any party wanting to rely on Hansard materials was required to supply the other party with all copies of Hansard to be used and the arguments to be made on it.[47]

42 Ibid 64 (Lord Browne-Wilkinson).

43 Ibid. Importantly, this (ie, thwarting Parliament's intent) is what very nearly happened in the case: See ibid 54-55 (Lord Browne-Wilkinson).

44 This was Lord Denning's argument which had been so roundly rejected earlier.

45 *Pepper*, above n 24, 67-68.

46 *Pepper*, above n 24, 69.

47 Practice Note [1995] 1 All ER 234 (Supreme Court). This was also reiterated in 1999 and 2002: Practice Direction [1999] 1 WLR 1059-60 (Court of Appeal, Civil Division) & Practice Direction [2002] 1 WLR 2870, 2880, 2894 (Criminal Proceedings).

Interestingly, just after the *Pepper v Hart* decision, a Report of the Hansard Society Commission on the Legislative Process (or the 'Rippon Commission'), did not recommend changing the exclusionary rule.[48] However, it did question its validity on the basis that adoption of the purposive approach to interpretation requires that the Court determine 'parliamentary intention'. It noted:[49]

> Virtually every other legal system in the world permits the Courts to gather from sources other than the words of the Statute, the intention underlying the enactment … We recommended that some means should be found of informing the citizen, his lawyers and the Courts of the intention underlying the words of a Statute. We have no doubt that this would render the effect of statutory words both more comprehensible and more certain.

Academic and Professional Responses

There have been many academic responses to the *Pepper v Hart* decision, with some in favour and some against. Initially, reaction seemed favourable. For example, Lord Steyn was originally in favour of it.[50] Most commentators have examined the wider principles and not just the pragmatism.

However, increasingly, commentaries were published which were more critical. Early and authoritative critics were Francis Bennion,[51] (both when Chief Parliamentary Counsel and in later academic life) and Geoffrey Marshall from Oxford.[52] They were joined by judges, speaking extra-judicially: Lord Hoffman, in 1997;[53] Lord Millett, in 1999;[54] and Lord Steyn, in 1999[55] & 2000.[56]

Lord Steyn's first criticism of the use of Hansard was a pragmatic one: despite its possible utility, it comes 'at exorbitant cost' such that it is now 'an undesirable luxury in our legal system'.[57] But it is Steyn's article '*Pepper v Hart*: A Re-examination' which has been the most influential of the various

48 Notably, Lord Browne-Wilkinson, who wrote the leading judgment for the majority in *Pepper v Hart*, was also on this Commission. See Lord Lester of Herne Hill QC, '*Pepper v Hart* Revisited' 15:1 *Statute Law Review* 10 (1994) 10.

49 *Report of Rippon Commission* at para 235, as cited by Lord Lester of Herne Hill QC in '*Pepper v Hart* Revisited' 15:1 *Statute Law Review* 10 (1994) 11.

50 Steyn, 'Does Legal Formalism Hold Sway in England?'(1996) *Current Legal Problems* 43, 50.

51 See, for example, Bennion, 'Hansard – Help or Hindrance? A Draftsman's View of *Pepper v Hart*' 14 *Statute Law Review* 149 (1993); Bennion, 'How they got it all wrong in *Pepper v Hart*' *British Tax Review* (1995) 325.

52 'Hansard and the interpretation of statutes' in D Oliver and G Drewry (eds) *The Law and Parliament* (1988) 139.

53 Rt Hon Lord Hoffman, 'The Intolerable Wrestle with Words and Meanings' (1997) 114 *South African Law Journal* 656.

54 Rt Hon Lord Millett, 'Construing Statutes' (1999) 20(2) *Statute Law Review* 107, 110. Lord Millett recommended passing a short Act 'abolishing the rule in *Pepper v Hart*'. His primary reasons are practical, stating that the dissenting judge in *Pepper v Hart* 'has been proved to be entirely right'.

55 Johan Steyn, 'Interpretation: Legal texts and their Landscape' in B S Markensis (ed), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Oxford: Hart, 2000) 81, 87-88.

56 Johan Steyn '*Pepper v Hart*: A Re-examination' 21(1) *Oxford Journal of Legal Studies* 59 (2001). This is the text of the Hart Lecture given at University College, Oxford, 16 May 2000.

57 Above n 55, 88.

criticisms.[58] In this article, Steyn's largest criticism has been over the shift of the legislative power from the legislature to the executive – that Ministers can affect what the law means. He also suggests that *Pepper v Hart* should be limited to its facts, ie, estoppel against the executive, and that the only other legitimate role for parliamentary materials is to determine mischief, as background material, as is the case with law reform materials.

Yet Steyn's 'Re-examination' article has also sparked a raft of responses, mainly from academics though some were judges writing extra-judicially. Stefan Vogenauer of Oxford, details how the retreat from *Pepper v Hart* is piecemeal and inconsistent, and argues convincingly that the retreat in the House of Lords should be reversed.[59] Philip Sales notes how Lord Steyn's estoppel argument would effectively establish an action in substantive legitimate expectation against the executive, contrary to existing rules on substantive legitimate expectation.[60] Lord Cooke has disagreed with Lord Steyn extra-judicially, noting that 'truly solid help' in statutory interpretation can be found in Hansard and arguing that the 'realistic road ahead is not to shut eyes to Hansard'.[61] Lord Cooke also disagreed with Steyn's cost criticisms, arguing that 'the level of some professional fees should not be allowed to dictate the substantive law of England'.[62] Lord Cooke provided a memorable image in criticism of the approach encouraged by Lord Steyn: 'Some traditionalists react as if to be seen openly to read Hansard is akin to being caught with pornography'.[63]

Judicial Decisions

Initially, after the decision in *Pepper v Hart*, the House of Lords was enthusiastic and used Hansard in their decisions;[64] indeed, they often did so without reference to *Pepper's* three-part test and even in violation of the test.[65]

58 Above n 56.

59 Stefan Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' 25 (4) *Oxford Journal of Legal Studies* 629 (2005).

60 Philip Sales, '*Pepper v Hart*: A Footnote to Professor Vogenauer's Reply to Lord Steyn' (2006) 26(3) *Oxford Journal of Legal Studies* 585 .

61 Lord Cooke 'The Road Ahead for the Common Law' (2004) 53 *International and Comparative Law Quarterly* 273, 284. This is the text of the Third Annual Commonwealth Lecture, which he delivered in October 2003 at the British Institute of International and Comparative Law.

62 Ibid.

63 Ibid 282.

64 Vogenauer comments that 'the prevailing attitude was a positive one and there were warm statements about the usefulness of the recourse to parliamentary materials for the higher judiciary'. Above n 59, at 635. Vogenauer cites Lord Bridge in *Foster* [1993] AC 754 and in *Holden & Co (No2)* [1994] 1 AC 22, and Lord Browne-Wilkinson in *Melluish v BMI (No3)* [1996] AC 454.

65 Brudney describes it charitably as the House of Lords being 'less than rigorous in applying *Pepper's* three-part test'. James J Brudney 'Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court' Ohio State University Moritz College of Law Centre for Interdisciplinary Law and Policy Studies, Working Paper Series, No 56, at p18. Accessed through <http://www.SSRN.com/abstract=946771>. Brudney continues (idem):

> On a number of occasions, the judges invoked parliamentary material as admissible and relevant without discussing at all the basis for concluding that the *Pepper* factors had been met. Further, the [C]ourt's analysis often indicated that Hansard was being referenced or relied on even though the *Pepper* factors had not been fulfilled. Thus,

Lower court judges were similarly happy to use Hansard, also often without consideration of the three *Pepper v Hart* requirements.[66]

After just a few years, the upper courts started questioning the scope of its use. Brudney describes this period as 'The Bloom Fades'. The House of Lords started more strictly enforcing the three-part test; yet continued to rely on Hansard for establishing meaning – occasionally with mixed messages (for example, saying that they would not use Hansard statements for interpretation because the legislative provision is not ambiguous, but nevertheless using it as background information material).[67]

From 2000, the upper courts started limiting the scope of the use of Hansard in their decisions. Note that this was begun shortly after Lord Steyn's public criticism of *Pepper* in his May 2000 Hart Lecture (which was later published as his 'Re-examination' article). For example, in December 2000, the House of Lords in *Spath Holme* declined to use it to identify the scope of a discretionary power, with two Law Lords saying that it could only be used to ascertain the meaning of a particular word or phrase.[68] In 2002, the Court of Appeal declined to use it in a penal statute because of the penal presumption.[69] From 2002, some judges even referred to Lord Steyn's 'Re-examination' article in their decisions. See, for example, *Robinson*, which strictly adhered to *Pepper's* three threshold requirements, criticised the use of Hansard for the waste of time it caused, and criticised such use for the theoretical shift of power to the executive.[70]

In 2003, the House of Lords added at least one other restriction on the use of Hansard, and arguably two further restrictions. In *McDonnell*, the House of Lords held that a Court may not use Hansard to overturn a previous interpretation arrived at without the use of Hansard.[71] A possible second restriction is where the Court must assess the compatibility of British law with the European Convention. Here Hansard may only be used as background material, in order to ascertain the mischief the legislation was designed to remedy, not to interpret the statute itself.[72]

> the judges invoked Hansard as support for what they independently thought to be the meaning of the text. Such confirmatory references may be perfectly reasonable, but *Pepper* declared there could be no such usage at all unless the text was found to be truly ambiguous or obscure.

66 See Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2005) 25(4) *Oxford Journal of Legal Studies* 629, 641-642.

67 See, for example, *Inland Revenue Commissioners v Willoughby* [1997] 4 All ER 65.

68 *R v Secretary of State for the Environment; Ex parte Spath Holme* [2001] 2 AC 349. While four out of five judges thought that it was inappropriate to use the Hansard material in that case, there were three different reasons for not doing so, with two different judges subscribing to each reason. In particular, Lords Bingham and Hope argued that an issue concerning the scope of a Minister's power was not an appropriate issue of statutory interpretation. Yet commentators state that this case introduced this restriction.

69 *Massey v Boulden* [2003] 1 WLR 1792, 1809 (Sedley J) and 1797-8 (Simon Brown LJ). However, Vogenauer argues that this was obiter and thus arguably not a proper restriction. Above n 59, 654.

70 *Robinson v Secretary of State for Northern Ireland* [2002] N. Ir. LR 390.

71 *McDonnell v Congregation of Christian Brothers Trustees* [2003] UKHL 63; [2004] 1 AC 1101.

72 *Wilson v First County Trust Ltd* [2003] 4 All ER 97. Why I have suggested that this is only a possible restriction is that Vogenauer argues that this was only obiter. Above n 59, 646.

Yet, despite this high-profile retreat, some Law Lords still regard the use of Hansard and other parliamentary materials as useful and thus worth retaining. For example, in 2006, Lord Carswell expressed regret over the retreat and expressed the opinion that ministerial statements could indeed be useful in helping to interpret statutes.[73] Lord Carswell also went further, suggesting that ministerial statements were 'especially' helpful 'as a confirmatory aid' – that is, simply to confirm a result reached at by other methods of statutory interpretation. This goes further than the *Pepper v Hart* restrictions on the use of Hansard would allow.

Interestingly, the lower courts have reportedly generally ignored this retreat, especially the suggested limiting to the estoppel-type argument.[74] The Courts of Appeal in particular have used it on occasion as being of key help in interpretation;[75] they have let in more statements than just those of Ministers; and they have not even always followed *Pepper's* thresholds.[76] Moreover, the Courts of Appeal appear undeterred even after being overruled in some cases by the House of Lords.[77] Vogenauer comments that there are currently two different lines of authority regarding admissibility of parliamentary history material: that of the Court of Appeal and that of the House of Lords.[78]

In summary, the House of Lords' rules about the admissibility of Hansard material are that: (a) it may only be used for the statutory interpretation of a word or phrase; it may not be used to define the scope of discretionary power, unless it is a case of clear estoppel;(b) there is a strong feeling by some judges that all uses must be limited to estoppel-type arguments; (c) only statements made by government Ministers are admissible; (d) in compatibility cases, it

73 *Harding v Wealands* [2006] 3 WLR 83, at 106. Lord Woolf also agreed with the use of Hansard. Ibid 86.

74 Though Philip Sales also notes that even other Law Lords have not adopted Lord Steyn's argued estoppel restriction. See above n 60, 585-86. Brudney cites Lords Hoffman, Rodger, Carswell and Woolf as Lords who 'have eschewed the proposed estoppel restriction'. Brudney, above n 64, at fn 142.

75 For example, *Quintavalle v Human Fertilisation and Embryology Authority* [2003] EWCA Civ 667.

76 See Vogenauer, above n 59, at 641-2 (footnotes omitted from quotation):

> Sometimes the requirement of a defective text is even openly disregarded by a court citing material referred to by counsel, although it holds the relevant provision to be clear, especially if the material confirms a conclusion reached otherwise. Occasionally, reference to Hansard is made more or less in passing, without establishing whether the three requirements are met at all. In at least one case Hansard was quoted extensively although the judges had not been referred to it at the hearing. In another the debates were researched at the request of the court and provided to it after the conclusion of the hearing.

77 For example, in *Spath Holme*, above n 68, and *Quintavalle v Human Fertilisation and Embryology Authority* [2005] 2 All ER 555; UKHL 28, the House of Lords rejected the Court of Appeal's use of Hansard. Lords Steyn and Hoffman, who had been publicly critical of *Pepper*, were on the *Quintavalle* bench. In *Spath Holme*, four out of the five law Lords concluded that the Hansard material should not have been used in that particular case because the threshold conditions had not been met (although they disagreed on which conditions had not been met). Lord Cooke was the only judge who thought that the conditions had been met and that the Court of Appeal use was appropriate.

78 Vogenauer, above n 59, 652-3.

may only be used as background material; and (e) Hansard evidence may not be used in order to overrule a previous interpretation arrived at without the use of Hansard.

There is little comment on the range of other parliamentary history materials that may be used by a court. It is accepted that evidence of an Act's mischief may be admitted, and law reform materials are routinely admitted for that purpose. Explanatory notes to Bills may similarly be used. Helpfully, the British explanatory notes are re-issued to cover amendments made to a Bill during its passage, so may be used for information about purpose that otherwise might have had to come from Hansard evidence. Lord Nicholls in *Spath Holme* considered that the various different extrinsic aids to interpretation should be treated similarly to Hansard.[79] Vogenauer has noted instances of the lower courts applying the *Pepper* threshold requirements to other materials.[80] Sales similarly notes that the *Pepper v Hart* threshold requirement of ambiguity or obscurity is the same for other extrinsic aids to interpretation, 'such as international treaties, white papers, a preamble to a statute and explanatory notes'.[81] However, it is likely that the category of other, non-parliamentary materials, such as Cabinet and departmental memos, is still subject to the exclusionary rule, as they do not meet these tests for admission.

VII. Australia

Australia originally had a similar common law exclusionary rule, whereby parliamentary history materials were admitted to help discover the purpose of an Act but not to interpret the provision in question. Thus law reform materials were routinely admitted, though parliamentary debates and other materials were not.[82] This began to be eroded by the courts in 1981 admitting Hansard evidence, first for determining the mischief,[83] then for interpretation in 1982.[84] Today, the common law still permits courts to refer to law reform materials and explanatory notes in order 'to ascertain the mischief to be remedied by a statute'.[85] It also allows reference to legislative history, including repealed provisions and subsequent amending Acts.[86] However, the law concerning parliamentary materials has been altered by statute.

In 1983, the Attorney-General's Department held a seminar in Canberra focussing on the use of extrinsic materials in statutory interpretation.[87] The seminar was attended by a range of people, including judges and practitioners,

79 *Ex parte Spath Holme* [2001] 2 AC 349, 397-8.

80 Vogenauer, above n 59, 642 (footnotes omitted from quotation):

> There are even instances where the courts use these criteria if they decide about the admissibility of extraneous materials not contained in Hansard, thereby extending the scope of *Pepper* far beyond its original field of application.

81 Sales, above n 60, 586 (footnotes omitted from quotation).

82 See Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [3.4].

83 *Wacando v Commonwealth* (1981) 148 CLR 1 (High Court of Australia).

84 *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society* (1982) 42 ALR 496.

85 Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [3.7].

86 Ibid [3.31]-[3.35].

87 Ibid [3.1].

who criticised the existing (eroded) exclusionary rules and suggested that they be abolished.[88] As a result, Australia abolished the exclusionary rule by legislation. It did this in 1984, for Commonwealth Acts, via an amendment to the Acts Interpretation Act (Cth).[89] Other states have followed suit in respect of their state legislation.[90]

Section 15AB provides: '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'.[91] Specific examples are given of materials which may be considered, but these examples expressly do not limit the generality already stated. So, for example, a court may refer to Ministers' speeches and 'any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representative, or in any official record of debates in the Parliament or in either House of the Parliament'.[92]

The occasions on which consideration may be given to such parliamentary materials are ostensibly limited: (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provisions 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 of object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

This provision suggests that parliamentary materials are not able to be referred to in order to confirm that the meaning to be given to a provision is not its ordinary meaning, unless that ordinary meaning is absurd or unreasonable. This interpretation was confirmed early by the High Court[93] and has been maintained subsequently:[94]

> It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the court is to give effect to the will of Parliament as expressed in the law.

The provision also directs the court using parliamentary materials to have regard to[95] both 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 of object underlying the Act and the need to avoid prolonging legal or other proceedings without compensating

88 See *Symposium on Statutory Interpretation* (1983).

89 *Acts Interpretation Amendment Act 1984* (Cth), s7, inserting s15AB.

90 All states except South Australia have enacted provisions with the same effect as the Commonwealth statute. Pearce & Geddes, above n 85, [3.1].

91 Section 15AB(1). If the required notice is not given, such material is only admissible with the leave of the Court. Idem.

92 Section 15AB(2).

93 *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, at 420.

94 *Re Bolton, Ex parte Beane* (1987) 162 CLR 514, at 518; 70 ALR 225, at 227-8. See also the more detailed discussion by Pearce & Geddes, above n 85, [3.14].

95 Section 15AB(3).

advantage. Regard to these factors must be had when considering whether to refer to such materials at all as well as when considering what weight to place on them even when used.

Further protection is afforded by the High Court's Practice Direction requiring that any party wishing to 'rely on extrinsic material pursuant to s 15AB must give 48 hours notice to the other party "specifying the material on which it is intended to rely"'.[96]

Presumably as a result of section 15AB (and its state counterparts), many extrinsic aids have been relied upon in Australian courts, including in the High Court. Pearce and Geddes note that Ministers' second reading speeches and explanatory memoranda have been referred to most frequently.[97] They also comment that the courts have assumed that the common law rules in relation to admissibility of extrinsic aids co-exist with the statutory regime.[98] For example, the courts have imposed a limitation on the use of extrinsic materials 'when the intention of the Minister but unexpressed in the law is restrictive of the liberty of the individual'.[99] This is similar to the traditional common law presumption that a Parliament would not intend to go against a fundamental common law right or liberty.

While there have been clear restrictions on some uses of extrinsic aids, the uses generally have been broad. There is not the focus on the admissibility of the evidence that is seen in British courts. Instead, the focus is more on the importance and weight to be placed on such evidence, both in its own right as well as in comparison with other methods of statutory interpretation.

VIII. New Zealand

In this section, I describe the approaches of the New Zealand courts to the uses of the different types of parliamentary history materials. The conclusions about current treatment have been derived from my consideration of more than 200 relevant cases to be decided by the Court of Appeal and the Supreme Court from the 1980s until the end of 2008.[100] In the course of considering these, some relevant High Court cases were also identified and considered, though this was not the focus of the project. While a number of conclusions were identified by the study, this paper concentrates on the substance of the use of the materials, notably whether there are any identifiable rules for their use. For ease of consideration, I have separated the different types, describing the historical and current treatments of the materials within each section.

96 High Court Practice Direction No 1, 1984. There is a similar Federal Court Practice Direction [No 1 (1994) FCR 1; 121 ALR 697] and in some state jurisdictions. Pearce & Geddes, above n 85, [3.22].

97 Pearce & Geddes, above n 85, [3.18].

98 Ibid [3.20].

99 *Re Bolton, Ex parte Beane* (1987) 162 CLR 514, at 518; 70 ALR 225, at 227-8.

100 These cases were identified by research assistants at the VUW Law Faculty and then analysed by myself. The research was made possible by a grant from the New Zealand Law Foundation.

New Zealand - Law Reform Materials

New Zealand courts have been willing to look at pre-legislation materials which help identify the mischief and/or object of an Act and its provisions. Thus, reports of law reform bodies are readily referred to. This was apparent in the 1800s [#CM1], before UK courts were readily referring to them. Interestingly, after this use had been accepted by the House of Lords, these UK cases were cited as the NZ authority for it.[101]

In respect of the use which could be made of such materials, the official rule was that reference could be made solely for the purpose of determining the mischief an Act was designed to remedy.[102] However, even while affirming the official rule, it has been commented that 'the line between' determining mischief and 'construing the enacting words' 'may often be fine and in a case … where the statute enacts in specific terms the draft provisions of the report itself it may be difficult to say where the identification of the mischief ceases and the interpretation of the remedial statute begins'.[103] Moreover, there are numerous examples of cases where judges have referred to such materials for other purposes, including whether a statute was intended to amend the earlier law,[104] and even for which argued interpretation might be the one intended by the reform body.[105]

The Modern Approach

Very few cases refer only to law reform materials from before the introduction of a Bill. There is so much discussion of the purpose of the legislation – including the mischief it is intended to remedy – in the explanatory note to the Bill, and in select committees, that these are used much more often than law reform materials. This is understandable, if only because they are likely to be more relevant to the Bill as discussed and later enacted.

101 See, for example, *Harding v Coburn* [1976] 2 NZLR 577, where Cooke J cited *Black-Clawson International Ltd v Papierwerke Wldhof-Aschafffenburg AG* [1975] AC 591; [1975] 1 All ER 810 for authority to look to a report by the Contracts and Commercial Law Reform Committee to determine the mischief which the Act was intended to remedy. This supported the decision to decide in favour of the interpretation indicated by the reform materials.

102 See, for example, *Harding v Coburn* [1976] 2 NZLR 577, 581 per Cooke J (for the Court).

103 *NZEI v D-G of Education* [1982] 1 NZLR 397, at 414, per McMullin J. In this case, while McMullin J thought it unnecessary to refer to the relevant Royal Commission report, Cooke J found it helpful to confirm that the interpretation reached by the court was 'consistent with the report'. Ibid 409.

104 Burrows cites examples of cases where the 1908 consolidation of statutes was referred to 'several times' for this purpose: *Hughes v Hanna* (1909) 29 NZLR 16; *R v Wilson* (1912) 31 NZLR 850. Burrows , 'Approaches to Statutory Interpretation', paper presented at Law Commission seminar in 1988, n 64. (The proceedings of that seminar are published in NZLC Preliminary Paper no 8, 'Legislation and its Interpretation' (1988)). Burrows also cites cases where a Royal Commission report was used 'as a direct guide to the intention of the draftsmen' in relation to the *Crimes Act 1961*. Ibid 65.

105 See, for example, *Worsdale v Polglase* [1981] 1 NZLR 722, per Davison CJ: The report of the Contracts and Commercial Law Reform Committee 'makes it plain that the interpretation contended for by Mr Boon was at least the one intended by the Reform Committee in its recommendations to Parliament'. Ibid 726.

A few cases have cited solely a Law Commission report and used it as descriptive of the background to the legislation only, but without using it as part of the reasoning.[106] Many cases have cited a Law Commission (or other Law Reform Committee) report or White Paper to confirm a result reached at by other means (typically used as part of establishing the background as well as for interpretation).[107] A law reform report has been used as central to resolving ambiguity, without judicial comment about the Court's ability to use it.[108]

Some – but few – cases have made direct comment on the ability of the court to use law reform materials. The comments made reflect the use attempted to be made of the materials. For example, early on, the court made restrictive rules where inappropriate use was attempted by counsel, although these rules have not been followed by later courts.[109] It may be that these rules can now be limited to the facts in response to which they were devised.

In respect of White Papers in particular, a White Paper has been held to be not enough to override the clear meaning of the words of the eventual legislation; a court cannot override clear words on the basis of a vague philosophy.[110] The court has refused to let the Bill of Rights White Paper 'freeze' the living Bill of Rights, so did not use it to interpret the *New Zealand Bill of Rights Act*, as argued.[111] In one case, estoppel-like reasoning was employed to help resolve an ambiguity: the earlier Bill of Rights White Paper and Police submissions to Select Committee were inconsistent with the later Police arguments in the case. As a result, the interpretation suggested by Police was not adopted.[112]

Legislative History – How to Treat Amendments to a Bill or Act

As mentioned above, in the preliminary section, the reference to previous legislative provisions on their own has not been contentious. The two contentious aspects of legislative history mentioned above – that of

106 For example, *R v Whareumu* [2001] 1 NZLR 655 (Court of Appeal); *NZ Police v Robeade Holdings Ltd* (Unreported) CA179/02, 15 April 2003, 13 June 2003.

107 See for example, *Weatherston v Waltus Property Investments Ltd* [2001] 2 NZLR 103 (Court of Appeal); *R v A* [1994] 1 NZLR 429 (Court of Appeal) (re Bill of Rights White Paper); *R v Jeffries* [1994] 1 NZLR 290 (CA) (re Bill of Rights White Paper); *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA) (re Bill of Rights White Paper); *Tyree Power Construction Ltd v DS Edmonds Electrical Ltd (in liquidation)* [1994] 2 NZLR 268 (Court of Appeal). The project identified another 16 such cases from the period 1986-92.

108 For example, *Grainger v Rossendale Holdings* [1989] 2 NZLR 389 (Court of Appeal) – used it to explain key effect of the section.

109 For example, *R v Howard* [1987]1 NZPR 347 (Court of Appeal): the Law Reform Committee clearly recommended that the defendant's argued interpretation be legislated for, but the legislation was inconsistent with the Report. The Court stated rules for reference to such Committee reports: 1. the Court can use them as an aid to identify a mischief; 2. it can use them as an aid to interpretation where the legislation is 'unclear on its face'; they are of 'no value' in construing a phrase that is clear on its face. The materials in this case were not allowed to override the clear words.

110 *LR McLean & Co Ltd v Commissioner of Inland Revenue* [1994] 3 NZLR 33 (Court of Appeal): the law reform report showed an intention not to 'double tax' in certain situations, but this was too vague to override the clear words which imposed the tax in question.

111 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (Court of Appeal).

112 *R v Goodwin* [1993] 2 NZLR 153 (Court of Appeal).

later amendments to an Act, and of defeated proposed amendments – have been expressly considered by New Zealand courts, though not in recent times.

The Court of Appeal in an 1884 case agreed to look at later amendments to an Act (and a marginal note) made by Parliament, as they did show that Parliament had assumed that they had earlier placed a particular condition on land-owners.[113] However, the evidence was not strong enough to displace the burden of explicit statement, 'in the plainest and most direct terms', that the legislation in question was meant to be retrospective, especially as the retrospectivity would have diminished the property rights of the land-owners.

In 1908 a Court of Appeal bench of four judges, including Stout CJ, unanimously held that the Court could not take into account the fact that, during passage of the relevant Act, a clause was inserted in the Bill but then removed.[114] The proposed clause took away the right the plaintiff was claiming, so the plaintiff attempted to argue that, by removing the clause that took the right away, Parliament must have intended to uphold the right. Stout CJ provided an alternative explanation: 'The clause may well have been struck out because the [l]egislature thought the Act was clear without it'.[115]

The modern approach does not treat such evidence as inadmissible. Instead, it is carefully assessed for the inferences which may be drawn from it and given an appropriate weight. It is then assessed against the evidence available from using other statutory interpretation methods. However, despite using a technically different approach, I suggest that the two historical cases mentioned would probably still have had the same result, as the relevant evidence would have been given a similar weight overall.

New Zealand – Select Committee Reports

Discussion of select committee reports is often mixed with discussion of other parliamentary materials, such as Hansard, because of the reporting back to Parliament by the select committee and because the same divergent views are often also discussed in the House (especially in the current MMP environment). However, there have been modern cases which have discussed only or primarily the relevant select committee report. These results are discussed separately here. Interestingly, the court takes the same approach to treatment of select committee reports as it does to other parliamentary materials.

113 *Otago Land Board v Higgins* (1884) 3 NZLR 66, 85.

114 *Hamilton Gas Co v Mayor of Hamilton* (1908) 27 NZLR 1020.

115 Ibid 1023. Chapman J commented further: 'If there were any ground for admitting it, it would be more reasonable to admit it when it showed how the original language of a Bill had been cut down by Parliament. This is not even a case of the sort – it is a mere case of a proposed amendment rejected or withdrawn'. Ibid 1037. Chapman also relied on *Otago Land Board v Higgins* (1884) 3 NZLR 66, although I suggest that *Otago Land Board* was not an example of non-admission of the evidence, but a case where the Court refused to let that evidence outweigh the clear legislative statement in a case of intended retrospective interference with property rights.

Since the 1996 changes to the parliamentary procedures concerning the content and timing of select committee reports, there has been considerable reference to select committee reports in judgments. There have been no threshold rules, suggested or otherwise apparent, limiting their admissibility or use.

Select committee reports are routinely referred to as part of the background description of the law, without comment on appropriateness of any such reference.[116] They may be used at least as part of the background to help identify a drafting error.[117] Select committee reports may be used to confirm a result reached by other means of interpretation.[118]

Select committee reports have been used as central support for a decision that the clear words as enacted by parliament were a mistake such that the literal reading was read down by context and purpose; the relevant select committee report and Explanatory Note were used to determine the purpose of the provision.[119] Hansard and a select committee report have been used to support an estoppel argument, where even *Pepper v Hart* was invoked (though the suggestion was only obiter).[120]

New Zealand –The Use of Hansard

In New Zealand, the exclusionary rule in respect of Hansard material has never been as clearly established as in the UK[121] and the courts have used Hansard evidence in a wide variety of ways. For example, as far back as 1905 Stout CJ looked at the parliamentary discussion of the Act in question in order to see if it showed whether Parliament understood it to be a mere consolidation of the existing law or whether it was expected to change the previous provision.[122] (However in this case, the legislative

116 For example, *R v Smith* [2003] 3 NZLR 617 (Court of Appeal): used the Select Committee report so that the legislative history 'may shed some light'.

117 *R v Armstrong* [2004] 1 NZLR 442 (Court of Appeal).

118 For example, *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (Court of Appeal): Hammond J referred to parliamentary discussion and the relevant Select Committee report 'for completeness' [45]. For example, *Norske Skog Tasman Ltd v Clarke* (unreported) CA 181/03, 5 April 2004: the Select Committee report merely confirmed the result reached by other means.

119 *Agnew v Pardington* [2006] 2 NZLR 520 (Court of Appeal).

120 *Commissioner of Inland Revenue v Wellington Regional Stadium Trust* [2006] 1 NZLR 617 (Court of Appeal). The extrinsic materials clearly showed the purpose of the provision, which helped resolve the issue; the Court noted that it may also have been a case of estoppel against the Inland Revenue Department, as in *Pepper v Hart* [82].

121 Law Commission, *A New Interpretation Act* (1990) 50: 'a prohibitory rule has never been clearly established in New Zealand'.

122 *In re AB* (1905) 25 NZLR 299. Stout CJ found: 'Neither in the Legislative Council, where the Bill was introduced, nor in the House of Representatives was there any discussion of the Act; it was accepted as being a codification of the existing law'. Ibid 299. However despite this finding about Parliament's understanding, he found that, due to a literal reading of the words of the section, 'the law was altered and not consolidated merely'. Ibid. Thus the parliamentary record was not allowed to override the clear words of the Act in question, despite his opinion that 'I feel sure that the Legislature would not have consented to this amendment if its attention had been drawn to it'. Ibid 300. This writer disagrees that the interpretation needed to be quite so strict. The sections read: 'any father, mother, or guardian, whose consent is necessary …, or in case any such guardian …' Ibid. The issue was over whether the second reference to 'guardian' could include a father.

intent was not allowed to override the clear words of the statute.) In 1933 the Supreme Court determined the object of an Act from looking at what was said in Parliament, and used that object to help interpret an ambiguity in the legislation.[123] Hansard has been used as part of setting out the general background to an Act, even where it was not explicitly used in order to help decide an ambiguity.[124] It has been used to support other findings in a decision. For example, in 1979, the record of parliamentary debates was used to date the introduction of a Bill. This was done in order to examine whether the Bill was introduced before or after the passage of a United Nations resolution, in order to see if the resolution was an international obligation of New Zealand's at the time. As the Bill had been introduced after the resolution, the court could apply the presumption that 'in the absence of unequivocal language it is not to be supposed that the New Zealand Parliament would intend to legislate in a manner inconsistent with moral, if not international obligations in this sphere'.[125] Typically, in the cases using Hansard material, there was no discussion of whether there was any ability to admit such evidence; it was simply described and/or used.[126]

Despite this occasional use in practice, commentators still describe the New Zealand courts before *Marac* as having a 'long-standing adherence to the tradition that Judges, at least openly, should confine their consideration to the end product of the legislative process'.[127] Indeed, Professor Burrows has commented that, despite the New Zealand authority being 'slight', 'it has always been assumed that the English rules hold good here',[128] such that the use of 'parliamentary debates, and the history of the passage of the Bill

While a literal reading said not; a purposive approach might well have said that it could, especially in the light of the parliamentary evidence about not having expected to change the law which would have allowed the relevant rules to continue to also apply to a father. Further, this literal approach gave rise to a statement based on presumed intention which makes the decision internally inconsistent: 'If it had been intended that a parent should [continue to] be treated as guardian the section appearing in the [original Act] would not have been altered'. Ibid 301. This cannot easily be reconciled with the conclusion about the likely legislative non-consent to the change if Parliament had known about it.

123 *Monk v Mowlem* [1933] NZLR 1255. 'When the legislation was before Parliament it was made plain that pensions are a recognition of services to the country and good conduct. The object is to give an inalienable right to receive that pension if it should happen that the earnings or property of persons qualified under the Act are so small as to make them eligible'. Ibid 1257. The ambiguity was over what could be counted as 'property' under the statute. The object of the Act suggested that a mortgage which was in fact worthless because the mortgagor could not pay should not be so counted.

124 See, for example, *Police v Thomas* [1977] 1 NZLR 109. Richmond P introduced the material simply by saying 'Before I leave this aspect of the matter it is a matter of public record that … the provisions were given considered attention by the Statutes Revision Committee', citing NZPD. Ibid 119.

125 *Levave v Immigration Department* [1979] 2 NZLR 74, 79.

126 See, for example, *Monk v Mowlem*, above n 123, *Police v Thomas*, above n 124, *Levave*, above n 125.

127 McGrath J, 'Purpose, *Hansard*, Rights and Language' in Bigwood (ed) *The Statute: Making and Meaning* (2004) 227, 231.

128 J F Burrows, op cit n 104, at 12.

through Parliament, were not admissible at all'.[129] The fact that there are only a few New Zealand cases that do refer to Hansard is consistent with the suggestion that lawyers did not often submit such materials to the Court on the assumption that they were inadmissible. This is possible even if a rule against admissibility was not clearly established through specifically New Zealand case law.

Leading up to *Marac* in 1986 the Court of Appeal made reference to Hansard in two cases in 1985.[130] In the first, statements by the Minister responsible for the Bill as well as statements by the Leader of the Opposition showed that 'the Bill represented a compromise arrived at after extensive negotiations' and that 'the Act was preceded by a broad agreement between the Maori owners and the lessees'.[131] The Court thus felt 'entitled to lean towards an interpretation of the Act which would not run counter to a fundamental premise of that agreement'.[132] McMullin J thought it 'not necessary to embark on a discussion of the use of parliamentary debates as an aid to legislative interpretation', yet approved of the 'valuable discussion by Mason J in [the Australian case] *Wacando*'.[133] In the second case, reference to the Parliamentary Debates was only as an aside and was not necessary to the discussion, but there was similarly no discussion of the ability of the Court to refer to such evidence. It was clear that it had been looked at by the judge in the course of making his decision.[134]

129 Ibid 4. Note also the comment by Cooke P in 1987 in the *Lands* case that it was a 'practice' that Hansard was not referred to. Below n 139 and accompanying text.

130 It is also relevant to note that, in 1982, the Court of Appeal of Western Samoa, which included judges of the NZ Court of Appeal, used the Constitutional Convention proceedings to help interpret the Western Samoa Constitution. These were used as an additional measure, to confirm the interpretation reached by other means. There was no comment on the possible application of the exclusionary rule. However, it was noted that the interpretation of a constitutional instrument was *sui generis* and, especially given the human rights involved, an approach should be adopted that avoided 'the austerity of tabulated legalism'. *Attorney-General v Saipa'ia Olomalu*, (1984) 14 VUWLR 275, 287 (Cooke P, Mills and Keith JJ). Discussion of the Constitutional Convention material appears at 288 & 290-292.

131 *The Proprietors of Atihau-Wanganui v Malpas* [1985] 2 NZLR 468, 478.

132 McMullin J, ibid.

133 In *Wacando v Commonwealth*, above n 83, the High Court of Australia rejected a claim that certain islands in the Torres Strait were not part of the state of Queensland. In support of the Court's reading of the 'plain and unambiguous' legislation [Gibbs CJ, [13]], Mason J quoted a speech upon introduction of the relevant Bill to show that the Bill was aimed precisely at validating the annexation of these islands. Mason J traversed the authority on admissibility of such evidence in Australia, the UK, Canada and the USA. His conclusion was that (at [20]):

> generally speaking, reference cannot be made to what is said in Parliament for the purpose of interpreting a statute. But in my opinion there are grounds for making an exception for the case where a bill is introduced to remedy a mischief. Then, to have regard to the purpose for which the legislation is enacted as stated by the Minister in charge of the bill would conform to the rule that extrinsic material is admissible to show the mischief which the statute is designed to remedy.

134 *Director-General of Education v Morrison* CA 213/84 (22 November 1985). Cooke J simply said that it was 'of some interest to note' that the rights in question had been going to be provided by regulations and not by statute.

The case that is officially said to have abolished the exclusionary rule in New Zealand is *Marac Life Assurance Ltd v Commissioner of Inland Revenue*, in 1986.[135] In this case, the Hansard material[136] was directly on point and argument was made by counsel that it should be admitted. The Court of Appeal used the material to assist its determination of the interpretation issue. While counsel's arguments on the use of the material were questioned thoroughly by the Court at the hearing,[137] there was little discussion in the judgment of the reasons for and against abolishing the exclusionary rule. Cooke J simply stated:[138]

> in my view it would be unduly technical to ignore such an aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief arrived at or to clarify some ambiguity in the Act.

In 1987, the Court of Appeal referred to both *Marac* and *Malpas* (which was the first 1985 case referred to above) in the famous *New Zealand Maori Council* case on the *State Owned Enterprises Act* (the *Lands* case). The Court first considered that the meaning of the section in question was 'plain and unqualified' and was thus inclined to reject the Crown's suggested qualification on the words in the section. It then added:[139]

> Before finally rejecting the limited interpretation put forward on behalf of the Crown … I think it right to refer to the parliamentary debates. This Court has been willing to look at Hansard to see whether significant help in ascertaining the purpose of legislation is to be obtained: see for instance *Marac Life Assurance v Commissioner of Inland Revenue* [1986] 1 NZLR 694, 701, 708, 716, 718; compare *Proprietors of Ataihau-Wanganui v Malpas* [1985] 2 NZLR 468, 478. Not to do so in a case of the present national importance would seem pedantic and even irresponsible. Counsel on both sides were content that we should do so.
>
> As is so often the case, however, Hansard ultimately provides no significant help.
>
> … [Cooke P then detailed the Hansard evidence.] …
>
> My strong impression is that Members who took part in the final debate thought that the Act would have the effect now contended for by the Crown … [But] [w]e could not be justified in cutting down the scope of the words without at least much more specific evidence of what the legislators had in mind [on the precise issue before the Court] …
>
> This case is an illustration of some of the reasons for the former practice of never referring to Hansard on questions of statutory interpretation.

Thus, the *Lands* case confirms that there was a previous practice of not referring to Hansard, that it was changed in 1985-1986, and that there are limits to the use of Hansard. But none of these cases establish threshold rules of the admissibility of such evidence. Indeed, it seems that all such evidence

135 *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (Court of Appeal) ('*Marac*'). The Court had to decide whether the difference between the premium paid by a holder of life bonds and the amount received was 'interest' for the *Income Tax Amendment Act 1983*. The Court found that it was not.

136 This was a Budget speech delivered in the House at the time the relevant Bill was introduced.

137 Indeed, the counsel making these arguments was apparently under the impression that they had not been well-received by the Court and was reportedly surprised when the Court used the material in its judgment. Conversation between Sir Ivor Richardson (who sat on the bench in *Marac*) and Stephen Iorns, VUW, 12 March 2007.

138 *Marac*, above n 135, 701.

139 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 658.

is admissible – for example, it was discussed in detail in the *Lands* judgment, even where it was held to not be helpful. The concern of the Court appears to be simply over what weight to give it as an aid to interpretation, when considering all the possible aids. I suggest that this initial impression has been confirmed by the analysis of the cases since *Marac*.

Cases Since *Marac*

The most common use of parliamentary material is as part of the background material to a decision. This is the case whether or not it is later useful for the decision itself. Indeed, of the cases which describe the parliamentary material, the most common treatment is to *not* use it as part of the reasoning for the decision.

The next most frequent use is to simply confirm a decision reached at by other means – ie, the material is not strictly needed for the reasoning, but it is considered for completeness.[140] Indeed, even when there are extremely clear examples of parliamentary intent, if other means are available, the parliamentary material might be used only to affirm a decision reached at using those other means.[141]

In some cases, the Hansard evidence was decisive on its own, but its admissibility or use was not commented on; the Court simply used it.[142] In other cases, Hansard evidence has been a central factor, even if there were also other factors.[143] Again, its admissibility or use is generally not commented on.

Since the introduction of MMP, on occasion there has been in-depth discussion by the Court of the voting and support needed to pass a provision and the compromise reached in terms of content, which helped determine the interpretation to be taken.[144]

Sometimes majority and dissenting judgments have both used the parliamentary materials to support their views of the correct interpretation, though typically stressing different materials.[145]

140 *R v Cruden* [2001] 2 NZLR 338 (Court of Appeal).

141 *R v Morgan* [2004] 3 NZLR 7398 (Court of Appeal) (Explanatory Note to Bill); *A-G v Hull* [2000] 3 NZLR 63 (Court of Appeal) (Hansard).

142 For example, *Brown v Doherty* (1990) HC; *R v Hapi* [1995] 1 NZLR 257 (Court of Appeal); *Te Waka Hi Ika o Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (Court of Appeal); *Ngati Apa* [2000] 2 NZLR 659 (Court of Appeal) – re Ngai Tahu settlement legislation; *R v Johnson* [2003] 3 NZLR 491 (Court of Appeal).

143 For example, *Re Bimler (deceased)* [1994] 3 NZLR 13 (Court of Appeal).

144 See, for example, *R v Morris* [2005] 2 NZLR 684 (Court of Appeal) concerning GST legislation. In *Awatere-Huata v Prebble* [2005] 1 NZLR 289 (Supreme Court): the Parliamentary materials were clear on the point at issue and supported the broad reading arrived at through other means. Keith J (at [88]) discusses the consideration of votes under MMP and the amendments inserted to the legislation in order to achieve the votes required.

145 For example, *Genesis Power Ltd v Greenpeace New Zealand Inc* [2009] 1 NZLR 730 (Supreme Court). Elias CJ in dissent used the Select Committee report to explain the background and purpose in relation to the distinction at issue, and used Hansard in support of this (at [30]-[35]). The majority looked at the explanatory note, the Solicitor-General's submissions upon introduction of the Bill, the Select Committee report and the Minister's speech to the House upon reporting back from Select Committee. These were used as 'further support' for the interpretation the majority decided upon, but they were an important factor. There was no discussion of their admissibility; the court just used them.

Thomas J (and others) in dissent has used it very effectively, even where it was not used or was used differently by the majority.[146]

It is commonly expressed that the clear words of a statute must prevail over understandings gained from parliamentary materials such as Hansard.[147] In this vein, clear words have been held to override purpose as determined from Hansard.[148] Caution is expressed about according too much priority to Hansard, even where there is an ambiguity. For example, Cooke P has noted that a minister in Parliament 'cannot be thought to have been attempting the precision of a legal argument'.[149] This sentiment has been cited approvingly in support of the approach to 'regard the controlling text as the language used in the Act rather than what was said in the course of Parliamentary debate'.[150]

Yet, despite such suggestions, Hansard evidence has on occasion been used as a central or primary reason for taking an interpretation *against* the words of the Act that appeared clear on their face.[151] It has also been used to help identify a drafting mistake, both where it was central to that reasoning[152] and where it was only one factor in support.[153] In only one case has *Pepper v Hart*-type estoppel been invoked, and even then it was only as obiter.[154]

In a few cases the Court has invited counsel to comment on the parliamentary materials.[155]

146 *R v Poumako* [2000] 2 NZLR 695 (Court of Appeal); *A-G v E* [2000] 3 NZLR 257 (Court of Appeal); *NZ Fire Service C'ssn* [2007] 2 NZLR 356 – O'Regan in dissent. In *R v Hines* [1997] 3 NZLR 529 (Court of Appeal) Thomas J, in dissent, and Richardson, in the majority, both used Hansard but took opposite views of it.

147 See, for example, *Southern Service Station (1968) Ltd v Invercargill City Council* [1991] 1 NZLR 86, at 90 (Cooke P for the Court): 'such speeches are far from decisive but, though of course not capable of overcoming clear words as enacted by Parliament, they may be of some help in the interpretation'. See also *Real Estate House (Broadtop) Ltd v Real Estate Agents Licensing Board* [1987] 2 NZLR 593, 596 (Cooke P): 'An explanatory note of a speech in the House could not be allowed to alter the meaning of an enacted provisions which in its own terms is clear beyond any doubt'.

148 *R v M* [2003] 3 NZLR 481 (Court of Appeal). This case concerned the minimum non-parole period for a rape offence. The Hansard material clearly showed a wide approach to the interpretation of the (clearly) narrower words of the statute; the narrow interpretation was favoured by the Court. The *Lands* case, above n 139, is another case where the clear words of the section were held to override the probable parliamentary understanding of its scope as indicated by Hansard.

149 *W v Attorney-General* [1993] 1 NZLR 1, 5 (Court of Appeal).

150 *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774, 798, [105] (William Young J) (Court of Appeal).

151 *R v Savage* (unreported) CA83/06, 19 June 2006: Hansard and a Select Committee report were used to identify the purpose of the legislation; the purposive approach overrode the literal interpretation of the words.

152 See, for example, *Agnew v Pardington* [2006] 2 NZLR 520 (Court of Appeal), where the Explanatory Note and Select Committee report were used to identify the purpose of the legislation, which showed that a drafting mistake had occurred.

153 *R v Armstrong* [2004] 1 NZLR 442 (Court of Appeal): Select Committee report used as one such factor.

154 *Commissioner of Inland Revenue v Wellington Regional Stadium Trust*, above n 120.

155 For example, *Panine v R* [2003] 2 NZLR 63 (Court of Appeal). A Minute of the Court asked counsel to address the legislative history of the provision in question [15]. This included amendments to the provision, the Hansard record of the Minister's speeches upon introduction of the new offence [31] and second reading [34], the changes made by select committee [32] and the committee's discussion [33]. In the end, the legislative history in

A court may require counsel to undertake a search to find out why an amendment was made or why the precise words were chosen.[156]

Disapproving comments on counsel's use of parliamentary materials have been made where references to Hansard were clearly not helpful. For example: 'constant reference to Hansard and indirect arguments therefrom' are not to be encouraged; 'Only material of obvious and direct importance is at all likely to be considered;' and 'the Court will not allow such references to be imported into and lengthen arguments as a matter of course'.[157] Reference to Hansard evidence has been criticised as being of no help because the same interpretation point as was being argued also arose in the materials submitted.[158] But in very few cases has it been held that the parliamentary materials submitted were completely irrelevant.[159]

In respect of possible threshold tests, as provided in *Pepper v Hart*, it has on occasion been mentioned or assumed that an ambiguity is required.[160] However, judges differ in their application. For example, in a case where one judge thought it was so clear that Hansard could not 'govern interpretation', another judge used it in his reasoning to confirm his conclusion.[161] Technically, in that particular case, the two uses were consistent, as the confirmation did not 'govern' the interpretation; but the different expression of the rules indicated different approaches to the threshold test.

the narrower sense was key to the Court's decision and took priority over the inconsistent Minister's statements. But the Court still felt the need to get counsel's submissions on it all.

156 See, for example, *White v Northumberland* (2006) 26 FRNZ 189; [2006] NZFLR 1105, [37] noting that the Court asked lawyers to examine the parliamentary history. That material was central to their decision.

157 See, for example, *A-G v Whangarei City Council* [1987] 2 NZLR 150, 152 (Court of Appeal). The same sentiment was expressed in *McKenzie v Attorney-General* [1992] 2 NZLR 14, 19 (Cooke P for the Court). See also *Devonport Borough Council*, below, n 159.

158 For example, *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd* [2008] 2 NZLR 228.

159 One such case is *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (Court of Appeal). The High Court judgment had used Hansard material even where neither counsel had argued it. The Court of Appeal disapproved of the use and noted (at 208-9, per Cooke P):

> This Court has accepted that reference to … Hansard may be appropriate if, for instance, significant help can be obtained thereby to resolve an ambiguity or provide really useful background, but we have stressed that it is clearly not appropriate as a matter of course … The quotations set out in the judgment add nothing to what is manifest from the Act itself. In these circumstances the references were not necessary.

160 See, for example, *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 406 (per Eichelbaum CJ): 'Because I consider the interpretation is not open to any ambiguity, neither of the mattes to be considered next can govern interpretation'. (The first of these matters included the Minister's third reading speech.) After *Pepper v Hart* was decided, some New Zealand High Court cases have referred to the *Pepper* threshold conditions. See, for example, *Alcan New Zealand Ltd v Commissioner of Inland Revenue* [1993] 3 NZLR 495, 506 (High Court); *Rowan v Attorney-General* [1997] 2 NZLR 559, 569 (High Court). However, these conditions were not consistently adhered to, even when mentioned. See, for example, *Brewer v R* [1994] 2 NZLR 229, 234-5 (High Court). We do not see these thresholds maintained in the High Court in recent times, presumably because the Court of Appeal has not done so.

161 See, *Nicholls*, ibid 424, where Tipping J used the same material that Eichelbaum J rejected, in order to confirm the conclusion that he said he would have reached by other means.

Interestingly, nearly all of the comments within judgments about the Court's approach to the use of Hansard materials appear before 2000. Since then, the Court has simply used the materials, deciding what weight to accord them in comparison with other methods.

An accurate overall statement of the Court's early approach is that provided by Cooke P: 'While references to Hansard are not encouraged, this Court has deliberately not set its face totally against them. Occasionally they have provided helpful aids to interpretation'.[162] Gault J comments that the 'Courts have been careful … in drawing upon extrinsic [parliamentary] material'.[163]

Today, I suggest that the expressed caution still exists, but nevertheless judges are very comfortable with simply using Hansard materials along with other materials. Where any such materials provide strong evidence of the correct interpretation of a provision, judges are not afraid to rely on them (as in the cases supporting a purposive over a literal interpretation, and as in the cases identifying a drafting error).

New Zealand - Other Materials

Few comments have been made about other, non-parliamentary materials. Some such comments have been critical, but, conversely, sometimes such materials have been used without comment. Some examples are provided by press releases, cabinet papers and departmental submissions.

Press releases have been submitted in only one case. They were not used because they were not helpful; yet the Court of Appeal did not comment on their submission.[164]

Interestingly, Cabinet papers have been used in the High Court without comment. It used them as additional evidence to confirm the interpretation that appeared clearly on the face of the provision and which was already supported by the purpose and statutory scheme.[165] The Court of Appeal has used Cabinet papers because they were relevant, while at the same time warning that it was not inviting such 'non-parliamentary material' in future cases.[166] Conversely, the Court of Appeal has declined to admit Cabinet papers in other cases.[167]

Departmental submissions to a select committee have been considered as part of the background to the arguments and issues before the Court, even if they were not actually used in the decision (along with the other

162 *R v Salmond* [1992] 3 NZLR 8, 13.

163 *Simpson v Attorney-General* [1994] 3 NZLR 667, at 707. In *McGrory v Ansett New Zealand Ltd* [1999] 2 NZLR 328, 334, the court agreed with the exercise of 'caution' in the use of the relevant Minister's speeches (Keith J for the Court).

164 *R v Mist* [2005] 2 NZLR 791 (Court of Appeal).

165 *Elliott v Work and Income NZ*, AP 143/02, High Court, Unreported (18 December 2002), [18] (Wild J) Hansard evidence was also referred to in order to determine the purpose or scope of the provisions, even though the judge said 'It is probably unnecessary to resort to Hansard, since I see no real ambiguity in the meaning of s80(9)', [17].

166 *Skycity Auckland Ltd v Gambling Commission* [2008] 2 NZLR 182, [38]-[55] (Court of Appeal). In this case the words of the provision clearly contrasted with the intent as evidenced from the parliamentary history materials. However, the Court went with the words because they were so clear.

167 For example, *Pfizer Inc v Commissioner of Patents* [2005] 1 NZLR 362 (Court of Appeal).

parliamentary history materials), because they did not help decide the issue – this was because the same issue of interpretation arose with the background materials.[168]

I suggest that, for non-parliamentary materials, the position in respect of admissibility appears to be slightly different from parliamentary materials. The courts appear slightly less receptive to using such materials. It is certainly harder to argue their relevance to the interpretation of a final legislative provision. It may be that admissibility *per se* remains the same as for parliamentary materials, in that they may be admissible if proven relevant; it is just harder to prove this relevance. Alternatively, it could be argued that the presumption is instead reversed: that such materials are *prima facie* not admissible, but they may be considered by the Court if shown to be directly relevant.

IX. Conclusion

It is apparent that the approach taken by the New Zealand courts towards the consideration of parliamentary history materials differs significantly from that of the UK courts. In contrast, it differs only slightly from the Australian courts, and that is despite the Australian courts being governed by a statutory framework for consideration of such material.

The first clear difference is that there has been very little discussion of the reasons for and against admitting parliamentary history material in New Zealand. When the House of Lords considered changing the exclusionary rule, a full bench considered the issue directly, and the judgment canvassed the reasons for the change in detail. In Australia, change was debated before the law was amended. In New Zealand, while argument on admissibility was heard in the course of hearing the issue, the Court of Appeal simply used it because it was helpful to the decision. In *Malpas*, in 1985, it was thought 'not necessary to embark on a discussion of the use of parliamentary debates as an aid to legislative interpretation';[169] in *Marac* it was thought that it would be 'unduly technical' not to use it.[170]

The second clear difference is in relation to the substance of the rules for admissibility of parliamentary materials. In the UK in particular, the rules are restrictive and clearly prescribed (even if there is inconsistent application in practice). In Australia, the statutory rules are not nearly as restrictive, but they are clearly prescribed, with some restrictions, and there are practice rules for admissibility. In New Zealand, in contrast, at least for parliamentary materials and possibly also non-parliamentary materials, there do not appear to be restrictions on admissibility *per se*. The Court is open to having such evidence presented and discussed; it then decides what weight to place on it.

Some New Zealand judges have on occasion suggested tests for the admissibility and use of parliamentary materials. Some judges have simply expressed caution about the use. One has even expressed sympathy for the

168 *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd* [2008] 2 NZLR 228 (Court of Appeal).

169 *Malpas*, above n 131, 478.

170 *Marac*, above n 135, 701.

position advocated by Lord Steyn.[171] However, the vast majority of judges continue to use parliamentary materials in some way in their judgments without commenting on that use.

This leads to the third difference, which concerns the way in which parliamentary materials are used in decisions. The use by New Zealand courts is very similar to that by Australian courts (once such materials have been admitted). A court will make its own judgment about what weight to place on the material. This weight will depend on the clarity with which it addresses the issue before the court and the clarity with which the other methods of statutory interpretation address the issue. The strength is evaluated overall.

The vast majority of use is by way of background explanation of the provision in question. This includes help in identifying the mischief that the legislation was designed to remedy.[172] It is thus mostly used only as supporting material rather than a key – and hardly ever a sole or trump-factor to decide issues of interpretation. This is very different from the ostensible UK guidelines for use of parliamentary materials. However, I suggest that this New Zealand (and Australian) use as background material is invariably helpful in providing a fuller and more certain picture of this background to a case than would be provided without the use of the material. Further, it is 'reassuring' when Hansard can confirm that the interpretation decided upon by a judge is the one assumed or intended by Parliament.[173] It thus assists the certainty of the law by providing greater clarity of and force to the reasoning behind the result.

There are two other conclusions from this study which are worth mentioning. The first is that parliamentary history materials have been used in all types of cases; they have not been limited by topic, and no real difference appears between, for example, tax and other types of cases.

The second is that, perhaps unsurprisingly, some judges have used parliamentary history materials in their judgments much more frequently than others. The usage total will clearly depend partly on the number of judgements written, which will depend partly on the time spent on the bench. But there are some judges with shorter tenure who have used it more than others with longer tenure. Where the material is central to resolution of an issue then all judges will discuss it. But more variability shows up in discussion of its use as background information, with or without it being

171 See the comment by William Young J in *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774, 798 (Court of Appeal) that 'Those who are sceptical as to the utility of extensive reference to, and reliance on, what is said in parliamentary debates when interpreting statutes will have gained heart from Lord Steyn's recent article "*Pepper v Hart*: A re-examination" [2001] OJLS 59'.

172 See, for example, *Commissioner of Inland Revenue v Lloyds Bank Export Finance* [1990] 2 NZLR 154, 158 (Court of Appeal). See also *Taunoa v Attorney-General* [2008] 1 NZLR 429, [36] (Supreme Court) (Elias CJ, in dissent).

173 Lord Cooke has commented 'even if, without Hansard, one would lean towards the interpretation supported by Hansard … it is reassuring, when considering whether sweeping general statutory language can properly be cut down by interpretation, to find a wide intention confirmed by Ministerial statements in parliamentary debates'. *Spath Holme*, above n 68, 403.

in support of other methods of interpretation. As the largest use of this material is as background information, I suggest that judicial inclination towards knowing the background information provided by these materials plays a factor in its use. (For example, there might be an inclination toward having this information for confirmation that the court is identifying the parliamentary purpose accurately from the other methods.) However, despite this variability, there has not been the expression of the more forceful opinions seen in some of the UK cases, let alone in extra-judicial writings. If there are any such large differences of opinion among the New Zealand judges, they have not been so publicly expressed.

In conclusion, I consider that the New Zealand judges have shown the ability to manage the use of parliamentary history materials in their courts without the need for strict rules concerning admissibility or use of such materials. This is not to say that there are no rules at all. These rules may not be as strict or precise as those in the UK, and the approach is ostensibly more relaxed than that taken in the UK. The approach taken in practice in New Zealand is similar to that taken in Australia, which is that an appropriate weight must be given to such materials, in accordance with the overall task of the court to interpret the text of a provision in the light of its purpose.