

# Principles of good legislation: OQPC guide to FLPs



**Clear meaning**

Office of the Queensland Parliamentary Counsel



## Clear meaning

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## Summary

*Consider whether legislation is drafted in an unambiguous and sufficiently clear and precise way. The legislation may interfere with the rights and liberties of an individual under section 4(3)(k) of the [Legislative Standards Act 1992](#) if the legislation is not drafted in plain English.*

### *Legal guidance*

It is an essential feature of the rule of law that legislation be clear and be able to be understood by those who are bound by it (see paragraph [1]).

### *Legislation to be drafted in plain English*

Legislation should be simple, precise and organised in a way to enhance comprehension. The former Scrutiny of Legislation Committee (the *Scrutiny Committee*) summarised its expectations with respect to clear meaning of legislation as follows:

- legislation should be user-friendly and accessible, so ordinary Queenslanders can gain an understanding of the laws relating to a particular matter without having to refer to multiple Acts of Parliament
- legislation should contain provisions that are precisely drafted
- legislation should contain coherent provisions that address foreseeable matters  
legislation should be drafted in a style that is as simple as possible and be consistent with the nature of the subject matter

Parliamentary committees consider and comment on any legislation they consider is ambiguous and not clear. At its core, the parliamentary committees consider that for legislation to be drafted unambiguously and in a clear and precise way, it should be drafted in plain English (see paragraphs [3]-[4] and [6]-[13]).

The parliamentary committees have considered that the clear meaning fundamental legislative principle is raised in a variety of contexts, including, for example:

- when the purpose and intended operation of a provision is not clear (see paragraphs [14]-[16])
- terms that are not clearly defined (see paragraphs [40]-[42]), or not defined in the legislation in which they are used (see paragraphs [50]-[53]) or are defined in a way that conflicts with an existing, established definition of the term (see paragraphs [48]-[49])
- legislation that does not clearly express the nature of the power given to the recipient and does not provide guidance as to how the power should be exercised (see paragraphs [30]-[38] and see also section 4(3)(a) of the [Legislative Standards Act 1992](#))
- the imposition of civil and criminal liability (see paragraphs [24]-[29] and [19]-[23])
- the extraterritorial application of Queensland legislation (see paragraph [60])



- extrinsic material that does not reflect the wording of legislation (see paragraphs [61]-[63]).

The information contained in this chapter is current as at 14 February 2014.





## Introduction

- [1] Section 4(3)(k) of the [Legislative Standards Act 1992](#) provides that legislation should be unambiguous and drafted in a sufficiently clear and precise way. The provision embodies a fundamental component of the rule of law, namely the principle that people should be able to understand the laws regulating their behaviour. This principle has been recognised both by legal practitioners and legal philosophers, including Lord Diplock, who considered that ‘... [a]bsence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it’,<sup>1</sup> and Joseph Raz, who considered the very concept of ‘the rule of law’ requires that:

[a]ll laws should be prospective, open and clear ... (the law’s) meaning must be clear. An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.<sup>2</sup>

- [2] However, it has also been recognised that legislative drafting presents unique challenges.<sup>3</sup> Legislation is drafted for the public at large, rather than a select audience, so legislative drafters cannot rely on the assumed knowledge of their readers. The legislation must be presented in a set form suitable for parliamentary debate. The subject matter of legislation is often complex and the wording must withstand attempts by readers to find unintended interpretations. As Justice Stephen held in 1891:

it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.<sup>4</sup>

- [3] The Scrutiny Committee stated in its 1998-1999 Annual Report that it expected legislation to:
- be user-friendly and accessible so ordinary Queenslanders can understand the law relating to a particular matter without having to refer to multiple Acts of Parliament; and
  - contain provisions that are precisely drafted; and
  - contain coherent provisions, addressing foreseeable matters.<sup>5</sup>
- [4] In its 1999-2000 Annual Report the Scrutiny Committee stated that legislation should also be:
- drafted in a style that is as simple as possible and consistent with the nature of the subject matter; and
  - structured in a logical, user-friendly and accessible way.<sup>6</sup>

<sup>1</sup> *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570 at 612

<sup>2</sup> J Raz ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195 at 198

<sup>3</sup> D Pearce & R Geddes *Statutory Interpretation in Australia* (7<sup>th</sup> ed, 2011) p 5 (‘Pearce & Geddes (2011)’)

<sup>4</sup> *In re Castioni* [1891] 1 QB 149 at 167-168

<sup>5</sup> [Scrutiny of Legislation Committee, Parliament of Queensland Annual Report 1 July 1998 to 30 June 1999, Report No 13 \(1999\) p 6 para 2.14](#)



- [5] The Scrutiny Committee commented on a number of Bills it considered contained provisions that were ambiguous or not drafted in a sufficiently clear and precise way. Since the Scrutiny Committee was replaced by the various parliamentary portfolio committees, those committees have continued to express the expectation that legislation should be drafted precisely and not be overly complex.<sup>7</sup>

### Using plain English

- [6] The inherent imprecision of language makes it difficult to draft legislation that is completely free from ambiguity. As Lord Nicholls of Birkenhead observed (writing extra-judicially):

[L]anguage is an imperfect means of communication. So the law must find some way to ascribe to language when used as the source of legal right or obligation a certainty of meaning it inherently lacks.<sup>8</sup>

- [7] One of the most significant ways in which this problem has been addressed has been the adoption of ‘plain English’ drafting. The principles of plain English drafting were usefully summarised by the Law Reform Commission of Victoria in the following extract from its report *Plain English and the Law*:

‘Plain English’ involves the use of plain, straightforward language which avoids [defects in legislation identified in the report] and conveys its meaning as clearly and simply as possible, without unnecessary pretention or embellishment. It is to be contrasted with convoluted, repetitive and prolix language. The adoption of a plain English style demands simply that a document be written in a style which readily conveys its message to its audience. However, plain English is not concerned simply with the forms of language. Because its theme is communication, it calls for improvements in the organisation of the material and the method by which it is presented. It requires that material is presented in a sequence which the audience would expect and which helps the audience absorb the information. It also requires that a document’s design be as attractive as possible in order to assist readers to find their way through it.<sup>9</sup>

- [8] The Scrutiny Committee consistently interpreted section 4(3)(k) of the [Legislative Standards Act 1992](#) as requiring legislation to be drafted in plain English so that it is:

comprehensible to the intended readers, clear, precise and organised in such a way as to enhance its comprehension.<sup>10</sup>

<sup>6</sup> Scrutiny of Legislation Committee, Parliament of Queensland [Annual Report 1 July 1999 to 30 June 2000, Report No 17 \(2000\) p 7 para 2.14](#)

<sup>7</sup> See, for example, the Agriculture, Resources and Environment Committee’s [Report No 10 on the Aboriginal and Torres Strait Islander Land Holding Bill 2012 pp 21 and 22](#) (‘AREC Report No 10’)

<sup>8</sup> D Nicholls ‘My Kingdom for a Horse: The Meaning of Words’ (2005) 121 *Law Quarterly Review* 577

<sup>9</sup> Law Reform Commission of Victoria *Plain English and the Law* (1990) p 45

<sup>10</sup> [AD 1997 No 2 p 1 para 1.3](#)



### *Simple and direct language*

- [9] In considering the [Queensland Law Society Legislation Amendment Bill 1996](#), the Scrutiny Committee expressed concern that the definition of ‘practising practitioner’ used in the [Queensland Law Society \(Approval of Indemnity Amendment Rule \(No. 1\)\) Regulation 1994](#) was a tautology. The Scrutiny Committee was particularly concerned because the definition had previously been criticised by the former Scrutiny of Subordinate Legislation Committee, which considered the definition did not meet appropriate standards of clarity.<sup>11</sup> The Scrutiny Committee observed:

It is a matter of concern and regret to the Committee that whilst Queensland is making great progress in legislative drafting by having most of its Statute Book drafted in plain English, outmoded and unnecessarily confusing language continues in legislation dealing with legal profession [sic].

The Committee urges the Attorney General to have the drafting of this Act and its associated instruments updated to keep pace with the rest of the Statute Book.<sup>12</sup>

- [10] The views of the parliamentary portfolio committees about plain English drafting appear to be similar to those of the Scrutiny Committee. For example, the Legal Affairs and Community Safety Committee (the *LACSC*) endorsed the use in the [Directors’ Liability Reform Amendment Bill 2012](#) of ‘... consistent plain English provisions that should be readily understood by the corporate world’.<sup>13</sup>
- [11] However, it is equally important when drafting in plain English to avoid simplifying the legislation to the point where it becomes legally uncertain. Legislation should be as simple as possible and contain only the degree of complexity necessary to achieve desired policy objectives in a legally effective way.<sup>14</sup> In balancing the requirements of simplicity and legal precision, the drafter must:

never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain.<sup>15</sup>

### *Presentation*

- [12] As noted in the earlier quotations from the Law Reform Commission of Victoria and the Scrutiny Committee, plain language alone may be insufficient to guarantee clear communication and the appearance and presentation of legislation should also be carefully considered. The plain English approach to drafting legislation:

<sup>11</sup> [AD 1996 No 4 p 21 paras 6.12-6.14](#)

<sup>12</sup> [AD 1996 No 4 pp 22-23 paras 6.20-6.21](#) (underlining in original)

<sup>13</sup> [LACSC Report No 25 on the Directors’ Liability Reform Amendment Bill 2012 p 25](#)

<sup>14</sup> Queensland Government, Department of Premier and Cabinet [The Queensland Legislative Handbook \(2011\) \[3.5.1\]](#)

<sup>15</sup> D Renton *The Preparation of Legislation* Cmnd 6053 (1975) para 11.5





requires a writer to think about word usage, sentence construction, organisation of ideas, document structure, design and appearance.<sup>16</sup>

- [13] The Scrutiny Committee acknowledged the importance of legislative structure and presentation on a number of occasions and drew Parliament's attention to formatting and structural issues such as stylistic inconsistencies and confusing page layouts. For example, in considering the [Statute Law \(Miscellaneous Provisions\) Bill 1999](#), the Scrutiny Committee drew Parliament's attention to an unnumbered commencement clause in small font.<sup>17</sup> The Scrutiny Committee also criticised the [Maritime Safety Queensland Bill 2002](#) for including a commencement provision stating that part 2 of schedule 1 of the Bill would commence by proclamation when the schedule did not appear to have clearly marked parts. The Scrutiny Committee considered that the clarity of the Bill would be greatly enhanced if the 'parts' of schedule 1 were clearly marked.<sup>18</sup>

### Purpose and intended operation must be clear<sup>19</sup>

- [14] Legislative provisions must be drafted in a way that clearly expresses their purpose and intended operation. The High Court has held that if there is ambiguity in the ordinary meaning of words contained in legislation, it is the courts' duty to '... give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.<sup>20</sup> In identifying the legislative intention, the court should not try to attribute a collective mental state to the legislature.<sup>21</sup> Rather, the legislative intent of the words resides in the statute's text and structure (although it may sometimes be necessary for the court to refer to common law and statutory rules of construction to discern it).<sup>22</sup>
- [15] The Scrutiny Committee often recommended to Parliament that it clarify the intended operation of provisions the Committee considered unclear. For example, the Scrutiny Committee was critical of clause 41 of the [Parliament of Queensland \(Reform and Modernisation\) Amendment Bill 2011](#), which inserted provisions into the *Parliament of Queensland Act 2001* providing for the making of complaints about the conduct of members of Parliament to the Ethics Committee. The Scrutiny Committee considered it unclear whether the provisions would allow members of the public to make complaints directly to the Ethics Committee or allow the Ethics Committee to instigate an inquiry on its own initiative.<sup>23</sup> The Scrutiny Committee noted that, although the proposed provisions had been modelled on existing provisions of the [Parliament of Queensland Act 2001](#):

<sup>16</sup> R Macdonald & D Clark-Dickson *Clear and Precise: Writing Skills for Today's Lawyer* (2<sup>nd</sup> ed; 2005) p 2

<sup>17</sup> [AD 1999 No 3 p 41 paras 6.4-6.5](#)

<sup>18</sup> [AD 2002 No 5 p 12 para 21](#)

<sup>19</sup> See *Acts Interpretation Act 1954*, s 14A

<sup>20</sup> *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [78] per McHugh, Gummow and Hayne JJ; (1998) 194 CLR 355 at 384

<sup>21</sup> *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [43]; (2011) 242 CLR 573 at 592

<sup>22</sup> *Zheng v Cai* [2009] HCA 52 at [27]; (2009) 239 CLR 446 at 455

<sup>23</sup> [LA 2011 No 5 p 31 para 37](#)



... within the context of reforms to implement wider public involvement in the parliamentary committee system, the committee invites the Premier to provide clarification regarding the intended operation of new sections 104B and 104C.<sup>24</sup>

- [16] The Scrutiny Committee's comments on clause 38 of the [Local Government and Other Legislation \(Indigenous Regional Councils\) Amendment Bill 2007](#) provide another example of its concerns about clarity. The clause sought to insert a new section in *Aboriginal Communities (Justice and Land Matters) Act 1984* (now included in the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*), which would require the Island Industries Board to investigate, report and make recommendations to the chief executive 'from time to time'. The Scrutiny Committee considered the requirement to be undefined and uncertain and thought that, as a result, there might be difficulties applying it. The Committee sought clarification from the Minister as to the intended operation of the provision.<sup>25</sup>

### Special care to be taken in drafting particular types of legislative provisions

- [17] As stated in the introduction to this chapter, the rule of law requires that legislation must be able to be easily understood by those bound by it. It follows from this principle that particular care should be taken when drafting a provision that imposes a liability on a person, or gives a person the power to affect the rights of others, to ensure the provision can be easily understood.
- [18] Clarity is especially important if the legislation is intended to displace important common law rights and privileges (for example, the privilege against self-incrimination) and to enable decision-makers to take action inconsistent with those rights. The principle of legality requires that any legislative provision seeking to alter or override a common law right or privilege must do so expressly and unambiguously. If the language used is even slightly ambiguous or uncertain, the courts will interpret the legislation in the way that avoids infringing the common law right.<sup>26</sup> As Chief Justice Mason and Justices Brennan, Gaudron and McHugh held in *Coco v R*:

[it must be apparent that] the legislature has not only directed its attention to the question of abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.<sup>27</sup>

<sup>24</sup> [LA 2011 No 5 p 31 para 38](#)

<sup>25</sup> [AD 2007 No 12 p 12 paras 18-19](#)

<sup>26</sup> Pearce & Geddes (2011) p 170

<sup>27</sup> *Coco v R* [1994] HCA 15 at [10]; (1994) 179 CLR 427 at 437 and see also the discussion of the principle of legality in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 at [42]-[46] per French CJ and [145]-[152] per Heydon J



### *Provisions imposing criminal liability*

- [19] The Transport, Housing and Local Government Committee (the *THLGC*) has emphasised the particular importance of clarity in drafting criminal offences.<sup>28</sup> The issue arose in the THLGC's consideration of the [Local Government and Other Legislation Amendment Bill 2012](#), which proposed to insert provisions into the [City of Brisbane Act 2010](#) and the [Local Government Act 2009](#) prohibiting councillors from purchasing or selling an asset if the purchase or sale were influenced by inside information. The provisions included the phrases 'inside information', 'likely to influence a reasonable person in deciding whether or not to buy or sell the asset' and 'cause the purchase or sale of an asset', which the THLGC considered to be 'broad and vague'.<sup>29</sup> Although the relevant department sought to justify the drafting by stating that the definition was meant to be exhaustive and cover all types of possible 'inside information', the THLGC recommended that the phrases used in the new offences be more precisely defined so the councillors have legal certainty.<sup>30</sup>
- [20] In discussing legislative provisions imposing criminal liability, it is important to note that if it is proposed to create a criminal offence in Queensland legislation that includes a 'mental element', the mental element will need to be expressly stated to be an element of the offence. Contemporary common law requires that a crime have a mental element (described as *mens rea*) and that criminal responsibility attach only to intentional or reckless conduct.<sup>31</sup> However, a key feature of the [Criminal Code](#) is that *mens rea* is not applicable to Queensland criminal law. It is the doing of an act or the making of an omission without authority, excuse or justification which is the general threshold of criminal responsibility in Queensland. Therefore, unless Queensland legislative provisions expressly declare intention to cause a particular result to be an element of the offence, the mental element of intent is irrelevant in determining criminal responsibility.
- [21] As a result of this aspect of the [Criminal Code](#), parliamentary committees have paid close attention to the words used to express the mental element of criminal offences. The Scrutiny Committee queried the use of 'knowingly or recklessly' to express a mental element of a criminal offence, suggesting the phrase 'intentionally or wilfully' might be preferable, because it is used throughout the [Criminal Code](#) and has a settled meaning in case law. In considering the proposed offence of racial and religious vilification in the [Anti-Discrimination Amendment Bill 2001](#) the Scrutiny Committee noted that the offence merely required that the defendant either 'knowingly' or 'recklessly' incite racial or religious vilification. The Scrutiny Committee observed that 'knowingly' was not defined in the Bill and was also not a term used in Queensland legislation to express the mental element required for an offence. The Scrutiny Committee also questioned why there was no requirement of proof that a person intended to incite racial hatred

<sup>28</sup> See also the Scrutiny Committee's comments about the imposition of criminal liability on employers for their employees' conduct: [AD 2006 No 10 p 29 para 20](#).

<sup>29</sup> [THLGC's Report No 11 on the Local Government and Other Legislation Amendment Bill 2012 \(2012\) p 37 para 3.1](#) ('THLGC Report No 11')

<sup>30</sup> [THLGC Report No 11 p 38 para 3.1](#) and [Recommendation 17](#)

<sup>31</sup> [Kural v R \[1987\] HCA 16](#); (1987) 162 CLR 502





or, at the very least, that the person wilfully incited racial hatred before he or she could be guilty of a criminal offence.<sup>32</sup>

- [22] The Scrutiny Committee specifically considered the use of ‘recklessly’ when it examined the [Sugar Industry and Other Legislation Amendment Bill 2003](#). The Bill proposed to create an offence under the [Sugar Industry Act 1999](#) of providing false or misleading information. The proposed offence provision stated that ‘... evidence that ... information ... was given or made recklessly was evidence that it was given or made so as to be false or misleading’. The Scrutiny Committee drew Parliament’s attention to the fact that the new offence equated recklessness with intent for the purpose of determining whether an offence had been committed.<sup>33</sup>
- [23] The Scrutiny Committee also queried the use of the phrase ‘ought reasonably to know’ to express the mental element of some new statutory offences, suggesting that it may be more appropriate to express the mental element of these new offences as ‘intent’ rather than ‘ought reasonably to know’. The issue arose during the Scrutiny Committee’s consideration of the [Health Legislation Amendment Bill 2001](#), which proposed to insert a number of offences relating to food into the now repealed Food Act 1981. For most of the proposed offences, intent was not required to be proved, and for some of the offences (which attracted serious penalties) a person could be liable if he or she ‘ought reasonably to know’ that his or her action, or lack of it, would, or be likely to, produce a particular result.<sup>34</sup> The Scrutiny Committee was concerned that many of these proposed offences did not require any element of intent and could therefore be committed simply by acting negligently. It drew Parliament’s attention to the provision.<sup>35</sup>

### *Provisions affecting civil liability*

- [24] The consequences of civil liability can sometimes be almost as serious as those of criminal liability and therefore the effect of legislative provisions on a person’s potential civil liability also needs to be clearly stated. The following paragraphs include examples of these types of provisions and the comments parliamentary committees have made about them.

#### *Taxation*

- [25] Clarity is important when legislation imposes a tax because:
- [d]ue process requires that the taxed situations be so lucidly described that ordinary people know when and what to pay and how to avoid punishment for failure to pay. If ordinary people are confused by the meaning of the tax law, a vital element of due process is violated.<sup>36</sup>
- [26] The Scrutiny Committee considered this issue when it examined the [Land Tax Bill 2010](#). The Bill proposed to impose land tax on the owner of taxable land but the term ‘owner’ was only defined

<sup>32</sup> [AD 2001 No 1 pp 9-12 paras 52-67](#)

<sup>33</sup> [AD 2003 No 4 p 14 paras 3-6](#) and see the Scrutiny Committee’s similar comments on the [Public Health Bill 2005](#) in [AD 2005 No 4 p 14 paras 26-30](#)

<sup>34</sup> [AD 2001 No 6 p 14 para 11](#)

<sup>35</sup> [AD 2001 No 6 p 14 paras 13-14](#). However, it should be noted that the Scrutiny Committee’s view is not wholly consistent with the finding of the Privy Council in *Lim Chin Ail v R* that strict liability may be implied for offences regulating public welfare, such as food regulations: [1962] AC 160 at 174.

<sup>36</sup> J Corkery ‘On Literalism, Rule of Law and Due Process’ (2003) 31(1) *Revenue Law Journal* 2 at 2-3



inclusively. The relevant department sought to justify the use of an inclusive definition rather than an exhaustive one on the basis that an inclusive approach was necessary to reduce tax avoidance through the use of ‘contrived structures’. The department also pointed out that an inclusive definition of ‘owner’ had been used in the Land Tax Act 1915 (the Act repealed by the Bill) and had not been the subject of legal dispute in that context.<sup>37</sup> The Scrutiny Committee appeared to accept this justification.<sup>38</sup>

### *Immunity or indemnity*

- [27] Where legislation imposes liability on an entity in connection with the exercise of statutory powers or the performance of legislative functions, it may be appropriate to provide the entity with protection from civil liability. If the legislation does include an immunity or indemnity of this kind, however, the scope of the protection must be clearly stated, because courts consider that statutory immunities or indemnities ‘... are to be narrowly construed against the interests of the body concerned’.<sup>39</sup>
- [28] The Scrutiny Committee expressed concern about the statutory protection that would be afforded to local government councillors performing duties under the [Local Government and Industrial Relations Amendment Bill 2008](#).<sup>40</sup> The Bill provided that councillors would not be civilly liable for a ‘matter or thing’ done but the Scrutiny Committee considered the wording to be ‘... at least ambiguous, if not simply inadequate, to encompass a failure to act’.<sup>41</sup> Further, according to the Committee, the Bill lacked ‘... any protection or indemnity for councillors in respect of their potential liability for the debts and other financial liabilities of their local government’.<sup>42</sup> The Scrutiny Committee was also critical of provisions in the Bill dealing with civil liability of councillors for acts done in the ‘intended’ exercise of a local government’s powers, describing the protection as ‘... meagre in its description and scope’.<sup>43</sup>

### *Other*

- [29] The [Electoral \(Resignation of Members\) Amendment Bill 2002](#) (P) proposed to make a Member of Parliament liable for by-election costs if she or he resigned early, unless the Member resigned on 1 of 4 grounds.<sup>44</sup> The Scrutiny Committee considered that the Bill should specify precisely when early resignation would, or would not, be justified so Members would be able to determine if their personal circumstances justified early resignation.<sup>45</sup>

<sup>37</sup> [Land Tax Bill 2010 Explanatory Notes pp 9-10](#)

<sup>38</sup> [LA 2010 No 5 p 12 para 29](#)

<sup>39</sup> Pearce & Geddes (2011) p 187

<sup>40</sup> [AD 2008 No 2 pp 4-5 paras 10-18](#)

<sup>41</sup> [AD 2008 No 2 p 5 para 14](#)

<sup>42</sup> [AD 2008 No 2 p 5 para 15](#)

<sup>43</sup> [AD 2008 No 2 p 5 para 16](#)

<sup>44</sup> If the symbol (P) appears after the name of a Bill, the Bill is a private member’s Bill.

<sup>45</sup> [AD 2002 No 2 pp 5-6 paras 17-25](#)





### *Provisions conferring power*

- [30] A provision that confers power on an entity should clearly express the nature of the power and, where appropriate, provide guidance as to how the entity on which the power is conferred should exercise it.

### *Criteria for exercise of power*

- [31] Where legislation gives the maker of an administrative decision discretion to exercise that power, the considerations the decision maker must take into account will depend on the construction of the statute conferring the discretion.<sup>46</sup> If the empowering provision does not adequately describe the relevant considerations, a court will imply them based on the scope, purpose and subject matter of the statute.<sup>47</sup>
- [32] The Scrutiny Committee was critical of proposed provisions that conferred a power without giving adequate guidance about its exercise. An example of the Scrutiny Committee's criticism is provided by its comments on clause 18 of the [Police Powers and Responsibilities and Other Acts Amendment Bill 2000](#). The clause proposed to insert a provision in the [Police Powers and Responsibilities Act 2000](#) requiring police officers to 'have regard to the rights and liberties of the person and the public interest' before approving the detention of a person for the purpose of taking a DNA sample.<sup>48</sup> The Scrutiny Committee noted the lack of detail as to how an officer '... exercising this intrusive and potentially highly incriminating power should have regard to those matters', and commented:

How a police officer is able to make a judgement about the relevance of the rights and liberties of the person and the public interest before exercising the power seems to be left entirely up to them by the bill. The police officer is not required to state or record any reasons for the decision. Because no criteria are spelled out in the bill and no reasons need be given it would seem to be a very difficult exercise for a court to review the decision when considering, for example, the admissibility of the evidence at trial.<sup>49</sup>

- [33] The Scrutiny Committee also criticised a provision in the [Electricity Amendment Bill \(No. 3\) 1997](#), which proposed to give an ombudsman the power to 'do anything else necessary or convenient to be done for, or in connection with, the performance of the ombudsman's functions'. The Committee said the provision should specify whether the provision included power to enter and search premises and seize evidence. It recommended that the provision be redrafted to address the issue and to clarify whether persons affected would have any right to seek review of any relevant decisions.<sup>50</sup>
- [34] More recently, the Finance and Administration Committee (the **FAC**) commented on a provision of the [Industrial Relations \(Fair Work Act Harmonisation\) and Other Legislation Amendment Bill](#)

<sup>46</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24; *Halsbury's Laws of Australia*, (5 March 2012; Lexis Nexis) at [10-2177]

<sup>47</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 at [15] per Mason J; (1986) 162 CLR 24 at 40

<sup>48</sup> [AD 2000 No 7 pp 6-8 paras 26-37](#) (emphasis added)

<sup>49</sup> [AD 2000 No 7 p 7 para 29](#)

<sup>50</sup> [AD 1997 No 12 pp 29-30 paras 5.3-5.9](#)



[2012](#) that allowed the Minister to make a written declaration terminating industrial action if it threatened the whole or part of the community or the economy. The FAC expressed concern that the legislation did not include criteria or other matters that would regulate the exercise of the power.<sup>51</sup>

*Clarity as to when power to be exercised*

- [35] It should be clear when a power contained in a proposed provision is to be exercised. This issue arose when the Scrutiny Committee considered the [Local Government and Other Legislation \(Indigenous Regional Councils\) Amendment Bill 2007](#). The Bill included a provision that described the functions of a board as investigating, reporting and making recommendations to the chief executive ‘from time to time’.<sup>52</sup> The Scrutiny Committee thought that this requirement was ‘undefined and uncertain’, and sought further information from the Minister to clarify the operation of the clause.<sup>53</sup>
- [36] Similarly, the LACSC commented on proposed amendments to section 125 of the [Penalties and Sentences Act 1992](#) in the [Criminal Law Amendment Bill \(No. 2\) 2012](#). The proposed provisions would have allowed a court to increase the number of ‘graffiti removal hours’ that a person could be ordered to perform if the person had been convicted of contravening a community based order without reasonable excuse.<sup>54</sup> In the LACSC’s view, the interaction between this provision and other provisions in the Bill capping the number of graffiti removal hours a person could be ordered to perform was unclear.<sup>55</sup>

*Clarity as to who may exercise power*

- [37] Parliamentary Committees have commented on provisions that do not clearly identify the person or entity authorised to exercise a statutory power. For example, the Scrutiny Committee recommended amending the [Justice and Other Legislation \(Miscellaneous Provisions\) Bill 2000](#) to make it clear that registrars of Magistrates Courts, as well as magistrates, could make garnishee orders in particular types of proceedings.<sup>56</sup> Similarly, the FAC recommended amending provisions of the [Commonwealth Games Arrangements Bill 2011](#) to clarify which board members could exercise casting votes in particular circumstances.<sup>57</sup>

*Limited reliance on ‘reasonableness’*

- [38] The Scrutiny Committee commented on legislation in which multiple requirements for the exercise of a power were qualified by reference to ‘reasonableness’. The [Local Government and Other Legislation \(Indigenous Regional Councils\) Amendment Bill 2007](#) was an example of this type of legislation. It proposed to insert a new section into the Local Government Act 1993

<sup>51</sup> [FAC’s Report No 14 on the Industrial Relations Fair Work Act Harmonisation\) and Other Legislation Amendment Bill 2012 pp 18-19 para 3.2](#)

<sup>52</sup> [AD 2007 No 12 pp 11-12 paras 16-19](#)

<sup>53</sup> [AD 2007 No 12 p 12 paras 18-19](#)

<sup>54</sup> [LACSC’s Report No 27 on the Criminal Law Amendment Bill \(No. 2\) 2012 p 32 para 3.4](#) (‘LACSC Report No 27’)

<sup>55</sup> [LACSC Report No 27 p 32 para 3.4](#)

<sup>56</sup> [AD 2000 No 9 p 32 para 22](#)

<sup>57</sup> [FAC’s Report No 7, Commonwealth Games Arrangements Bill 2011 pp 10-11 para 3.3](#)



(since repealed) that required a trustee making a decision about a community deed of grant in trust to consult with two entities, namely a trustee and a land panel. Under the proposed provision, the trustee would have been required to give the land panel ‘reasonably sufficient information’ about the trustee’s decision and to allow the panel a ‘reasonably sufficient time’ to form a view. The members of the land panel were required to give written notice of their views of the decision ‘within a reasonable time’ and if the members advised that they did not support the trustee’s position, the trustee was obliged to take ‘reasonable steps to make the reasons publicly available’. The Scrutiny Committee thought the wording of the proposed provision gave a ‘broad discretion’ to the bodies performing their duties.<sup>58</sup> Noting that views on what is ‘reasonable’ may differ considerably depending on the individual, the Scrutiny Committee thought more specific language should be used to avoid confusion. It referred the matter to Parliament.<sup>59</sup>

## Definitions

- [39] It is important that statutory definitions be drafted precisely. The principles of statutory interpretation require that words be given the meaning which English speakers would ordinarily understand them to bear in the context in which they are used. However, this principle does not apply if a statute expressly defines a particular word or phrase. The statutory definition is presumed to prevail over the ordinary meaning of the relevant term except so far as the context or subject matter otherwise indicates or requires: *Acts Interpretation Act 1954*, section 32A.<sup>60</sup> Similarly, when an Act confers upon any authority power to make regulations, expressions used in the regulations are given the same meaning as in the authorised Act unless there is a clear contrary intention: *Statutory Instruments Act 1992*, section 37.<sup>61</sup> Accordingly, if the meaning or application of a statutory definition is unclear, there is a serious risk of confusion in interpreting both the statute itself and subordinate legislation made under its authority.

### *Definitions of central terms*

- [40] On a number of occasions, the Scrutiny Committee drew Parliament’s attention to the absence of statutory definitions for terms that the Committee considered central to proposed legislation. In examining the *School Uniform Bill 1999* (P), which proposed to impose sanctions under the now repealed Education (General Provisions) Act 1989 for school students who did not comply with ‘dress code’ requirements, the Scrutiny Committee expressed concern that the term ‘dress code’ was not defined. As students might be subject to sanctions for failing to observe dress codes, the Scrutiny Committee recommended the term be defined.<sup>62</sup>
- [41] Similarly, the Scrutiny Committee was critical of a provision of the *Financial Intermediaries Bill 1996*. The provision proposed to give the Office of Financial Supervision power to direct a

<sup>58</sup> [AD 2007 No 12 p 12 para 22](#)

<sup>59</sup> [AD 2007 No 12 p 12 paras 22-23](#)

<sup>60</sup> See also *Conde v Gilfoyle & Anor* [2010] QCA 109 at [20], *George and Goldsmiths' and General Burglary Insurance Association Ltd* [1899] QB 595 at 602-603 and *Hall v Jones* (1942) 42 SR (NSW) 203

<sup>61</sup> For an example of the application of *Statutory Instruments Act 1992*, s 37, see *Johnson v Anglo Coal (Callide Management) Pty Ltd* [2006] 1 Qd R 235 at 244-246 per Mullins J; [2005] QSC 255 at [37]-[41].

<sup>62</sup> [AD 1999, No 2 p 2 paras 1.14-1.17](#)



financial organisation listed as a ‘society’ in schedule 2 of the Bill to do certain things if the society were ‘trading unprofitably’ or conducting its affairs in an ‘improper or financially unsound way’. The Office of Financial Supervision would have power to direct a society to remove its directors or auditors or to terminate its contracts if the office considered the society had traded unprofitably or conducted its affairs improperly. The Scrutiny Committee noted that the proposed amendment failed to define the expressions ‘trading unprofitably’ and ‘an improper or financially unsound way’ and drew Parliament’s attention to the fact that this failure could result in a society being subject to substantial penalties if its officers did not appreciate the society’s obligation to comply with the office’s directions.<sup>63</sup>

[42] The Scrutiny Committee also commented that, if a particular term has acquired a special or technical meaning, the legislation should state clearly how Parliament intended the term to be used within the context of that legislation. For example, the Scrutiny Committee commented on the use of the term ‘market value’ in the [Body Corporate and Community Management and Other Legislation Amendment Bill 2010](#). The Scrutiny Committee noted that it may not be clear whether the term referred to the sale price of a lot or an amount assessed by a valuer at another point in time.<sup>64</sup> Other examples of the types of terms that attracted the Scrutiny Committee’s attention include:

- ‘reasonable belief of the buyer’, in the [Body Corporate and Community Management and Other Legislation Amendment Bill 2010](#);<sup>65</sup> and
- ‘took no part’, in the [Electoral \(Truth in Advertising\) Bill 2010 \(P\)](#);<sup>66</sup> and
- ‘an entity of the Commonwealth or of a State’, in the [Health Legislation \(Health Practitioner Regulation National Law\) Amendment Bill 2010](#);<sup>67</sup> and
- ‘bullying’, in the [Criminal Code \(Filming or Possessing Images of Violence Against Children\) Amendment Bill 2009 \(P\)](#).<sup>68</sup>

[43] Although the principles of statutory interpretation usually require that undefined terms in legislation be given their ordinary meaning,<sup>69</sup> this presumption can be displaced if:

- the words have acquired a technical legal meaning;<sup>70</sup> or
- the words have acquired a special meaning by their usage in a trade;<sup>71</sup> or
- the context in which the words appear necessitates that the words be understood in some other special and peculiar sense.<sup>72</sup>

<sup>63</sup> [AD 1996 No 5 p 13 paras 4.17-4.20](#)

<sup>64</sup> [LA 2011 No 1 p 17 para 39](#)

<sup>65</sup> [LA 2011 No 1 p 17 paras 40-42](#)

<sup>66</sup> [LA 2010 No 7 p 10 para 14](#)

<sup>67</sup> [LA 2010 No 5 p 6 para 37](#)

<sup>68</sup> [LA 2011 No 9 p 9 paras 22-24](#)

<sup>69</sup> J Bell & G Engle *Cross Statutory Interpretation* (3<sup>rd</sup> ed; 1995) p 1 (‘Bell & Engle (1995)’)

<sup>70</sup> Pearce & Geddes (2011) p 127

<sup>71</sup> Pearce & Geddes (2011) p 130

<sup>72</sup> *Robertson v French* (1803) 102 ER 779 at 781





[44] If words have acquired a special meaning as a result of being used in a trade or profession, there is a presumption that Parliament intended the words receive that meaning. As Lord Esher held:

If the Act is directed to dealing with matters affecting everybody generally, the words used have their meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.<sup>73</sup>

[45] Similarly, Justice O'Connor held in *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of New South Wales*:

Where words have been used which have acquired a legal meaning it will be taken, *prima facie*, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context.<sup>74</sup>

[46] *Barrett v Thurling* provides an example of the technical meaning of a term prevailing over its everyday meaning. In that case, the New South Wales Court of Appeal held that the word 'children' had acquired a special meaning in the context of family maintenance legislation and therefore did not include 'step children'.<sup>75</sup>

### Scope

[47] Definitions that are drawn very broadly, or very narrowly, may be ambiguous. It was the practice of the Scrutiny Committee to draw Parliament's attention to these kinds of definitions and at various times the Scrutiny Committee:

- noted that the definition of 'fraud' in the [Criminal Law Amendment Bill 1996](#) may have been so broad in scope as to make it difficult to predict where the boundaries of fraud would lie;<sup>76</sup> and
- pointed out, when considering the phrase 'ship connected with Queensland' in the [Anti-Discrimination Amendment Bill 2001](#), that persons connected with Queensland but not *on ships* connected with Queensland were not captured by the definition and queried whether the definition was therefore wide enough to capture all relevant discriminatory acts;<sup>77</sup> and
- noted that the use of the term 'buyer' in the [Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010](#) did not account for more than one buyer.<sup>78</sup>

<sup>73</sup> Bell & Engle (1995) p 72

<sup>74</sup> [\[1908\] HCA 94](#); (1908) 6 CLR 469 at 531

<sup>75</sup> [\[1984\] 2 NSWLR 683](#)

<sup>76</sup> [AD 1997 No 2 p 11 para 1-53](#)

<sup>77</sup> [AD 2001 No 1 p 2 paras 8-9 and 13](#)

<sup>78</sup> [LA 2010 No 5 p 11 para 15](#)





### *Consistency*

#### *Consistent use of terms across the statute book*

- [48] In examining the [Criminal Code \(Organised Criminal Groups\) Amendment Bill 2007](#) (P), the Scrutiny Committee drew to Parliament's attention the fact that the definition of the phrase 'organised criminal group' in the Bill conflicted with established definitions of the phrase in both the [Crime and Misconduct Act 2001](#) and the [Police Powers and Responsibilities Act 2000](#).<sup>79</sup> The Scrutiny Committee also noted that the definition of 'serious violent offence' conflicted with the established definition of that term in the [Penalties and Sentences Act 1992](#).<sup>80</sup>

#### *Same concepts expressed consistently within same legislative instrument*

- [49] In examining the [Police Powers and Responsibilities and Another Act Amendment Bill 2002](#) the Scrutiny Committee noted that, while the provisions of the Bill used the term 'driver in control of a motor vehicle', most of the existing provisions of the [Police Powers and Responsibilities Act 2000](#) used the defined term 'person in control of a motor vehicle'.<sup>81</sup> The Scrutiny Committee noted the discrepancy and sought information from the Minister about the reasons for it.<sup>82</sup>

### *Cross-referencing definitions*

- [50] It was the general view of the Scrutiny Committee that statutory definitions, other than those contained in the [Acts Interpretation Act 1954](#), should be included in the legislation in which the defined term is used.<sup>83</sup> The Committee considered there were risks associated with the practice of applying definitions in one piece of legislation to another piece of legislation, for example, by stating that words used in the legislation have the same meaning as in other legislation or by directing the reader to a definition in other legislation.<sup>84</sup> The Scrutiny Committee's objection to the practice was partly based on the risk of complications if the legislation containing the primary definition was amended or repealed. However, the Committee also considered that cross-referencing reduced the accessibility of legislation because one piece of legislation could not be read without having access to the other.<sup>85</sup>
- [51] However, the Scrutiny Committee accepted that cross-referencing of definitions may be appropriate in some circumstances.<sup>86</sup> For example, in considering the [Residential Services and](#)

<sup>79</sup> [AD 2007 No 7 p 10 para 16](#)

<sup>80</sup> [AD 2007 No 7 p 13 para 32](#)

<sup>81</sup> [AD 2002 No 5 p 18 para 43](#)

<sup>82</sup> [AD 2002 No 5 p 18 paras 45-46](#)

<sup>83</sup> [AD 1996 No 2 pp 10-11 paras 4.5-4.9](#); [AD 1996 No 1 p 6 para 2.30](#); [AD 1995 No 3 p 13 para 4.11](#)

<sup>84</sup> [AD 1999 No 3 p 7 paras 1.52-1.54](#) The Scrutiny Committee was commenting on clause 3 of the [Community-Based Referendum Bill 1999 \(P\)](#). Clause 3 contained a definition clause that stated that all words defined in the Act have the same meaning as in the [Referendums Act 1997](#). The Scrutiny Committee described the clause as an 'extreme example' of the practice of cross-referencing: [AD 1999 No 3 p 7 para 1.52](#).

<sup>85</sup> See, for example, [AD 1996 No 3 p 7 paras 2.14-2.18](#) and [LA 2011 No 5 p 24 paras 36-39](#)

<sup>86</sup> The Scrutiny Committee also accepted the use of footnotes and notes within legislation as a means of mitigating the problems it considered were caused by cross-referencing: [LA 2011 No 5 p 31 para 34](#); [AD 1996 No 5 p 23 para 6.6](#) and [AD 1996 No 4 p 23 para 6.25](#).



[Other Legislation Amendment Bill 2004](#), which relied on defined terms in the *Social Security Act 1991* (Cwlth), the Committee acknowledged that it is sometimes impractical to include all definitions within a Bill. The Committee referred to the justification for the cross-referencing offered in the Explanatory Notes for the Bill, namely that the Commonwealth Act necessarily informed the operation of the Bill.<sup>87</sup> (It appears that the Scrutiny Committee's view was also influenced by the fact that point-in-time consolidations of Commonwealth legislation were freely available via the internet.<sup>88</sup>) Similarly, in considering the [Police Powers and Responsibilities Bill 2000](#), the Scrutiny Committee acknowledged that the nature of the legislation made the number of cross-referenced definitions unavoidable.<sup>89</sup>

- [52] The portfolio committees appear to share the Scrutiny Committee's general concerns about cross-referencing and its view that the practice may be appropriate in some circumstances.<sup>90</sup> For example, the State Development, Infrastructure and Industry Committee (the *SDIIC*) noted that the [Electricity Amendment Regulation \(No. 4\) 2011](#) might offend section 4(3)(k) of the [Legislative Standards Act 1992](#) because it did not include the definition of the term 'standard control device' and instead referred to the definition in the National Electricity Rules.<sup>91</sup> However, the SDIIC appears to have accepted the relevant department's explanation that the regulation needed to be consistent with the National Electricity Rules.<sup>92</sup> The Agriculture, Resources and Environment Committee (the *AREC*) also appeared to accept the justification offered by the relevant department for extensive cross-referencing in the [Aboriginal and Torres Strait Island Land Holding Bill 2012](#) to the [Aboriginal Land Act 1991](#) and the [Torres Strait Islander Land Act 1991](#), namely the close connections between those Acts and the Bill.<sup>93</sup>
- [53] However, care should be taken when incorporating terms from one piece of legislation in another piece of legislation with an entirely different purpose. This issue arose in the Scrutiny Committee's discussion of the [Criminal Code \(Abusive Domestic Relationship Defence and Another Matter\) Amendment Bill 2009](#). Clause 3 of the Bill sought to insert a new section 304B(2) into the [Criminal Code](#) that used terminology from the now repealed Domestic and Family Violence Protection Act 1989. The Scrutiny Committee considered the incorporation of the terminology from that Act into the [Criminal Code](#) to be potentially problematic because of differences in the way in which the two Acts had been interpreted. The Scrutiny Committee observed that:

principles of statutory interpretation indicate that beneficial legislation, such as the *Domestic and Family Violence Protection Act 1989*, should be interpreted liberally to achieve its purpose ... Statutory interpretation approaches penal provisions, such as those in the Code, so as not to extend their operation beyond the words used. Accordingly, the expansive and less precise

<sup>87</sup> [Residential Services and Other Legislation Amendment Bill 2004 Explanatory Notes pp 5-6](#)

<sup>88</sup> [AD 2004 No 2 pp 21-22 paras 3-9](#)

<sup>89</sup> [AD 2000 No 3 p 12 para 84](#)

<sup>90</sup> See, for example, the [AREC's Report No 18 on the Mining and Other Legislation Amendment Bill 2012 \(2013\) p 31](#)

<sup>91</sup> [SDIIC's Report No 3 on Subordinate legislation tabled on 14 February 2012 p 3](#) ('SDIIC Report No 3')

<sup>92</sup> [SDIIC Report No 3 p 3](#), quoting from the director of legislation from the Department of Energy and Water Supply

<sup>93</sup> [AREC Report No 10 p 22](#)



nature of part 2 of the *Domestic and Family Violence Protection Act* should be contrasted with the prescriptive nature of the Criminal Code.<sup>94</sup>

### *User-friendly definitions*

- [54] The LACSC has expressed concern about the potentially confusing use of ‘commencement’ as a defined term in legislation. The issue arose when the LACSC considered section 44 of the [Work Health and Safety Amendment Regulation \(No.1\) 2012](#), which defined ‘commencement’ for part 13.1 of the [Work Health and Safety Regulation 2011](#) to mean the commencement of the section in which the term was used. The defined term appeared in many sections and LACSC thought it was undesirable that the commencement date for each provision could be ascertained only by examining the legislative annotations and the ‘SL as made’ series.<sup>95</sup> The LACSC said that it was concerned that current drafting practices did not allow for a simpler way to determine the commencement date, especially as the [Work Health and Safety Regulation 2011](#) was a widely used piece of legislation.<sup>96</sup>

### **Other matters**

- [55] The preceding discussion has set out the principal types of issues about clear meaning that have drawn, and continue to draw, comment from parliamentary committees. However, parliamentary committees have also commented on many other issues in the context of expressing concerns about clear legislative drafting. A few of these specific issues, and committees’ comments about them, are considered below.

### *Simplifying complex policy*

- [56] In some cases, legislation may not be capable of being easily understood because of the complexity of its underlying policy. This issue was raised by the THLGC when it considered the [Heavy Vehicle National Law Amendment Bill 2012](#). The THLGC noted that the complexity of the scheme meant that it was not always easy to follow the Bill.<sup>97</sup> The relevant department acknowledged the scheme was complex but stated that it was ultimately more flexible in its operation than the scheme it replaced and had the added benefit, as a national scheme, of removing regulatory duplication across jurisdictions.<sup>98</sup> However, in light of the THLGC’s concerns, the department said that it would recommend that the national body consider simplifying some future aspects of the scheme.<sup>99</sup>

<sup>94</sup> [LA 2010 No 01 p 10 para 24](#) (citations in original omitted)

<sup>95</sup> [LACSC’s Report No 21 on Subordinate legislation tabled between 22 August 2012 and 27 November 2012 p 10](#) (‘LACSC Report No 21’)

<sup>96</sup> [LACSC Report No 21 p 10](#)

<sup>97</sup> [THLGC’s Report no 16 on the Heavy Vehicle National Law Amendment Bill 2012 p 37](#) (‘THLGC Report No 16’) and see also AREC’s comments on the complexity of the [Aboriginal and Torres Strait Islander Land Holding Bill 2012](#) in its [Report No 10 on the Aboriginal and Torres Strait Island Land Holding Bill 2012 pp 21-22](#)

<sup>98</sup> [THLGC Report no 16 p 37](#)

<sup>99</sup> [THLGC Report no 16 p 38](#)



### *Using effective examples*

- [57] The use of examples in legislation is often a helpful way to illustrate how Parliament intends a provision to operate. However, as the Legal Affairs, Police, Corrective Services and Emergency Services Committee (the *LAPCSESC*) has recognised, examples may need to be monitored to ensure their continued relevance. The issue arose during the LAPCSESC’s consideration of the [Civil Proceedings Bill 2011](#), which proposed to insert a new provision in the [Retirement Villages Act 1999](#). The proposed provision included an example showing ‘how to work out an exit fee for a residence contract on a daily basis’.<sup>100</sup> The LAPCSESC received submissions stating that the example needed revision and that a second example may be needed to illustrate how exit fees would be worked out under the Act in circumstances other than those assumed by the existing example. The LAPCSESC acknowledged:

both the utility and limitations of using examples in legislation and the difficulty in devising a broadly-applicable example that nonetheless illustrates the detail of an issue effectively. The committee encourages the Department to monitor whether confusion arises over the meaning of the examples in practice.<sup>101</sup>

### *Using terms interchangeably*

- [58] Using terms interchangeably may create ambiguity, as noted by the Scrutiny Committee in considering:
- the interchangeable use of the terms ‘a copy of the relevant contract’ and ‘the relevant contract’ in the [Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010](#);<sup>102</sup> and
  - the interchangeable use of ‘contractor’ and a ‘private sector entity’ in the [Freedom of Information \(Open Government–Disclosure of Contracts\) Amendment Bill 2007](#) (P).<sup>103</sup>

### *Using precise or apt terms*

- [59] The Scrutiny Committee noted that the use of imprecise terms may cause confusion. For example, the Committee considered:
- the phrase ‘alleged breaches of parliamentary privilege’ should be used in the [Parliament of Queensland \(Reform and Modernisation\) Amendment Bill 2011](#), rather than the phrase ‘breaches of parliamentary privilege’;<sup>104</sup> and

<sup>100</sup> [Legal Affairs, Police, Corrective Services and Emergency Services Committee Report No 8 on the Civil Proceedings Bill 2011 p 16 paras 2.2-3.3](#) (\*LAPCSESC Report No 8 (2011)\*)

<sup>101</sup> [LAPCSESC Report No 8 \(2011\) p 16 paras 2.2-3.3](#)

<sup>102</sup> [LA 2010 No 5 p 18 para 21](#)

<sup>103</sup> [AD 2007 No 12 p 7 para 11](#)

<sup>104</sup> [LA 2011 No 5 p 31 para 36](#)





- it was preferable to use ‘may’ instead of ‘must’ in certain provisions of the [Penalties and Sentences \(Sentencing Advisory Council\) Amendment Bill 2010](#) to avoid fettering judicial discretion.<sup>105</sup>

### *Extraterritoriality*

- [60] The Scrutiny Committee considered it important that legislation be clear about extraterritorial application and operation. An example of the problems that can arise in relation to extraterritoriality is provided by the [Sexual Offences \(Protection of Children\) Amendment Bill 2002](#). The Bill provided that it would be an offence for an adult to use electronic communication to procure a person who was, or whom the adult believed was, under the age of 16 years to engage in a sex act. The provision also specifically stated that the conduct was an offence whether it occurred ‘in Queensland or elsewhere’. The Scrutiny Committee was concerned that, as drafted, the offence could apply to any person, anywhere in the world. It recommended amending the provision so that it expressly related to conduct with a link to Queensland, to reflect the limits of Parliament’s power to pass legislation operating outside Queensland.<sup>106</sup>

### *Extrinsic material*

- [61] Extrinsic material capable of being used to interpret legislation should be consistent with the language of the legislation.<sup>107</sup>
- [62] The Scrutiny Committee expressed concern about the content of the Minister’s second reading speech for the [Land Amendment Bill 1996](#). The Bill proposed giving the Minister discretion to set a rent amount if he or she considered a rent amount calculated using the standard method prescribed in the Act would cause an ‘undue rent increase’ in particular circumstances. The Minister’s speech stated the purpose of the provision was to allow the Minister to intervene if a rent increase were deemed ‘unviable’ for a category of people or if a category of people were incapable of paying the increased rent ‘without dire hardship’. The Scrutiny Committee pointed out that the content of the Minister’s speech did not reflect the wording of the Bill, noting that:

[i]n this instance the speech is more limited than the relevant clause in the Bill and this may cause some ambiguity.

The Committee is aware that the second reading speech may be used as extrinsic material capable of assisting a court in the interpretation of this clause, however, the Committee is of the view that it is preferable for the Parliament to make its intent clear in the wording of the clause.<sup>108</sup>

- [63] The Scrutiny Committee has also commented on Explanatory Notes if it considered they did not accurately express the content and intent of the relevant legislation. This issue arose in the Scrutiny Committee’s consideration of the [Justice and Other Legislation \(Miscellaneous](#)

<sup>105</sup> [LA 2010 No 9 p 24 para 32](#)

<sup>106</sup> [AD 2002 No 11 pp 19-20 paras 17-21](#)

<sup>107</sup> The use of extrinsic material to interpret Queensland legislation is governed by the [Acts Interpretation Act 1954](#), s 14B.

<sup>108</sup> [AD 1996 No 2 p 12 paras 5.5-5.6](#)





[Provisions\) Bill 1998](#). The Bill proposed to omit the words “the Code of” from the definitions of ‘bishop’ and ‘officer’ in the [Roman Catholic Church \(Incorporation of Church Entities\) Act 1994](#). However, the Explanatory Notes stated that:

[The proposed amendment] also omits from section 3 (Definitions) the following definitions, “bishop” and “officer”. The unnecessary words, “the Code of”, have also been omitted from this section.<sup>109</sup>

The Scrutiny Committee noted that the Explanatory Notes might be used in future to interpret the provision and recommended that they be revised to accurately reflect the proposed amendment.

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<sup>109</sup> [AD 1998 No 2 p 41 paras 6.18-6.20](#). For a more general discussion of Explanatory Notes, see the Scrutiny Committee’s [Report to Parliament on the Scrutiny Committee’s Monitoring of the Operation of the Explanatory Notes System](#) (Report No 18; 2001).