The Language of the Law: How do we need to use language in drafting legislation?

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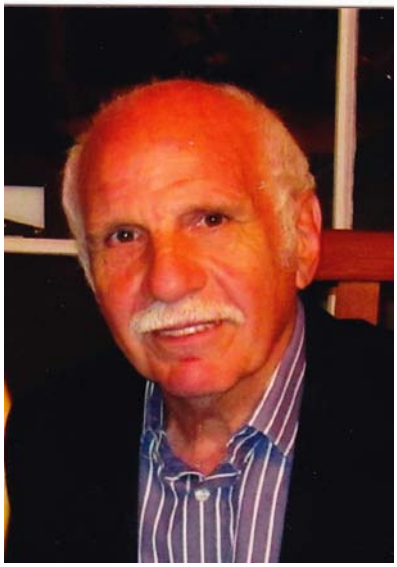

Abstract:

As a general proposition the drafting of legislation does not require the use of specialised language, but should use the same language as in other kinds of formal writing. But while consistency and conciseness are important attributes of any formal writing, in legislation they are vital, for there is a presumption that different words or expressions used in the same text are intended to indicate differences in meaning. And loose drafting without attention to conciseness can produce sentences that are too long or too complex; these can be not only difficult or tiresome to read and understand but lead to an increased risk of inconsistent use of words and ambiguity.

The attributes of consistency and conciseness are applied in legislation by the adoption of conventional ways of expressing commonly occurring words and groups of words. This is particularly important in the core elements of most legislative sentences: i.e. statements of who is affected by the rule, what it is they are required or empowered to do or refrain from doing, and what the consequences are of failing to comply.

Most legislative sentences are addressed directly to particular persons or groups of persons, and this needs to be done in a consistent way. Traditionally the verb auxiliaries "shall" and "may", with their respective negatives, have been used to indicate obligation and discretion respectively,

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but in modern drafting these are being replaced by "must" and other auxiliaries that better reflect modern formal writing. And the drafting of penal sanctions that apply to the contravention of obligations imposed by legislation is so common that it is particularly desirable that consistency and conciseness be applied to them.

This paper examines that way in which conventional devices are used in legislation to apply these vital attributes.

1. What basically is required of a legislative drafter?

Everybody knows that legislation is the main body of formal rules that provides for the conduct of society (although it much more often in practice consists of rules for the conduct of *particular sections* of society). But what actually needs to be done, by the process of legislative drafting, in order to create them?

I believe the basic requirement can be simply stated: good legislative drafting boils down to the need to inform those affected by the legislation, and those who are to administer or enforce it, as far as possible exactly what they must do or not do in general or in given circumstances, or how far their power or discretion to do or not to do things in given circumstances extends.

Clearly, in order to achieve this, a great deal of care and precision is needed in the use of language, and a number of basic attributes of good formal writing[2] need to be applied towards this end:

- clarity
- comprehensibility[3]
- certainty[4]
- completeness
- consistency
- conciseness

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[2] By formal writing I mean, for example, textbooks and serious writing on any subject; newspaper leading articles; professional reports, articles and opinions; and professional and business letters generally.

[3] At least to those directly affected. Inevitably some subjects will be technical, complex and not easy to understand on the part of those not familiar with the processes or procedures concerned.

[4] In fact the language used in some formal writing is sometimes deliberately vague (as for example in policy objectives or political manifestos), and in the original edition of his *Complete Plain Words*, Sir Ernest Gowers took a swipe at civil servants by repeating the allegation that the language they use all too often demonstrates "a reluctance to convey any meaning at all" [p.8]. A degree of vagueness is even required in some legal documents, for example in the drafting of international agreements, owing to the desirability of getting as wide a measure of agreement to what is being proposed as possible. But this approach does not normally apply in the drafting of domestic legislation.

However, it does need to be remembered that these attributes are required in most kinds of good formal writing, and so this leads to the next proposition.

2. There is generally no need for special language in legislative drafting

The first thing that I believe needs to be emphasised to those newly attempting the skill is that, contrary to what many of them seem to think, there is generally no need in legislative drafting for the use of special language or structure of language. There are of course, as will be noted, some conventional ways of stating things, and though there are a few technical lawyers' terms that are difficult to avoid without complex explanations or the use of cumbersome English language equivalents (for example, *prima facie*; *ex parte*), legislative drafting should in general be couched in the same language as is used in other kinds of formal writing.

It is also a fact that certain of the attributes referred to do play a more prominent role in legislative drafting than in other formal writing, but this does not detract from the proposition stated above. It is a matter of degree rather than kind.

Unfortunately, those who come newly to drafting seem to be largely unaware of this. They tend to think that patterns of drafting adopted in the past must of necessity be those required to be followed if they are to achieve the necessary clarity, certainty and completeness. I can best illustrate this by an example that must be common enough in financial legislation. Suppose it is required to draft a rule to give effect to the following policy proposition:

> A financial adviser who receives a fee for giving investment advice is to be regarded, until the contrary is shown, as having given that advice in the course of business (and hence to be potentially liable for professional negligence).

All too often an attempt by an inexperienced drafter to embody this principle in a legislative rule will (after his or her careful attempt to copy what is thought to be the required style) go something like this:

> Any financial adviser who shall have received a fee for advising a person in relation to any investment shall be deemed to have advised the said person in the course of business:
>
> Provided that the financial adviser shall not be deemed to have so advised the person in the course of business if he shall prove that…

This provision (of a kind all too often found in enacted legislation around the Commonwealth) involves:

- tiresome repetition of words,
- archaic ways of stating what is to be considered as a fact ("shall be deemed"), and referring to a person already mentioned ("the said"),

- a form of writing (the proviso) that is virtually extinct outside legislation,
- cumbersome and unnecessary uses of the stress word "any",
- unnecessary, and unnecessarily complex, verb tenses (the future and future perfect).

It usually comes as a delightful surprise to those concerned that the proposition can much more effectively be stated thus:

> A person who receives a fee for advising another person in relation to an investment is to be regarded as having done so in the course of business, unless he proves that…

However, any pleasure taken in this comparative simplicity of expression is then often overtaken by the thought that, as "anybody could have written that", the result may not after all be so welcome. A dampening down of enthusiasm follows awareness of a lurking fear that the use of the kind of language that "anybody can write" must necessarily make much of the legal profession redundant. That fear is unfounded. An experienced drafter's answer to such doubts would undoubtedly be to suggest that "anybody" should go ahead and try to do it!

It is of course much more readily accepted by drafters today than formerly that the language they use should indeed be such as "anybody could have written". This is because it is recognised that it is not the *language* (or indeed the structure of language) in drafting that needs to be special, but rather that the process of analysis behind it needs to be rigorous. It is my contention that, so far as the use of language is concerned, observance of the standards of grammar and style that apply to any formal writing, plus some quite simply stated Commonwealth-wide conventions[5], constitute the fundamentals of good drafting.

The most important of these conventions are examined below, but it needs to be re-emphasised that they come about not because there is any necessity for special language, but because legislative drafting requires to a greater degree than in other types of formal writing the application of the last two of the attributes noted in paragraph 1 above: consistency and conciseness. In legislation these are not merely desirable aims but necessities.

3. The particular need for consistency and conciseness

It is an important rule of drafting any type of legal document, and especially legislative rules, that the same words and expressions are used to mean the same things, as there is a presumption that the use of different ones is intentional and indicates a shift in meaning.

[5] There are also some fairly easily stated conventions as to *structure* (usually in the Commonwealth represented by sections, subsections, paragraphs, etc.) and the order in which sections, etc. appear, but these are outside the scope of this account.

The potential for confusion can easily be seen in the commonly required legislative provision for the giving of permission to do certain things in a certain way; it would be easy for a drafter to drift into unthinking use of different words to indicate permission: "allow", "authorise", "consent", "enable", "entitle", "give leave", "license", "let", "permit", "recognise", "sanction", whether these words be verbs or, with any necessary modifications, nouns.

In addition, more than in any other kind of formal writing it is necessary to write "tight" prose. This means reducing the text to the minimum number of words needed in a sentence or series of sentences in order to explain their effect. Loosely drafted sentences incorporating more words than are needed to get a message across can not only be unduly complex or tiresome to read, but also increase the likelihood of inconsistent use of words and expressions and hence ambiguity.

In order to avoid ambiguity it is therefore necessary to take care to use words *consistently* and *concisely*, and the importance of this proposition can be most easily illustrated by looking at the three most common elements of legislative sentences:

- Who is affected by the rule?
- What are they required to do or refrain from doing, or permitted to do?
- What is the consequence of failing to comply with the rule?

Assuming a new drafter is unencumbered by traditional drafting styles of the kind already noted, he or she will, on being asked to draft a rule for the policy proposition "No standing on the bus; penalty £100 fine", probably produce something like this:

> Nobody is allowed to stand on a bus, and if they do they have to pay a fine of £100.

Leaving aside niceties of lack of analysis (Does the rule apply literally to everybody? Are people to be allowed to sit, squat or lie on the floor? Should there be an exception in relation to those getting on or off?), questionable grammar ("...if they do...") and the matter of whether an offender may be ordered to pay less than the stated penalty, this neatly illustrates a typical novice's concept of creating a rule. It is not that the words used are wrong, for they are indeed everyday words that everybody understands, but that they fail to use a conventional format, a format dictated by the need to be *consistent*.

So what are the conventions that have been developed in the Commonwealth towards achieving consistency?

4. Who is affected?

Unless legislative provisions are concerned with explaining meanings or specifying legal consequences (for example, in interpretation or explanatory provisions) they usually need to state that those to whom the legislation is addressed are required to do, or refrain from doing, something or (particularly in the case of administrators or enforcers) have a power

or discretion to do or not to do something. When drafting the requisite rules, the first thing that needs to be done is therefore to refer to the persons affected.

Bearing in mind that legislation is conventionally drafted in the third person (not least because it is often necessary to address more than one kind of "person" in different parts of the same sentence) there are in English a number of possible ways of doing this. If we want to refer to persons generally, we could write "anyone...", "anybody...", "everybody...", "people...", "persons...", "any person...", "every person...", "a person..." or even the old fashioned forms "whoever" or "whosoever". Depending on the shape of the sentence to be drafted, most of these can easily be expressed as negatives: "no-one...", "nobody...", "no person..." etc. However, for the sake of consistency we need to choose a particular form and stick to it; and because it best represents plain language and avoids unnecessary use of words of emphasis[6], modern drafting convention in the Commonwealth favours "a person..."[7]

For drafting convenience the meaning of "person" is almost invariably extended in an Interpretation Act, or equivalent such as a General Clauses Act, to include not only a natural person but also a body of persons, whether incorporated or unincorporated.

5(1) What is required or permitted?

When referring to what is actually required, forbidden or permitted there are also numerous drafting alternatives available:

> A person has a responsibility to.../ has a duty to.../ is required to.../ is compelled to.../ has to.../ shall.../ must...
>
> A person is not allowed to.../ is required not to.../ is not permitted to.../ is forbidden from.../ shall not.../ must not.../ may not... / cannot...
>
> A person is allowed to.../ is permitted to.../ is authorised to.../ is given leave to.../ has a discretion to.../ may.../ is able to.../ can...

This can also be done by using slightly different forms relating to permitted or forbidden conduct that were favoured in the past and are still often seen:

> It shall be lawful/shall be unlawful/shall not be lawful for a person to...
>
> It shall be an offence for a person to...

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[6] Use of "any", "each" and "every" as words of emphasis needs to be reserved for where a contrast is to be drawn, for example, between the specific and the general: *"Only a [specified kind of member] may propose a candidate for election, but any member may vote at the subsequent election"*.

[7] In practice we more often need to refer to a restricted class of persons. We can do this either by modifying "person": A person *who is qualified under this Part…/ who contravenes this section…/ who is the driver of a motor vehicle...*; or by referring directly to the category of person concerned: *a driver of a motor vehicle.../ a financial adviser... / a licensed dealer...*

Again, the need for *conciseness*, as well as consistency, has led to conventional uses of the shortest of these forms to the exclusion of the others. Traditionally "shall" (and "shall not") have been used to indicate obligation and "may" to indicate discretion.[8] These are known as verb auxiliaries, or merely "auxiliaries". Subject to what is stated below, the examples immediately above would more likely be written:

> A person shall/shall not/may/may not...

Increasing recognition is, however, being given to problems relating to the auxiliary "shall", and, as will be seen, "may" is not without problems too.

5(2) Problems with "shall"

(a) to indicate an obligation

The first problem is that, even in formal writing, use of this word to indicate obligation is slightly archaic. A century or more ago it was common when doing so, either in speech or writing, to state:

> You shall proceed as directed
>
> He shall do as he is told

In modern English these statements sound slightly awkward or pompous. Today we tend to substitute "will" in each case, and indeed in conversational usage the two words have become largely interchangeable. But strictly speaking if we use "will" an ambiguity arises:

> You will proceed as directed
>
> He will do as he is told

Do these statements indicate an obligation? Or are they merely stating what is going to happen (that is, in the simple future tense)? [9] In conversation we tend to get away with this potential inter-changeability as the meaning is usually clear from the context. However, if we want to be precise in indicating *obligation* we would today almost certainly substitute

[8] Indeed, some Commonwealth Interpretation Acts actually define these words accordingly, for example *Interpretation Act*, (Canada) RSC 1985, c. I-21, s. 11.

[9] The rules about the auxiliaries "shall" and "will" as stated in authorities such as the OED and Fowler's *Modern English Usage* are exceedingly complicated, especially as their use has varied both in time and locality. The simplest rule for formal English use seems to me to be the one I was given at school, namely that *in the second and third persons* "shall" indicates an obligation and "will" simply the future tense. To complicate matters, *in the first person* the rule is reversed and "shall" indicates simple future tense, while "will" indicates a settled intention. However, fortunately for our purposes, the first person is not used in legislation unless in specifying particular words required to be used, for example in a prescribed form, or on taking a prescribed oath; or occasionally in a formal preamble to a constitution: "We, the People of Utopia, believing that...

"must"; and indeed this is increasingly the auxiliary used for the purpose, not only in formal language generally, but also in legislation.

Legislative uses of the two examples quoted above (again, bearing in mind that the second person "you" is not normally used in legislation) might be:

> A driver of a heavy goods vehicle must proceed through a weighbridge as directed by...
>
> A person involved in a road traffic accident must follow the instructions of a police officer called to the scene.

The second problem with the use of "shall" is that, as has been seen with "will", it too can beg the question as to whether an obligation is in fact being imposed at all. Consider the following examples:

> Where the application complies with section 10, this section shall not apply
>
> A person who...shall commit an offence
>
> Subject to any conditions that an inspector shall specify, a licence shall be valid for 12 months

Taking the first of these, it is submitted that the rule is not creating an obligation at all (on whom could it be intended that this is to be imposed?) but is merely stating what is going to happen, that is, a state of affairs brought about by the rule. "Shall" presumably therefore merely indicates *the future tense*. This is even more starkly demonstrated in the second example (it would be absurd to interpret this as an obligation to commit an offence), and the same reasoning applies to the words after the comma in the third.

The opening context clause in the third example throws up yet another potential problem: inconsistent use of "shall" (leading in this case to an ambiguity). Is the inspector under a duty to specify conditions in every case, or is this a discretionary power to be applied as necessary? Use of the word "any" would seem to indicate the latter; if so the correct word would be "may".

A simple test as to the way in which "shall" is used is to ask oneself whether "must" can meaningfully be inserted in its place. If not then some other mode of expression is needed.

The modern convention when expressing a state of affairs or consequence is to use the *present* tense. Besides being better style, this neatly gives effect to the maxim of construction "a statute is always speaking".[10] So by use of this convention we would get in place of the above examples:

[10] In fact there *are* occasional uses for the future tense (as also the past tense) in legislation. In order to indicate the future, use of the auxiliary "will" is a possibility: *"An application must contain an estimate by the applicant of what he or she will earn in the period..."* although in practice "would earn", or the present tense "expects to earn", are probably just as likely.

Where the application complies with section 10, this section does not apply

A person who ... commits an offence

Subject to any conditions that an inspector may specify, a licence is valid for 12 months

(b) to set out duties

But there are further potential problems with the overworked "shall". In many cases it is desired to set out what some authority, usually a Minister, a court or a specified official or body, is required to do. Breach of the requirement would almost certainly *not* give rise to penal consequences, and the thrust of the provision is not so much to create an obligation or series of obligations (for operation of the legislation concerned would often be predicated on the doing of the relevant things), but simply to state or list the powers or duties of the authority concerned:

The Minister shall:

(a) appoint the chairman;

(b) give directions as to...

The court shall not give leave to make a further application unless...

The functions of the Utopia Law Society shall be:

(a) to ...;

(b) to ...

In these kinds of case it is usually better to express the sense of the provision by using the present tense in the form "is to" or "are to":

The Minister is to:

(a) appoint the chairman;

(b) give directions as to...

The court is not to give leave to make a further application unless...

The functions of the Utopia Law Society are:

(a) to ...;

(b) to ...

(c) to establish an office, corporation or other thing

The overworked "shall" tends to be used here too:

There shall be a Director of Ports and Harbours.

> The Authority shall be a body corporate with perpetual succession and a common seal...
>
> A tax, to be known as "land transaction tax", shall be charged and due...

In these cases, as with those examined in (b) above, the troublesome auxiliary can better be replaced by "is to" and in the second by replacing "shall be" with "is".

(d) to explain provisions

Examples of the use of "shall" for this purpose have been noted in (a) above. Further typical provisions might be:

> An interim order shall not be deemed to be an adoption order within the meaning of this Act.
>
> The Commission shall be lawfully constituted if there are no less than 4 elected members present.

It has also already been noted in section 2 above that "be deemed to be" in the first example is slightly archaic legalese, hardly ever used even in formal language outside legislation (in modern writing we would state "be treated as", "be regarded as" or "be taken to be"), and so applying conventions already discussed we get:

> An interim order is not to be regarded as an adoption order within the meaning of this Act.

However, applying principles of *conciseness*, the use in this context of the "deeming" words is arguably redundant:

> An interim order is not an adoption order within the meaning of this Act.

In the second example all that is needed is to replace "shall" with "is".

5(3) Problems with permissive words

(a) choice of word

As has been seen, from the variety of words and expressions that could be used to indicate discretion, "may" is the one usually chosen.[11] Of course in informal spoken language another verb auxiliary "can" is often used in this sense too:

> You can call me by my first name or my nickname
>
> He can do whatever he thinks is right in the circumstances

[11] Not invariably, however, as there are other useful expressions that sometimes better reflect the sense of a particular rule, for example, "is entitled to" or "is eligible to".

Indeed, in some Australian legislation the word is actually used in the sense of "may".[12] But it is submitted that it is not correct to do this. "Can" in its correct use is synonymous with "is able to" and should be reserved for referring to physical or mental ability to do something, rather than permission to do it. What we really need is a word indicating permission or discretion:

> An Act may be referred to by its short title or chapter number.[13]
>
> The Authority may direct a course of action that it considers appropriate in the circumstances.

(b) "may not"

At first sight the negative form "may not" seems to have the same meaning as the negative obligation form "must not", and indeed in spoken language we might say any of the following interchangeably:

> You must not smoke in here
>
> You may not smoke in here
>
> You cannot smoke in here

The last of these has already been dealt with, but in legislative sentences there is a fine yet important distinction between the first two, and this needs to be brought out. "Must not" is used to create *an obligation* not to do something; "may not", on the other hand, is reserved for cases in which it is required to emphasise lack of authority to do something, probably without incurring a penalty for contravention:

> A licensee may not apply to renew a licence more than 30 days before it is due to expire.
>
> A court may not convict a person of an offence under this section if that person has paid a fixed penalty.

In these cases a licensee who failed to comply would presumably simply be told to re-apply at the correct time, and in the unlikely event that a person were actually to be convicted of the specified offence in the circumstances mentioned he or she would have an unanswerable appeal. But contrast the more usual type of case:

> A person must not carry on the business of a hawker unless he or she[14] holds a hawker's licence of the appropriate class.

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[12] For example, "A control order *can* be made by a Court in the following circumstances..." *Companion Animals Act* 1998, No.87, of New South Wales, s. 47(2).

[13] This is a common provision in Interpretation Acts in the Commonwealth.

[14] Most Commonwealth jurisdictions now adopt gender neutral expressions instead of relying on the traditional "he".

This clearly creates an important negative obligation, and there would undoubtedly have to be a provision following it making anybody who failed to comply liable to penal sanctions.

There is sometimes inconsistent use of "may", for example simply in the sense of "is" or "are":

> In sections 2 to 9 of this Act references to adoption are to adoption of infants wherever they may be habitually resident.

While there would not in practice be any difficulty in understanding this provision, an ambiguity could conceivably arise with inconsistent use, particularly if the auxiliary is capable of meaning "might":

> The Minister may not make an order if the circumstances set out in subsection (2) apply.

This could be construed either as a lack of power in the specified circumstances, or (reading "may" as "might") as an explanation of the way in which that power could be expected to be exercised in a particular case.

6(1) Are there penal consequences for failing to comply?

We have seen that penal consequences do not always follow non-compliance, and this is so even where an *obligation* to do something is imposed:

> The Authority must, before suspending or revoking a licence, give written notice of its intention to do so to the licensed person.
>
> The Minister must cause any code prepared under this section to be printed and distributed.

It is obvious in these cases that failure to observe either of the rules would give rise to an appeal or application for judicial review on the part of a person adversely affected, rather than a potential criminal penalty to be imposed on the authority concerned. However, in most cases requirements to do or refrain from doing something, or to do something only in a prescribed way, need to be backed by sanctions for non-compliance. These are known as "penal provisions", and they are so commonly required in legislation that it is particularly important that they be drafted both *consistently* and *concisely*.

Taking the example already noted above:

> A person must not carry on the business of a hawker unless he or she holds a hawker's licence of the appropriate class.

there are a number of ways in which penal provisions could be drafted. We might for instance draft a further sentence:

> A person who carries on the business of a hawker without being licensed to do so under this Act is guilty of an offence.

and combine them as separate subsections of the relevant section. But, though clear and certain, the result would be anything but *concise* as the second sentence repeats most of the words in the first. In fact in this instance we could actually dispense with the first sentence altogether, as the second one now contains all the relevant information.

Often in practice, however, the conduct required or prohibited is more complicated. Taking a similar example:

> A person must not carry on a business of dealing in second-hand goods, including that of a pawnbroker:
>
> (a) unless that person holds a licence issued under this Act authorising him or her to carry on such a business; and
>
> (b) except from premises specified in the licence.

It would probably overload the sentence if we now also inserted the sanction, and the whole sense of the rule is better conveyed if we instead add a further sentence (in conventional structure, a new subsection):

> A person who fails to comply with subsection (1) is guilty of an offence.

In fact we can be even more *concise* without affecting the meaning. There is a convenient word "contravenes" which means the same thing as "fails to comply with", and "commits" means the same thing as "is guilty of". It is thus that, in order to be *consistent* and at the same time *concise*, modern penal provisions tend to use the following form:

> A person who contravenes subsection (1) commits an offence

6(2) What are the actual penalties for non-compliance?

It lastly remains to state to what penalty a person found guilty of the offence should be liable. It is constitutionally the role and duty of the courts to assess guilt or otherwise after following the relevant criminal procedure (what is sometimes called "due process of law", or simply "due process") and, after a plea or finding of guilt, to impose an appropriate penalty. But it is accepted that the legislature is entitled to specify a view of society generally as to what the *maximum* penalty should be.[15] So the above sentence might continue (and in some jurisdictions actually still does) on the following lines:

> …and is liable, on conviction by a court of competent jurisdiction, to imprisonment for a term not exceeding six months, or to a fine not exceeding [ten thousand

[15] There are also occasions when legislation states minimum penalties or fixed penalties, but discussion of these is outside the ambit of this paper.

> pounds] [level 4 on the standard scale[16]], or to both such fine and such imprisonment

Once again, we are concerned to be as *concise* as possible, and it is here that another device used towards this end comes into play: elliptical writing. This usually means the omission of words from a sentence that are not relevant or necessary to understand the point being made (conventionally, when quoting from a sentence, by the use three dots to indicate words omitted). But in drafting it also means the deliberate omission of words that, though implied by law, are not required to be stated in order to convey the full sense of the sentence.

Obviously a person may not be fined or imprisoned for an offence unless found guilty of having committed it by a lawfully constituted court that has jurisdiction to try the accused person. Indeed, so fundamental are these constitutional and criminal procedure concepts that in most Commonwealth jurisdictions it is considered to be unnecessary to repeat them every time a penal provision is drafted: they are implied but not stated. And by further applying the test of *conciseness* we can also omit the final five words from the above example as being superfluous. Our provision can thus be reduced to stating simply what the penalties are to be:

> …and is liable to imprisonment for a term not exceeding six months, or to a fine not exceeding level 4 on the standard scale, or to both

6(3) How can penal provisions be made as concise as possible?

Because they appear so frequently in legislation, many Commonwealth jurisdictions have provided further background rules to facilitate consistency and conciseness in penal provisions, typically by insertion of provisions such as those often found either in Interpretation Acts or general criminal legislation:

> (1) Where a penalty is expressed in relation to an offence, unless the contrary intention appears, the offence is punishable with a penalty not exceeding the penalty specified.
>
> (2) Where more than one penalty is specified in respect of an offence, the use of the word "and" between the penalties means, unless the contrary intention appears, that they may be imposed in the alternative or cumulatively.

[16] It is common, if not universal, in some jurisdictions to express monetary penalties not as specified sums of money, but by reference to particular legislative scales (Scale 1: up to £500, etc.) the scales being subject to amendment by subsidiary legislation where this is necessary so that monetary penalties can remain the same in real terms rather than being eroded by inflation. The device is a very practical one that gets round the need to have to directly amend primary legislation for this purpose. Where the maximum level of fine needs to be higher, provision may be made simple for "a fine".

Under authority of provisions such as these, the penal provisions may now be shortened to:

> …and is liable to imprisonment for six months and a fine at level 4 on the standard scale

There is also no reason why we cannot express numbers in figures rather than words, if for no better reason that they are easier to read. Returning to our two examples above, we might thus get:

> A person who carries on business as a hawker without a hawker's licence of the appropriate class commits an offence and is liable to imprisonment for 6 months and a fine at level 4 on the standard scale.

Or, if the sentence is a little more complex:

> (1) A person must not carry on a business of dealing in second-hand goods, including that of a pawnbroker:
>
> (a) unless that person holds a licence issued under this Act authorising him or her to carry on such a business; and
>
> (b) except from premises specified in the licence.
>
> (2) A person who contravenes subsection (1) commits an offence and is liable to imprisonment for 6 months and a fine at level 4 on the standard scale.

7. Summary

There is generally no special language or structure of language needed in legislative drafting. However, the need for *consistency* and *conciseness* leads to the adoption in modern Commonwealth drafting of certain conventions relating to the most common elements of legislative sentences. These can be simply summarised as follows:

- reference in a standardised way to the person or persons affected by legislative rules: in modern drafting this is done by referring to "a person", modified as necessary, or the specific kind or class of person affected ("a police officer", "a financial adviser", etc.);
- use of the auxiliary "must" to indicate obligation, and "may" to indicate discretion, though other expressions are sometimes also useful to indicate eligibility or entitlement;
- use of the present tense to indicate a state of affairs brought about, envisaged or explained by the legislation;
- use of standard words "commits an offence" to indicate liability to criminal penalties;

- adoption of some straightforward background rules to facilitate the concise and consistent drafting of the penalties themselves.
