*Commonwealth Association of Legislative Counsel*

# THE LOOPHOLE


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# THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

***Issue No. 2 of 2012***

*Editor in Chief*—John Mark Keyes, CALC Council Member



***Correspondence***

Correspondence about *The Loophole* should be addressed to—

John Mark Keyes, Editor in Chief, *The Loophole*,

*E-mail:* jmkeyes13@gmail.com

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## Editor's Notes

One of the most notable characteristics of legislative counsel is practicality. We take ideas for achieving lofty policy objectives and transform them into laws that deliver results. But all too often we alone are the only ones who see the gulf between the promises that surround the enactment of legislation and the realization of these promises in its application after it is enacted.

This issue of *The Loophole* looks at a number of very practical aspects of legislative drafting. It completes the publication of papers presented at the 2011 CALC Conference in Hyderabad and also includes three additional articles.

It begins with Nick Horn's detailed analysis of the use of section headings from the Hyderabad conference. He considers their effect on both readability and judicial interpretation, highlighting them as example of the progression in legislative drafting from rigorous economy of language to the facilitation of reading through features that are strictly speaking redundant.

The discussion of readability continues in the next two articles by legislative counsel from jurisdictions where readability is emerging as a consideration in legislative drafting. Ronan Cormacain considers the application of plain language drafting techniques to legislation in Northern Ireland and offers his observations on their workability. Similarly, Lambert Dushimimana looks at the need to improve the intelligibility of legislation in Rwanda and the challenges of doing so, particularly in terms of finding legislative counsel with the drafting skills needed to do so.

Jack Stark is also concerned with the practical application of legislation, focusing on its principal functions and what legislative counsel should do to make sure the legislation they draft fulfils them. His perspective is particularly shaped by the litigious environment in which legislation is drafted and applied in the United States.

Finally, this issue concludes with Duncan Berry's Hyderabad conference paper. It is cogent reminder of another critical aspect of practical drafting: to pay attention to the enforceability of legislation, not only in terms of making it clear who is to comply with legislated requirements, but also what sanctions await them if they do not comply.

I commend these papers to you and encourage you to note the call for papers for the next CALC Conference in Capetown, SA from 10-12 April, 2013. It takes its title – *Thirty Years of the Winds of Change in Legislative Drafting* – from both CALC's 30-year history as well as the famous speech of Sir Harold MacMillan to the South African Parliament in 1960. It's time to set your sails.

*John Mark Keyes*

*Ottawa, April, 2012*

# Upcoming Conferences

### Clarity Conference

Clarity's 5th international conference will be held from May 21-23, 2012 at the National Press Club Washington DC. Details are available at https://sites.google.com/site/claritydc2012/.

### Annual International Conference on Law, Regulations and Public Policy

This conference will be held at Hotel Fort Canning, Singapore 1-12 July, 2012. Details are available at http://www.law-conference.org/index.html/.

### Bi-annual Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ)

This conference will be held in *Ottawa, Canada 10-11 September, 2012.* The theme will be *Legislative Architecture – Building with Words.* It will examine the general structure of legislative systems, including the interplay of different forms of legislation with other regulatory instruments as well as the legislative revision and regulatory reform. The keynote speaker will be Professor Edward Rubin of Vanderbilt University in Tennessee. He will set the context of the conference with an address on Re-thinking Politics and Law in the Modern State. The conference will also include updates on recent case law on legislative matters, the impact of international accessibility standards on the publication of legislation and workshops on practical aspects such as ethical issues for legislative counsel and drafting provisions governing the commencement of legislation or authorizing the making of delegated legislation. Details are now available on the CIAJ website: http://www.ciaj-icaj.ca/.

### 2013 Conference of the Commonwealth Association of Legislative Counsel

CALC will celebrate its 30th birthday in 2013. Its next bi-annual conference is accordingly entitled *Thirty Years of the Winds of Change in Legislative Drafting*. It will be held *10-12 April 2013 in Capetown, South Africa*. This conference will be a fitting occasion to look back on what CALC and its members have accomplished over this time and the developments that have taken place in legislative drafting. It will also be an opportunity to look forward to what the future holds. The winds of change have surely left their mark and will continue to blow for years to come.

The Conference Programme Committee invites proposals for papers that will explore these themes in both general and practical terms. Topics of particular interest are:

- the evolution of drafting technique,

- how information technology (particularly word-processing and the Internet) have changed legislative drafting and where it is leading,
- development of legislative drafting skills: theory and practice,
- the impact of development assistance on legislative drafting,
- the government context for legislative drafting, including relations with instructing officials,
- legislative sovereignty and the globalization of law.

Anyone who wishes to present a paper at the conference should send a proposal to jmkeyes13@gmail.com including

- their full name, title, postal and email addresses,
- a brief CV,
- the title of the proposed paper and a brief summary of the points to be made.

The presentation should be 15-20 minutes in length with further time being available for questions.

The deadline for receiving proposals is ***31 July 2012***, but please respond as early as you can.

*Programme Committee*

John Mark Keyes

Katy LeRoy

Peter Quiggin

Edward Stell

# Legislative Section Headings: Drafting Techniques, Plain Language, and Redundancy

Nick Horn[1]

*Abstract*

How do legislative section headings work? They are presumed to help readers of legislation find what they need to know faster, and understand it more easily when they find it. This paper sets out some rules and techniques that drafters can use to maximize the (presumed) effectiveness of section headings. The distinction between the effect of section headings on access to the law by primary users, and their effect—or lack of it—on the meaning of the law for official interpreters, is questioned. The empirical evidence, such as it is, for the effectiveness of section headings for primary users is described. Three modes of operation are distinguished: vertical (descriptive), horizontal (structural), and a third dimension in which section headings are framed as questions. In the horizontal mode, one particular type of section heading, the 'divided heading', is discussed in detail.

The redundancy involved in section headings and other devices used to assist primary users to access and understand legislation is discussed and defended. The legal or interpretative effect of section headings is briefly outlined and Professor Ruth Sullivan's approach to interpretation based on indications of meaning, which can be proved in evidence rather than taken on judicial notice, is described and related to the discussion of section headings.

[1] Nick Horn works for the Australian Office of Parliamentary Counsel as a Senior Assistant Parliamentary Counsel. This article grew out of a talk given at the CALC conference in Hyderabad, India in February 2011. He thanks the delegates at the conference for their helpful comments when the paper was presented. He acknowledges the support of his office in preparing the paper but takes personal responsibility for the views expressed. This article has also appeared in the *Statute Law Review* 2011 32: 186-208, and is republished here by permission.

> Ideally, the section heading will look inwards at its own subject-matter, and outwards to the context of the Act in which it appears.[2]
>
> [T]he more redundant legislation is, the greater the likelihood that readers will assimilate and remember the legal message …[3]

## 1. What is a Section Heading?

### (A) Section Headings—Forms

Section headings are a subset of other legislative headings, including titles and chapter, part, division, subdivision and schedule headings, and cross-headings.

This paper does not cover the nature of legislative titles (or names) as such.[4] As far as other forms of heading are concerned, the comments offered in this paper on section headings apply to the other forms of heading, subject to obvious contextual differences relating to history, jurisdiction, and the type of legislation involved.

Ross Carter has published a useful table showing the different forms of heading in use in New Zealand (see Figure 1).[5] These, or their close relatives, are easily identifiable in many other Commonwealth laws.

[2] G Stewart 'Legislative Drafting and the Marginal Note' (1995) Statute Law Review 16, 21 at 38.

[3] R Sullivan 'Some Implications of Plain Language Drafting' (2001) Statute Law Review 22, 145 at 170.

[4] On legislative titles, see GD Orr 'Names Without Frontiers: Legislative Titles and Sloganeering' (2000) Statute Law Review 21, 188 and P O'Brien 'Legislative Titles: What's in a Name?' Commonwealth Association of Legislative Counsel Conference, Hyderabad 2011, unpublished. On the concept of legislative and other legal and literary titles, see N Horn 'Tityrus' (1994) Law/Text/Culture 1, 48.

[5] R Carter '"May" Means "Must", Section Headings and Latent Acts' (2001) Statute Law Review 22, 20 at 27.

*Figure 1 Types of legislative heading*

'MAY' MEANS 'MUST', SECTION HEADINGS, & LATENT ACTS 27

**Elements and potential elements of an Act**

| element | margin | centre of page |
|---|---|---|
| Part heading→ | | **Part 6**<br>**Division of property where one partner dies** |
| Subpart heading→ | | Subpart 1—Preliminary provisions |
| Cross heading→ | | *When does this Part apply?* |
| Marginal note→ | **Application of this Part** | 65. (1) This Part applies where a de facto relationship has ended when one of the partners dies.<br>(2) This Part also applies if, after a de facto relationship has ended when the relationship breaks down, one of the partners dies, and no proceedings under Part 5 are commenced before that partner's death. |
| Shoulder note→ | | **65. Application of this Part[.]**—(1) This Part applies where a de facto relationship has ended when one of the partners dies.<br>(2) This Part also applies if, after a de facto relationship has ended when the relationship breaks down, one of the partners dies, and no proceedings under Part 5 are commenced before that partner's death. |
| Section heading→ | | **65 When does this Part apply?** |
| Subsection heading→ | | *Application generally*<br>(1) This Part applies where a de facto relationship has ended when one of the partners dies. |
| Subsection heading→ | | *Application if death after relationship breaks down*<br>(2) This Part also applies if, after a de facto relationship has ended when the relationship breaks down, one of the partners dies, and no proceedings under Part 5 are commenced before that partner's death. |
| Section heading in 2 parts→ | | **65 Application of this Part: generally**<br>This Part applies where a de facto relationship has ended when one of the partners dies. |
| Section heading in 2 parts→ | | **65A Application of this Part: if death after relationship breaks down**<br>This Part also applies if, after a de facto relationship has ended when the relationship breaks down, one of the partners dies, and no proceedings under Part 5 are commenced before that partner's death. |

The comments in this paper about section headings can be applied to cross-headings and subsection headings and are also intended to cover headings in the form of marginal notes

and shoulder notes. From the discussions by Stewart[6] and Simamba,[7] who each cite cases relating to marginal notes and in-text headings, it does not appear that the position in which the heading is printed has any significant legal (or interpretative) effect.

Equally, it appears unlikely that the positioning of the heading in the margin or in the body of the text significantly affects the comprehensibility or ease of use of the text. One empirical research study in the area of educational document design has found that there is no significant effect on comprehension or ease of use (by high school children) of an educational text depending on whether headings are located in the margin or in the body of the text.[8] However, I am not aware of any similar empirical studies into the effect of the location of legislative section headings in the margin or the body of the text.[9]

### (B) Section Headings—History

What we now know as section headings started life as explanatory aids to legislation that were not included in the text of Bills under Parliamentary consideration. The headings were added to laws by the King's Printer after enactment, in the form of notes in the margin.[10] For this reason, some interpretation laws dealing with the status of section headings refer (or also refer) to them as 'marginal notes' (e.g. the *Acts Interpretation Act 1901* (Australia), s 13(3))[11].

Stewart observes, in discussing subsection headings in New Zealand legislation, that in the late 1800s, a number of marginal notes might be inserted for each section.[12] It must be remembered that originally, each 'section' was a separate enactment; the marginal notes were a way of breaking down what could be extremely long laws into shorter sequences.

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[6] Ibid. at 41–43.

[7] BH Simamba 'Should Marginal Notes be Used in the Interpretation of Legislation?' (2005) Statute Law Review 26, 125 at 125–126.

[8] J Hartley and M Trueman 'A Research Strategy for Text Designers: the Role of Headings' (1985) Instructional Science 14, 99 at 149–151.

[9] See 'Empirical Evidence' and 'The Third Dimension—Should Questions be Used as Headings?' below (at (2)(B)(i) and (v)) for comment on Stewart's study on the effect of section headings in the form of questions, and of subsection headings.

[10] In most Commonwealth jurisdictions, for example the federal, State and Territory jurisdictions in Australia, and in New Zealand, section headings are now included in the text of Bills considered by the legislature. However, in some jurisdictions, the practice of inserting section headings (or marginal notes) editorially, after the enactment of the relevant law, persists. For an example from Nova Scotia, Canada, see the third reading or enactment version of the *Anti-idling Act* (2010, ch 32) at: http://nslegislature.ca/legc/bills/61st_2nd/3rd_read/b114.htm (accessed 12 September 2011).

[11] Before its amendment by the *Acts Interpretation Amendment Act 2011* (Australia).

[12] Above n. 2 at 46–47.

The numbering and descriptive labelling of sections was proposed over 150 years ago by Jeremy Bentham and Arthur Symonds. Bentham energetically advocated the numbering of sections and parts of laws and urged the inclusion in legislation of 'all such helps to intellection as can be found applied to any other subject'.[13] Symonds more explicitly encouraged the use of descriptive headings in the form of marginal notes.[14]

When Sir Henry Thring was appointed as the first Chief Parliamentary Counsel in England in 1869, he set about establishing a consistent set of drafting principles, both structural and grammatical, in the spirit of plain language reformers who had gone before such as Bentham, Symonds and Sir George Coode.[15] Francis Bennion notes that Thring recommended that section headings, when read together in the 'arrangement of sections' (i.e., the analysis or table of contents) 'should have such a consecutive meaning as will give a tolerably accurate idea of the contents of the Act'.[16] Sir Courtenay Ilbert, Thring's successor (in 1901) reiterated Thring's principle, recommending that each Bill should have an 'arrangement made up from the marginal notes'; and noting in addition that '[t]he marginal note often supplies a useful test of whether a subject should be covered in more than one clause'.[17]

Modern texts on legislative drafting[18] remain strongly influenced by those principles; an influence not surprisingly reflected, in turn, in the practice of drafters in common law jurisdictions. I will now go on to examine how section headings work (or are presumed to work), which will lead directly, in the first instance, into some general issues about statutory interpretation and plain language drafting.

## 2. How Do Section Headings Work?

### (A) Primary Users and Official Interpreters

Section headings are claimed to assist, or at least to affect access to and interpretation of the law by, two classes of readers of legislation: primary users and official interpreters.

Primary users are those whose behaviour is sought to be changed by the law or rather (most often) those who need to access the law to act on behalf of those whose behaviour is directly sought to be changed by the law. Thus, the primary users of a law about occupational health

[13] Qtd Stewart, above n. 2 at 25.

[14] Ibid 25–26.

[15] See SYC Fung and A Watson-Brown 'Traditional Drafting in Common Law Jurisdictions' (1995) Statute Law Review 16, 167 at 171–173.

[16] Qtd Stewart, above n. 2 at 37

[17] Qtd Fung and Watson-Brown, above n. 15 at 174.

[18] Such as Thornton: see Stewart, above n. 2 at 28.

and safety would be trade unions, employer associations and their legal advisers, as well as those workers and individual employers (if any) who access the law in their own right.

Official interpreters are those whose interest in a statute is either to administer or implement it (generally, government administrative and law enforcement agencies) or to adjudicate disputes about its meaning in administrative or judicial forums.

Published treatments of the topic of section headings tend to observe this distinction by discussing the ways in which section headings can help primary users by enabling them to understand and access the statute more effectively; and discussing, separately, the effect of section headings on the 'interpretation' of the statute—that is, how the law is understood by official interpreters.

Before going on to deal with how section headings in particular can assist both classes of users of the law, it is instructive to consider briefly a general issue about plain language and interpretation.

Commentators on section headings base their analysis on a hard distinction between the 'use' and 'interpretation' of a statute.[19] They share this analytical premise with advocates of plain legislative language. For example, in its pioneering 1987 paper on plain language law reform, the Law Reform Commission of Victoria sets out the noble aim for plain language law of side-stepping 'interpretation', avoiding the need for judicial intervention entirely: 'Our object is to have the public understand so that matters do not end up in court!'.[20] The Commission's focus clearly is on the primary reader; however, in setting out this argument, a distinction between 'ordinary' reading and 'interpretation' is assumed and perpetuated. This line has been followed in plain language discourse since.

While it is a worthy aim—to which I imagine all legislative drafters aspire—to draft laws so as to minimize the need for disputes about interpretation, I would go further and argue that the distinction itself between 'use' (ordinary reading) and 'interpretation' (official reading) should be questioned. As Ruth Sullivan argues, whenever a person reads a text, an act of 'interpretation' occurs. Far from being expendable, interpretation is inevitable. She bases this on the consensus among linguists that a fixed 'meaning' does not inhere within a text (to be discovered by interpreters) but is generated each time the text is read, in the context in which the text is used. This act of generating meaning from a text constitutes interpretation, no matter whether the law is being read by a primary user or an official interpreter. Such linguistic evidence is directly contrary to the premises on which the law of interpretation has developed.[21]

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[19] See Carter, above n. 5, Simimba, above n. 7 and Stewart, above n. 2.

[20] Law Reform Commission of Victoria, *Plain English and the Law* (Victorian Government Printer, Melbourne, 1987) at 9.

[21] See Sullivan, above n. 3 at 49.

This analysis undermines the logical basis for applying different rules for the generation of meaning in either case and for perpetuating many of the arcane rules (often inconsistent) that constitute the common law of statutory interpretation that is applied to the understanding of statutes by official interpreters. By acknowledging that all readers of statutes apply a process of interpretation, there is a space for Sullivan's argument that interpretation should be an empirical evidence-based exercise, whether undertaken by primary users (whom she calls 'unofficial interpreters') or official interpreters. This in turn offers powerful support (in principle) for plain language drafting techniques, such as the use of redundancy in the form of section and other headings, as well as similar techniques such as simplified outlines and readers' guides; support which bypasses traditional drafting concerns with such devices based on the rules of 'statutory interpretation' (as narrowly defined by the common law).

Evidently, however, the common (and statutory) law of interpretation has still to be reckoned with, and its particular attitudes to section headings cannot be ignored in a comprehensive discussion of this topic. With Sullivan's perspective in mind, the remainder of this paper will largely be concerned with the two aspects of interpretation she mentions: 'unofficial' interpretation (by primary users) and 'official' interpretation (particularly judicial).

### (B) Assistance for Primary Users

#### *(i) Empirical Evidence*

There is an underlying premise in the literature on this topic that the use of section headings can assist primary users to understand the law.[22] What is the basis for this premise? Krongold, like most other writers on topic, does not offer empirical evidence in the form of user testing or the like. Even Sullivan, otherwise keen to apply research on linguistics and communications generally to her analysis of plain language and interpretation, accepts this premise without citing objective proof. Stewart's user tests on forms of legislative section and subsection headings do not examine this basic premise.[23] It appears that it is founded (by default) on common sense and intuition deriving from personal reading experience.

However, some studies in the field of educational document design provide objective evidential support for the significant assistance that headings can give student readers. Hartley and Trueman, whose study is by far the most comprehensive and systematic of any, conclude from a series of experiments with high school students that headings can be an aid to recall, search, and retrieval.[24] Kools supports these conclusions, finding that search times

[22] See S Krongold 'Writing Laws: Making Them Easier to Understand' (1992) Ottawa Law Review 24, 511.

[23] See Sullivan above n. 3 and Stewart above n. 2 at 49–53.

[24] Above n. 8 at 149–53.

are faster for text with headings than for text without headings.[25] Wilhite's study suggests that headings are particularly effective for readers with prior knowledge of the subject matter of the text.[26]

These studies were carried out with students, as mentioned; and in Hartley's case, they were based on relatively simple textual material suitable for year 7–9 students. For hard evidence about the use of legislative text with section headings, we need to turn to Stewart's study.[27] He conducted a number of tests with experienced users of legislation on the effect of headings in the form of questions (as discussed further below) and on the effect of subsection headings. Unlike Hartley and Trueman, Stewart (as mentioned) did not test for the effect of the presence of headings as opposed to their absence. However, he found that there was a significant increase in speed in locating relevant provisions in sections using subsection headings, as opposed to sections that did not use subsection headings.[28] Perhaps this can be taken as a proxy for a test on the effect of headings as opposed to their absence. If subsection headings can assist users to identify and retrieve text in a section, it seems reasonable to use this as evidence that section headings can also assist them to identify and retrieve text in broader contexts within a law.

### *(ii) Section Headings in Three Dimensions*

Stewart identifies two dimensions in which the section heading operates, corresponding to Ilbert's principles mentioned above: 'a. [t]he section heading and its relation to the section'; and 'b. [t]he section heading and its relation to other section headings'.[29] As Stewart notes '[i]ndividually, the heading indicates the contents of the section; collectively, [headings] should indicate the contents of the Act'.[30] The first dimension might be thought of as vertical (directing the reader downwards into the section); the second as horizontal (directing the reader, via the table of contents, across the rest of the Act).

The use of section headings in the form of questions might be said to engage a third dimension of sorts (that of depth): such headings reach out of the page, so to speak, to echo questions the user is presumed to bring to the law for answers.

The comments that follow are mostly directed to the second (horizontal) dimension (see 'The Horizontal Dimension' below at (iv)) since I believe that this aspect can benefit most

[25] See M Kools, et al 'The Effects of Headings in Information Mapping on Search Speed and Evaluation of a Brief Health Education Text' (2008) Journal of Information Science 34, 842–43.

[26] S Wilhite 'Headings as Memory Facilitators: The Importance of Prior Knowledge' (1989) Journal of Educational Psychology 81, 116–17.

[27] Stewart, above n. 2 at 49–63.

[28] Ibid, 58–59.

[29] Ibid, 37.

[30] Ibid, 37.

from a more systematic consideration. However, some notes are also included on the first and third dimensions (see 'The Vertical Dimension' and 'The Third Dimension—Should Questions be Used as Headings?' below at (iii) and (v)) since it is submitted that the drafter should consider all modes of operation in order to fully engage the potential of section headings to assist users.

### *(iii) The Vertical Dimension*

In the vertical dimension, assistance is offered to the primary user to understand the contents of the relevant section of the law. In this dimension, the driving principle is Thornton's general prescription for accuracy,[31] tempered by the constraint of brevity.[32] This would, I imagine, be endorsed by all drafters. Stewart usefully sets out a number of rules about accuracy:

- *Avoid ambiguity.* The drafter should avoid obvious ambiguity. Stewart cites as an example the heading 'Application', often used to indicate the scope of a section.[33] This can easily be misread as dealing with the process of applying for some form of legislative privilege or entitlement. In this specific case, the ambiguity can be avoided by the use of an alternative such as 'Scope'; the main challenge for the drafter is to recognize the potential for ambiguity in the first place.
- *Certainty.* Stewart gives as an illustration of a common source of uncertainty the inaccurate use of 'etc.' at the end of lists of items. Among the common faults he points to are the unnecessary abbreviation of very short lists and the misleading use of the device to shorten lists in cases in which there are unlisted items that are not 'fairly predictable' from the listed items.[34] For example, a heading in the form of 'Road and rail transport etc.' could be misleading in the case of a section that also deals with transport by water since a user interested in water transport might be tempted to overlook it. If a list is too heterogeneous to be adequately described in a brief heading, perhaps the drafter needs to reconsider dealing with all the elements of the list together (as suggested 100 years ago by Sir Courtney Ilbert).[35]

[31] As Stewart notes, ibid, 29.

[32] Stewart tested for the effect of brevity by comparing the speed and accuracy of searches for sections with one-word headings as opposed to searches for the same sections with longer more explanatory headings, some in the form of questions (ibid, 60–62). The results were equivocal: expanding the heading for one of the sections (but not in question form) does not seem to have assisted users, while expanding the heading for the others (in question form) seems to have improved results. As he notes, it is not clear from the results of the testing whether the improved results were because the expanded headings were in the form of questions or simply because the expanded headings had greater explanatory value.

[33] Ibid, 32–33.

[34] Ibid, 33–34.

[35] See above n. 15.

- *Direct reference.* The heading should directly indicate the contents of the section. Stewart gives the example of a provision headed 'Corrupt use of official information' which deals only with one aspect of corrupt use: the deeming of certain persons to be officials to whom other provisions of the Act dealing with corrupt use are to apply. He suggests a summary heading such as 'Certain persons deemed 'officials' in corruption proceedings'.[36]

On the issue of summary headings, however, Thornton proposes an additional rule that a heading should describe, not summarize, the contents of a section. For example, the heading 'Grant of licence' (which is descriptive) is to be preferred to the heading 'The Minister may grant licences' (which is a summary). The rule is justified by noting that a heading in the form of a summary ' … cannot hope to tell [the user] what the section says about [the] subject'.[37] In other words, a summary heading is inadequate because it cannot be a complete substitute for the section.

I suggest that this rationale is inadequate on two fronts. First, and most obviously, a descriptive heading also suffers from a similar deficiency; it is also true that a brief descriptive heading cannot fully communicate the relevant legislative rule. All either form of heading can do is indicate 'what the section says about the subject'. It is in the nature of headings of any sort to be incomplete.

Second, at a more fundamental level, Thornton's rule is based on a misguided fear of redundancy in legislation. As discussed further below, this fear is based on the concept that any form of repetition of the law creates the potential for misinterpretation. Thus, section headings, by restating in short form, or partially repeating, the main statement of the law, create the potential for inconsistency with that main statement and therefore (it is claimed) for interpretative misreadings.[38] The drafter is advised to state the law once, and once only, in the hope that this will fix the meaning of the law in place when it comes to be used; summaries, user guides, and similar plain language aids are redundant and to be used cautiously, if at all.

However, if we are to give credence to Sullivan's approach, which fully engages the communicative potential of the legislative text by embracing multiple indications to give evidence of the content of the law, the drafter's fear of redundancy can be overcome. This approach would allow more fully for 'meta-legal messages' to be relied on, based on

[36] Above, n. 2 at 35.

[37] Qtd Stewart, ibid, 28.

[38] The same may be said of other user guides, for example, legislative notes at the foot of sections, and simplified outlines at the head of Chapters or Parts (each used extensively in modern Australian federal legislation).

conventions of how the format of the text (certain text formatted as headings, as opposed to substantive rules, etc.) affects the way meaning is generated from the text.[39]

In implicit recognition of the usefulness of redundancy, and reliance on general textual conventions about how headings and text interact, Thornton's rule is not so strictly applied in modern Australian legislation and that of many other jurisdictions. One situation in which Stewart argues that summary headings are to be preferred is a section whose full text reads 'This Act binds the Crown'. Stewart notes the practice in New Zealand for such provisions to be entitled 'Act to bind the Crown' (a summary) rather than any form of description (e.g. 'Act and Crown').[40] In general, Stewart's recommended approach, describing recent and continuing drafting practice in New Zealand and Australia, is pragmatic, applying different types of heading (including summary headings where appropriate) for different occasions.

### *(iv) The Horizontal Dimension*

Moving on to consider the horizontal dimension of section headings, the main drafting principle is clarity and transparency of structure. As indicated in Thring's and Ilbert's comments noted above,[41] section headings serve as a navigation guide to the arrangement of an Act as a whole. From the table of contents of an Act, the primary user should be given a sense of three aspects of the law:

- *Scope*—what subject matter is covered, and the relative importance of various topics.
- *Narrative flow*—the flow of the 'story' told by the law from section to section.
- *Organisation and logic*—through the indication of the nesting of sections within subdivisions, divisions, parts, and chapters.

Section headings thus behave as a sort of structural Tarzan's Grip (a brand of a glue) enabling the relationship between the parts and the whole to be fixed in place.

As noted in the quotation from Stewart's article at the head of this paper, ideally, section headings should look both inward (or vertically) to the contents of the section and outward (or horizontally) to the relationship of the section to the rest of the Act. Drafters are challenged, as Stewart notes, to pay conscious attention to both the specific section and to the larger context of the Act. It is an aspect of the drafter's craft (or art) to learn how to balance these twin aims.

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[39] On meta-legal messages, see Sullivan, above n. 3 at 149. See also R Sullivan 'The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation' in E Mackaay (ed.) *Les Certitudes de Droit* (Themis, Ottawa, 151 2000) <http://aix1.uottawa.ca/~resulliv/legdr/pmr.html> (accessed 15 April 2012).

[40] Above n. 5 at 29. Similar summary headings are used in Australian legislation in this context.

[41] See above nn. 16 and 17.

Considering the horizontal dimension by itself, how should drafters take best advantage of this aspect of the operation of the heading? There are five techniques that can be considered. These are all illustrated by Figure 2, a brief (hypothetical) example of a sequence of sections in a Part of a Bill.

### Horizontal Drafting Techniques

- *Strategic arrangement.* The main structural challenge for the drafter is to arrange the sections of the Bill in an order that best enables primary users (or their advisers or representatives) to understand the way the statute affects such users and to find what they need in that law. This strategic arrangement is, of course laid bare by the organisation of headings in the table of contents.[42] In Figure 2, the most important provision in this Part for the primary user is placed first, at section 10, indicating why the reader may (or may not) need a fishing licence. If the user discovers that she does not need a fishing licence, she need read no further.
- *Narrative indications.* Indications of narrative flow can be included in the wording of section headings. In Figure 2, the 'life cycle' of a fishing licence is indicated by a narrative implicit in the consistency and variation of the wording of the headings.
- *Consistent language.* Consistent language and phrasing in section headings help the reader make implicit links across the statute. In Figure 2, the consistent use of the phrase 'fishing licence' helps to glue the Part together.
- *Structural indications.* Explicit indications of structural relationships in the wording of section headings may be employed to show less formal cross-structures working within the formal structure of the Bill. In Figure 2, this is illustrated by the divided section headings in the internal sequence from ss 14-17 (divided headings are discussed further below). Another way in which relationships between provisions of an Act can be shown in section headings is by direct cross-references in section headings (e.g. as an alternative to Figure 2, s 16: 'Fishing licence conditions—Part 6 penalties for breach'), though of course this can be a little opaque.
- *Contextual indications.* Most users only need to refer to parts of a statute, and these days many, if not most, users access statutes on-line, which tends to impair easy access to any context except the most immediate. This makes it important that headings should be context-specific. In particular, they should not be duplicated elsewhere in the Bill (that is, each section heading should be unique). For example, generic headings like 'Powers', 'Establishment', or 'Offences'

[42] For consideration of the use of a structural template for this purpose, see N Horn 'Shaping Policy Into Law: A Strategy for Developing Common Standards' (2011) *The Loophole* (special ed.), 40.

should be avoided (whether or not they are duplicated elsewhere, but particularly if so). In Figure 2, this is illustrated by the references to fishing licences (rather than just bare 'licences'), reinforcing the Part heading. Remember that the Part heading may not be visible to an on-line user, who does not have access to the running header at the top of a hard-copy version of the Act. This technique could also help to distinguish these sections from those in another Part dealing with, say, trawling licences, and to avoid duplication.

*Figure 2: Hypothetical sequence of legislative sections*

**Part 2—Fishing licences**

| | |
|---|---|
| 10 | Requirement for fishing licence |
| 11 | Eligibility for fishing licence |
| 12 | Application for fishing licence |
| 13 | Grant of fishing licence |
| 14 | Fishing licence conditions—imposition |
| 15 | Fishing licence conditions—variation |
| 16 | Fishing licence conditions—administrative penalty for breach |
| 17 | Fishing licence conditions—cancellation for breach. |

### Divided Section Headings

One device illustrated by Figure 2 is of particular interest: the internal division of the headings of sections 14 to 17. This is an example mainly of the fourth drafting technique (structural indications), but with elements of the fifth technique (contextual indications) as well as the others. This has already been seen in Carter's table at Figure 1 above, 'Section headings in 2 parts'. Carter comments that '[t]his kind of section heading is one way of linking a number of related sections without (say) placing them under a Part heading or a cross heading'.[43]

In Figure 2, the divided section heading allows a linked internal sequence relating to fishing licence conditions to be introduced without disrupting the narrative flow of this small Part by dividing it into Divisions. But the divided heading can do more than this; it is a very flexible tool. At least three distinct applications may be distinguished: (i) internal sequences, (ii) parallel structures and (iii) reinforcing formal structures.

#### *(a) Divided headings—internal sequences*

In Figure 3, two internal sequences are identified by divided headings: the first to link provisions relating to the time of registration (ss 160–162); the second to link provisions

[43] Above n. 5 at 29.

dealing with defects in registration (ss 164–166). Dividing the Part into Divisions would have been awkward (particularly given the outriding ss 163 and 168). The divided headings technique offers a less obtrusive way of indicating different subtopics within the Part.

*Figure 3: Personal Property Securities Act 2009 (Australia)*

**Part 5.4—When a registration is effective**

| | |
|---|---|
| 159 | Guide to this Part |
| 160 | Registration time—general |
| 161 | Registration time—security agreements and interests |
| 162 | Registration time—transfers |
| 163 | Effective registration |
| 164 | Defects in registration—general rule |
| 165 | Defects in registration—particular defects |
| 166 | Defects in registration—temporary effectiveness |
| 167 | Security interest in certain property becomes unperfected |
| 168 | Maintenance fees |

As Carter notes, these distinctions could also have been made using cross-headings, but this device is not used in Australian federal legislation. Moreover, it might have been difficult to characterize the remaining provisions under cross-headings (or, indeed, to group them into a separate Division or Divisions, if the Part were divided into Divisions) while still maintaining the narrative flow of the Part.

*(b) Divided headings—parallel structures*

In Figure 4, the divided section heading is used to distinguish between parallel sequences of provisions (as well as to indicate two internal sequences). This device enables the drafter to avoid duplicating section headings, even if the Part were to be split into Divisions (or divided by cross-headings). Given the brevity of the Part, the judgment was made that the use of the divided section heading could do the same job. Even if separate Divisions had been created, the divided headings could have been used; the heading would then operate in addition as an immediate indication of structural context, as I will discuss shortly.

*Figure 4: Personal Property Securities Act 2009 (Australia)*

**Part 5.9—Registrar of Personal Property Securities**

| | |
|---|---|
| 193 | Guide to this Part |
| 194 | Registrar—establishment of office |
| 195 | Registrar—functions and powers |
| 196 | Registrar—acting appointments |
| 197 | Registrar—delegation |
| 198 | Registrar—resignation |
| 199 | Registrar—termination |
| 200 | Deputy Registrar—establishment of office |
| 201 | Deputy Registrar—functions and powers |
| 202 | Deputy Registrar—resignation |
| 203 | Deputy Registrar—termination |

*(c) Divided headings—reinforcement of formal structures*

Figure 5 is an example of a more extended use of divided headings to indicate (and distinguish between) parallel sequences of provisions.

*Figure 5: Paid Parental Leave Act 2010 (Australia)*

**Part 5-1—Internal review of decisions**

**Division 1—Guide to this Part**

202 Guide to this Part

**Division 2—Internal review of decisions**

203 Internal review—own-initiative review by Secretary
204 Internal review—own-initiative review and tribunal review
205 Internal review—review following application
206 Internal review—application for review of claimant decision
207 Internal review—application for review of employer determination decision
208 Internal review—application for review of employer funding amount decision
209 Internal review—withdrawal of application
210 Internal review—when decision made on review comes into force
211 Internal review—notice of decision on review of claimant decision
212 Internal review—notice of decision relating to employer

**Part 5-2—Review by the Social Security Appeals Tribunal**

**Division 1—Guide to this Part**

213 Guide to this Part
214 SSAT objective under this Act

**Division 2—Review by SSAT of claimant decisions**

215 Application of this Division
216 SSAT review of claimant decision—application for review
217 SSAT review of claimant decision—making of application
218 SSAT review of claimant decision—review following application
219 SSAT review of claimant decision—powers of the SSAT
220 SSAT review of claimant decision—when SSAT decision comes into force
221 SSAT review of claimant decision—variation of decision before review completed
222 SSAT review of claimant decision—parties to review

**Division 3—Review by SSAT of employer decisions**

223 Application of this Division
224 SSAT review of employer decision—application for review
225 SSAT review of employer decision—making of application
226 SSAT review of employer decision—review following application
227 SSAT review of employer decision—powers of the SSAT
228 SSAT review of employer decision—when SSAT decision comes into force
229 SSAT review of employer decision—variation of decision before review completed
230 SSAT review of employer decision—parties to review

Two forms of review (internal review and review by the Social Security Appeals Tribunal (SSAT), an administrative tribunal) are provided, with, in addition, different procedures for the two different types of tribunal review (concerning claimants and employers). Since the actual process legislated for in each case is similar, in Figure 5 the divided section headings are used to avoid a confusing duplication of section headings in parallel provisions.

Although this results in considerable repetition, it is an effective solution to the problem of how to draft distinctive section headings in each parallel series of provision. It also should be remembered that when reading the substantive provisions of the Act, the repetition will not be so evident, and the usefulness of the structural reminder will be greater, particularly for on-line users.[44]

Figure 6 shows how divided section headings can assist primary users to reinforce the formal structure of the Act, reminding the user at the head of each section of the structural context of the provision. Even if not necessary to avoid duplication (as with the indications of parallel structures above), divided headings can be used to give coherence and some transparency to relatively complex provisions.

[44] In Figure 5, the headings to Pt 5-1, Div 2 and Pt 5-2, Divisions 2 and 3 could also have been reworded to duplicate the first part of the relevant divided headings. This might have allowed the divided heading structure to reinforce the formal structure of the Act more effectively (as shown in Figure 6).

*Figure 6: Personal Property Securities Act 2009 (Australia)*

**Part 7-4—Relationship between Australian laws**

**Division 1—Introduction**

253 Guide to this Part

**Division 2—Concurrent operation**

254 Concurrent operation—general rule

255 Concurrent operation—regulations may resolve inconsistency

**Division 3—When other laws prevail**

256 When other laws prevail—certain other Commonwealth Acts

257 When other laws prevail—security agreements

258 When other laws prevail—personal property, security interests and matters excluded from State amendment referrals

259 When other laws prevail—exclusion by referring State or Territory law

**Division 4—When this Act prevails**

261 When this Act prevails—registration requirements

262 When this Act prevails—assignment requirements

263 When this Act prevails—formal requirements relating to agreements

264 When this Act prevails—attachment and perfection of security interests

In Figure 6, different aspects of the Act in question bear different relationships to other Australian laws. To help clarify the context in each provision and indicate its relationship to similar provisions, the heading to the relevant Division is repeated in the first part of each section heading in the Division. This part of the Act is very technical and would generally only be used by specialist lawyers; however, even for experts, such a device could be useful to help clarify the logic of the Act.

#### Restrictions on the Use of Divided Headings

It remains to be noted that there are some evident restrictions on the use of divided headings.

First, their use tends to work against the principle of brevity noted at ‘The Vertical Dimension’ (at (iii) above). Sometimes it is difficult to restrict the length of the divided section heading to a single line, a rule of thumb used by many drafters in drafting section headings. For example, see Figure 6, s 258, which goes well into the second line. Therefore, it may demand some creative compression of material: in this case, perhaps ‘When other laws prevail—amendment referral exclusions’, which sacrifices directness for brevity. Alternatively, the drafter may decide not to use divided section headings for this reason. As

a general guide, since the first phrase in the heading is repeated, drafters should try and keep this term as concise as possible in building a sequence of divided section headings. An example of this kind of drafting decision can be seen in Figure 5, Part 5-1, Division 2: instead of using the longer expression 'Internal review of decisions' as the first phrase (as in the Division heading), the shorter phrase 'Internal review' is chosen for the sake of brevity.[45]

Secondly, divided section headings depend for their effectiveness (if any) on repetition: the repetition of the first phrase of the heading, which may also be repeated in a division, part, or chapter heading (as in Figure 6). When gathered together in a table of contents (as in the examples above), the repetition can become a little numbing since the distinguishing feature of the section is only indicated at the end of the heading.

However, there are considerable navigational advantages to this drafting technique within the body of the Act, and in that context, the adverse effects of repetition are not nearly so pronounced. It is always a matter for the drafter's judgment in the particular case. The drafter has to balance, as Stewart also notes, the horizontal (structural) advantage to users offered by the use of the divided heading against the vertical advantage offered by a more direct description of the contents of the section. Is it more important that primary users be able to access the law quickly and effectively via the grouping of provisions (structural indications) or via direct descriptions/summaries (content indications)?

There can, of course, be no drafting solution that will suit every occasion. It is submitted that there is a strong case for drafters to consider the use of divided section headings in the contexts described, but not that their use should become automatic.

### *(v) The Third Dimension—Should Questions Be Used as Headings?*

One of the drafting techniques advocated for greater access to the law for primary users is the employment of section headings as questions.[46] Sullivan describes the use of section headings as questions:

> Another technique that emphasizes direct communication with the public is drafting headings in the form of questions that members of the public might actually be moved to ask. The provisions that follow the headings then have the force of answers to those questions. By simulating the exchange that occurs in 'real' conversation, this question-answer format creates a sense of immediacy.[47]

[45] In jurisdictions that still use section headings in the form of marginal notes, the limit posed by the need for brevity has greater weight due to the relatively restricted space for such notes in the margins (even though they are generally printed in smaller font).

[46] For example, see Krongold above n. 22 at 511–512.

[47] Above n. 3 at 161.

As noted, the first dimension of the effect of section headings can be said to be 'vertical' (describing the section); the second dimension can be said to be 'horizontal' (indicating the structure of the law).[48] Section headings in the form of questions might be said to work in a third dimension: they come out of the text to engage the reader in a dialogue.

Some significant empirical testing has been carried out on the effect of headings in the form of questions. Stewart supports his advocacy of this device in legislation with empirical testing of a range of users of legislation and claims some beneficial results in terms of accuracy and speed of recall, though there was some variability in the results on speed of recall.[49] Hartley has twice conducted educational document design studies into the use of questions as headings with school students. The first study indicated that this form of heading assisted students with relatively low academic capacity. However, his second, more thorough, series of tests did not confirm this result but was equivocal as regards the effectiveness of this technique.[50]

Among professional users of Australian federal legislation, there appears to be a reasonable level of support for the use of section headings in the form of questions. As part of a recent survey, the Australian Office of Parliamentary Counsel asked judges, magistrates, public service users, and private practitioners for their opinion.[51] The survey found that 75% of respondents were satisfied that the use of questions as section headings made the law easier to understand and read, rising to 87% satisfaction by judges and magistrates. However, some respondents warned that it could be off-putting for 'frequent users' of legislation and that not all laws would lend themselves to this style; some also said it was 'patronising'. Respondents also noted a risk that readers of the law might miss relevant information in a section not covered by the specific question.[52]

Thus, it would appear that there is some basis for using section headings in the form of questions: however, as noted by Stewart, and having regard to the cautionary responses to the Australian survey, some care should be used in the employment of this technique.

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[48] See above 'Section Headings in Three Dimensions' at (ii).

[49] Contrast the results of the same study for the presence or absence of subsection headings, which found that they assisted speed of recall, but not necessarily accuracy (58–59).

[50] Hartley and Trueman, above n. 8 at151–152.

[51] Office of Parliamentary Counsel [Australia] 'Results of 2001 Legislation Users Survey 2010' (2011) <http://www.opc.gov.au/plain/pdf/2010LegislationSurveyResults.pdf> (accessed 12 September 2011).

[52] But this is a risk for any heading; see the discussion of the rule about certainty above at 'The Vertical Dimension' (at (iii)). For an overview of the results of the survey, see P Quiggin 'A Survey of User Attitudes to the Use of Aids to Understanding in Legislation' (2011) The Loophole (special ed.), 96. Peter Quiggin commissioned the survey as the Australian First Parliamentary Counsel.

### *(vi) Headings as an Instance of Redundancy*

Sullivan notes (without citing empirical evidence, but with intuitive force) that effective communication requires redundancy. By contrast, as she says "the content of legislation is unusually devoid of redundancy". She continues:

> When communicating new information, most writers include familiar material along with what is new. Although the familiar material is redundant, it is included because it helps the reader integrate the new information by relating it to what she already knows. If the new information is difficult, highly original or for any reason remote from what the reader already knows, writers typically provide more context and repeat it more than once. The more challenging the material, the greater the need for both types of redundancy, for references to familiar material and for repetition of what is new.
>
> Traditionally and throughout the 20th century, these forms of reader assistance (such as redundancy) have been discouraged in legislation....This absence of redundancy makes the legislative text extremely difficult for most readers.
>
> … In my view, *headings and overviews and examples are helpful because they introduce substantive redundancy* into legislation.[53] [emphasis added]

Not only are headings said to assist users to understand the law by introducing an element of redundancy, they also enable the drafter to disrupt the oracular tone of the law by the use of a different verbal register.[54] The heading allows the drafter to break free of the iron rules of syntax by using summary language. It also can allow for a more direct, if less exact, form of language, as in the provision in Figure 7.

*Figure 7: Electoral Act 1992 (Australian Capital Territory)*

**32 Advertorials**

A newspaper must not publish an election advertisement in a form intended to appear like an editorial or newspaper reportage.

In Figure 7, the drafter has her piece of cake: the use of the colloquial expression 'advertorial' in the heading to succinctly describe, in language that many primary users would immediately understand, the subject matter of the section. She then proceeds to eat her cake too, by incorporating in the section itself a more formally worded definition: an advertisement published 'in a form intended to appear like an editorial or newspaper reportage'.

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[53] Sullivan, above n. 3 at 154 and 170.

[54] This effect can also be achieved by the use of legislative notes: see N Horn 'Pale fire or grey silt? Notes on the legislative note' Paper presented at 4th Australasian Drafting Conference, Sydney, 4–6 August 2005 <http://www.pcc.gov.au/pccconf/2005/papers/13-Nick-Horn.pdf> (accessed 12 September 2011) for a discussion of the aesthetics of such notes.

The section heading offers the drafter the opportunity to address the reader more directly, and in a different voice, to offer a new perspective on the law. The inherent redundancy of section headings can be a positive virtue in terms of communication, as the reader may be given a greater opportunity to understand the law, without compromising its effectiveness as law.

To that question of the *legal effectiveness* of headings (the way they are read by 'official interpreters') we now finally turn.

### (C) Assistance for Official Interpreters

#### *(i) Common Law and Interpretation Statutes*

The common law has always regarded statutes somewhat warily, as evidenced by the notoriously multifarious, ad hoc, and internally inconsistent rules of 'statutory interpretation'.[55] Still more archly is regarded such marginal legislative material as tables of contents, readers' guides, simplified outlines, marginal notes, headings, and legislative notes. However, gradually, despite an historical Nelsonian blindness, the English common law has conceded, with section headings now plainly printed in the text of Bills before most Parliaments, that section headings can assist in working out the meaning of a law, at least so far as they may resolve ambiguities in the text of the law.[56]

The courts continue to assert that sections headings can never 'control the meaning' of a section.[57] Interpretation statutes in common law countries, when they have addressed the issue of section headings at all, have by and large reinforced this cautious approach by providing that section headings are not 'part of the law'.

On the other hand, there is a modern trend in Australian interpretation statutes to declare that section headings are part of the law.[58] This clarifies the position with amendments of section headings (if they are part of the law, they can be amended in the same way as any other part of an Act, or a Bill in parliament). It also brings section headings into the 'intrinsic material'

[55] See W Twining and D Miers *How to Do Things With Rules* (5th ed., Cambridge, CUP 2010), 242–245 ['(c) Judicial interpretation in practice: the desire for order'] for a summary of academic attempts to rationalize the common law of statutory interpretation.

[56] See Simimba, above n. 7 at 125–126 and Stewart, above n. 2 at 40–41. In jurisdictions in which section headings (or marginal notes) are still added to the text of legislation editorially, by government or commercial printers, after enactment (or to consolidated statutes after the enactment of amendments), it is understandable that courts should give such headings (or notes) no more than the status of extra-legislative commentary.

[57] See Stewart, above n. 2 at 41 (discussion of the New Zealand *Ombudsman case*).

[58] In the Australian Capital Territory (Legislation Act 2001, s 126(2)), Northern Territory (Interpretation Act, s 55(2)), Queensland (Acts Interpretation Act 1954, s 14(2)), Victoria (Interpretation of Legislation Act 1984, s 36(2A)) and the Commonwealth of Australia, *Acts Interpretation Act 1901*, s 13 (as recently amended by the *Acts Interpretation Amendment Act 2011*).

of an act that can be used by official interpreters to determine the purpose, and therefore the meaning, of a provision.[59]

*(ii) NZ Interpretation Act 1999*

An innovative approach to the issue of 'non-substantive' legislative text such as section headings has been adopted in New Zealand in its interpretation law; see Figure 8:

*Figure 8: Interpretation Act 1999 (New Zealand)*

**5 Ascertaining meaning of legislation**

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

The provision in Figure 8 suggests that all components of the statute bear whatever interpretative weight they can in the context of reading the Act, having regard to its purpose.[60] The question of what is 'part of the Act' (and what is not) is not used as a criterion for the 'matters that may be considered'; indeed, the issue of what is part of an Act would not seem to figure at all in the principles to be applied in 'ascertaining the meaning of an enactment'. This amounts to a more direct, holistic approach to interpretation for official interpreters, more in tune with the way in which textual communication works in other contexts. The result of such an approach is that the ways in which modern drafters strive to make the legislative text more accessible to primary users, including such 'redundant'

[59] Purpose has increasingly become the touchstone for working out the meaning of an Act in common law statutory interpretation in the past 20 or so years. This is recognized in a number of Commonwealth interpretation laws: for example, in Australia (*Acts Interpretation Act 1901*, s 15AA) and New Zealand (see Figure 8 below).

[60] Simamba comments that s 5 of the *New Zealand Act* ' … does not deal with the weight to be attached to marginal notes [section headings]. It seems however that a court would, to say the least, be very slow to let a marginal note change the meaning of an otherwise clear provision.' (above n. 7 at 127). However, it is to be hoped that some consideration is also given by the courts to the likelihood that, when s 5 is compared to its predecessor and counterpart provisions in other jurisdictions, the legislature deliberately avoided a fixed rule for assigning such 'weight'.

techniques as headings, users guides, and legislative notes, can be more easily reconciled with the equally vital concern of drafters to ensure legal effectiveness (by making the meaning of the law just as clear to official interpreters).

### *(iii) Redundancy and Interpretation*

Sullivan takes her support for redundancy and other plain language devices to its logical conclusion—beyond the treatment of 'indications' of meaning in the New Zealand Act—in a radical proposal for a new law of interpretation. She would abandon the reductive 'plain meaning rule' (by which the courts emphasize the 'plain' or 'ordinary' meaning of the text taken to form part of the law) in favour of an empirical evidence-based approach to determining the official meaning of the law.[61] The text of the law is not equivalent to the law, but evidence of the law: as she says: '[i]n reading statutes, not less than in reading cases, readers are required to construct the relevant legal rule from variable materials'.[62]

In a similar vein, she urges that:

> … all components of plain language statutes should be regarded as legal text, as declaring and not just commenting on the law. On this view, components like headings and examples have the same status as numbered provisions and there is no basis for a rule that limits reliance on them to cases in which the so-called operative part of the statute is ambiguous. There is no basis for a rule that automatically assigns them lesser weight.[63]

In particular, the text of a section should not automatically be privileged over that of its heading if there is an apparent inconsistency, for " … there is no reason to assume that if a mistake has been made, it occurred in drafting the heading or example rather than the provision."[64]

Of course, different textual features contribute to meaning in different ways, and to various degrees. However, the way in which textual indications are taken into account in working out the meaning of a law is determined not by artificially rigid legal presumptions, but by more fluid general conventions about how these devices are understood.

Sullivan proposes that reading by unofficial interpreters (i.e. primary users) and official interpreters alike should be undertaken in just the same way: the courts should abandon their practice of taking judicial notice of 'plain meaning' and should allow evidence of the meaning of legislation by expert linguists and primary users disinterested in the outcome of

[61] Sullivan, above n. 3 at 162–167. See also Sullivan, above n. 39.

[62] Above n. 3 at 170.

[63] Ibid. 171

[64] Ibid, 173.

the particular case.[65] If there is a dispute about the conventions of textual communication (the effect of headings, notes, examples, etc.), this can be resolved in the same way as other higher-level disputes about fact are resolved in a court of law: by expert evidence.

In short, there should be no special legal rules for 'interpretation' that do not apply to how meaning is generated from laws by ordinary users.[66] All reading is interpretation, and all interpretation is just reading: the everyday act of generating meaning from a text in its context at a particular historical, social, and cultural moment.

## 3. Conclusions

I hope this paper offers some food for thought about how legislative section headings are used, and some ideas about the creative use of the divided heading device. My observations on this and other topics relating to section headings are framed around a more general contention that the 'rules' for a primary user in working out the meaning of a law ought not to be so different from those that apply to an official interpreter. If this is accepted, then drafters will find themselves more free to adopt techniques (based on general principles of communication) that will allow greater access to the law for all those who need it, primary users and official interpreters alike. In particular, I argue that far from being an anathema to classical drafting technique, the redundancy involved in section headings and other plain language devices helps enable laws to be read more naturally by those whose behaviour is sought to be affected by them (and perhaps more importantly, their advisers) and also by those whose job it is to administer them and to adjudicate disputes about their meaning.

One implication of this approach to interpretation generally is that, just like official interpreters in Sullivan's schema, we need to obtain an empirical, that is to say evidence-based, understanding of how the laws we are drafting will be understood by their primary readership. This leads to the conclusion that legislative drafting could benefit from the reader-testing advocated by others before me.[67]

Drafting by reference to an objective understanding for what the law will likely mean in context, when its meaning is generated by primary users after enactment, is more likely to

[65] Ibid, 162-167.

[66] There are, of course, sui generis conventions for reading statutes, relating for example to their idiosyncratic structure and numbering, restricted syntax and intricate cross-referential features (both within the statute and between statutes). These affect the meaning of the law as generated by primary users and official interpreters; such conventions send 'meta-legal messages' about their meaning (see Sullivan, above n. 3 at 149–152). Sullivan gives as one example the practice of regularly consolidating Canadian statutes, which sends a meta-legal message that the statute book must be read as an integrated whole (ibid, 152–157).

[67] For example, see D Berry 'Audience Analysis in the Legislative Drafting Process' (2000) The Loophole, 61; D Berry 'Techniques for Evaluating Draft Legislation' (1997) The Loophole, 31; D Greenberg 'The Three Myths of Plain English Drafting' (2011) The Loophole (special ed.), 103.

be consistent with the meaning assigned to that law by official interpreters. This is probably so whether or not official interpreters are prepared to accept empirical evidence of meaning (rather than rely on presumptions and the doctrine of judicial notice), but it certainly prepares the ground for any positive developments in interpretation law such as those that are advocated by Professor Sullivan.

At the level of technique, for the same reason, we need to know more about the effect of drafting devices employed by drafters to facilitate communication (such as section headings). From my position as a drafter, I have to admit that I just do not have any evidence (beyond an instinctive feeling, occasionally supported by anecdote and research such as the OPC survey[68]) whether in practice, for any particular law, these techniques significantly help individuals who use the law to generate the meanings intended for the law. Systematic user testing among both inexperienced and experienced users of the law, and official interpreters, of the techniques described in this paper, and others, may help to determine whether they are at all worthwhile and could assist in developing more targeted applications.

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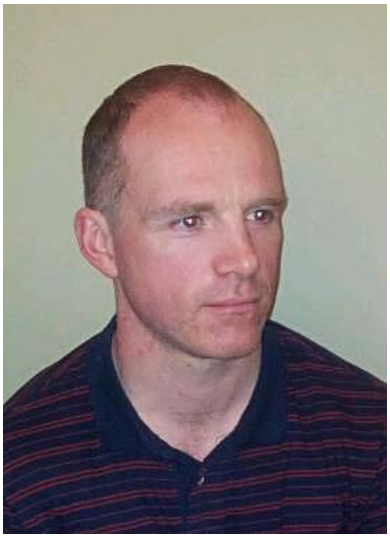
[68] Office of Parliamentary Counsel (Australia), op cit.

# A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996

Ronan Cormacain[1]



*Abstract:*

This article investigates whether plain language principles can improve the quality of a statute from Northern Ireland. It considers two definitions from that statute and applies the following principles: use of simple words, avoiding superfluous concepts, avoiding front-loading of sentences with conditions, use of lists, formatting. It concludes that these principles generally improve quality, but that terms of art should not be simplified. It cautions that judges must also take on board plain language principles in interpreting statutes and argues that the principles must not be automatically applied, but considered in each instance to determine if they will improve the statute.

## Introduction

The purpose of plain language drafting is to improve the quality of legislation by drafting in a way which is simple and clear. Simplicity and clarity are goals which every legislative counsel would agree are worthwhile. Furthermore, they enhance democratic legitimacy:

[1] Consultant Legislative Drafter. Formerly of Office of the Legislative Counsel, Northern Ireland I gratefully acknowledge the support of the Northern Ireland Law Commission and the Institute of Advanced Legal Studies in preparing this essay. The views expressed are my own. Comments welcome at ronan@ronanruth.plus.com.

'people who live under the Rule of Law are entitled to claim that law should be intelligible'.[2]

Plain language is not some new-fangled concept. The *Administration of Justice (Language) Act* (Ireland) 1737 sought to ban incomprehensible legal language. The Preamble states

> Whereas many and great mischiefs do frequently happen to the subjects of this kingdom from the proceedings in courts of justice being in an unknown language; those who are summoned and impleaded having no knowledge or understanding of what is alledged for or against them … who use a character not legible to any but persons practicing the law.

At that time the 'legalese' was the French and Latin favoured by lawyers. Although the Irish language is an official language in the Republic of Ireland, in Northern Ireland it too falls foul of the 1737 Act. The Court of Appeal in Northern Ireland recently prohibited an applicant from presenting an application for a licence drafted in Irish.[3]

How useful in practice are plain language principles? Edwin Tanner carried out a quantitative study of Australian statutes to determine if plain language principles resulted in more intelligible statutes.[4] He concluded that much headway had been made. This essay takes a qualitative approach. It applies plain language principles to a case study to ascertain how practically useful the principles are.

The case study is the *Business Tenancies (Northern Ireland) Order* 1996 ('the 1996 Order'). I have chosen this as a case study for two reasons. Firstly, it is a detailed and technical law and as such, difficult for the lay person to understand. Even experienced conveyancing lawyers struggle with it.[5] Peter Butt criticises traditional drafting (particularly of leases) which 'ooze archaic language, illogical word order, complex grammatical structures and sentences of excruciating length'.[6] If plain language can help here, it can help anywhere. The second reason is more prosaic. I was recently commissioned by the Northern Ireland Law Commission to assist with drafting amendments to the 1996 Order. As such, it is a statute I am familiar with.

There are a large number of plain language principles. Turnbull gives a good exposition of them[7] and they also appear in several drafting manuals.[8] For this short essay, I will not list

[2] Lord Simon, 'The Renton Report – Ten Years On' (1985) 6 SLR 133.

[3] *Re Mac Giolla Cathain's Application for Judicial Review* [2010] NI 258.

[4] Legislating to Communicate: Trends in Drafting Commonwealth Legislation (2002), 24 Sydney L Rev 529.

[5] Comment from Neil Faris, Commissioner, Northern Ireland Law Commission and solicitor.

[6] Modern Legal Drafting (2002), 23 SLR 12, 13

[7] Clear Legislative Drafting: New Approaches in Australia (1990), 11 SLR 161.

[8] See for example Minnesota Bill *Drafting* Manual (2002, Office of the Revisor of Statutes).

all the principles. Instead, I have selected a few principles which appear common to most of the lists of principles and which are relevant to the case study.

The argument developed is not revolutionary. It is that these principles have a practical benefit, provided that they are not applied rigorously and automatically. They are a useful tool for improving the quality of legislation.

### Selected Plain Language Drafting Principles

This is by no means an exhaustive list.

- Use simple words. In particular:
  - Avoid archaic words,
  - Avoid complicated words when a simpler or shorter word will suffice,
  - Don't be bound by a precedent which contains outdated modes of expression,
- Don't create superfluous concepts,
- Don't front-load sentences with conditions,
- Use lists to break up longer sentences,
- Use formatting to break up text and make meaning clearer.

These principles are not absolute. They normally have a caveat along the lines of 'unless it is necessary to do otherwise', or 'as simple as possible, but no simpler'. Even the most ardent proponents of plain language recognise that one cannot be absolutely prescriptive about the contents of legislation.

### Case Study: Definitions in the 1996 Order

The *Business Tenancies (Northern Ireland) Order* 1996 is a piece of primary legislation from Northern Ireland. It regulates the relationship between landlords and business tenants. Its purpose is to facilitate business by granting business tenants additional rights, in particular strong security of tenure. The rationale is that security of tenure gives businesses continuity and the confidence to develop. The 1996 Order copies many concepts from its predecessor, the *Business Tenancies Act* (Northern Ireland) 1964 ('the 1964 Act').

For the purposes of this analysis, it is not necessary to consider the whole Order. In fact, two definitions from it will suffice as a basis to demonstrate the uses and limitations of plain language drafting. These are the definition of 'landlord' from Article 2(2) and the definition of 'controlling interest' from Article 2(4).

Definition of Landlord

> "the landlord", in relation to a tenancy ( "the relevant tenancy"), means the person (whether or not he is the immediate landlord) who is the owner of that estate in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—
>
> (a) that it is an estate in reversion expectant (whether immediately or not) on the termination of the relevant tenancy; and
>
> (b) that it is either the fee simple or a tenancy which will not come to an end within 14 months or less—
>
> (i) by effluxion of time, or
>
> (ii) by virtue of a notice already served being a notice served in relation to that tenancy by the immediate landlord or tenant thereof in accordance with the terms of that tenancy, or
>
> (iii) by virtue of a notice to determine, or
>
> (iv) by virtue of a notice under Article 7 requesting a new tenancy,
>
> and is not itself in reversion expectant (whether immediately or not) on an estate which fulfils these conditions;

Definition of Controlling Interest

> For the purposes of this Order a person shall be deemed to have a controlling interest in a company if he has the power to secure, by means of the holding of shares or the possession of voting power in or in relation to the company, or by virtue of any powers conferred by the articles of association or other document regulating the company, that the affairs of the company are conducted in accordance with his wishes.

## Application of Plain Language Drafting Principles to the 1996 Order

'Effluxion of time'

The definition of landlord includes the phrase 'effluxion of time'. Effluxion is not a simple word in ordinary usage.[9] The *Compact Oxford English Dictionary* does not define it. The *Shorter Oxford English Dictionary on Historical Principles* defines it as 'The action or

[9] Having said this, the special issue of The Loophole, 9 February 2011 does state that 'Duncan [Berry], through "effluxion of time", became a consultant in Hong Kong in 1999'. I make no judgement on how apposite the phrase is in this context.

process of flowing out; an out-flow'. Aiyar includes effluxion of time within a legal dictionary and defines it, with reference to tenancies as

> the conclusion or expiration of an agreed term of years specified in the deed or writing, or expiration arising in the natural course of events, in contradistinction to the determination of the term by the acts of parties or by some unexpected or unusual incident or other sudden event.[10]

Wylie, in his majestic survey of Irish land law refers to expiry of a lease at the end of the term where this was fixed as a principal means of determining the relationship of landlord and tenant.[11] He does not specifically mention the term 'effluxion of time'.

The plain language approach would be to substitute a simpler synonym for effluxion, perhaps the 'passage of time' or the 'expiry of time'. Both of these phrases are more intelligible to readers and neither of them requires the use of a dictionary for the reader of average intelligence. A law which users can understand is axiomatically a good thing. To take this point further, many plain language advocates suggest that even complex concepts can be expressed in simple language.[12] This is not necessarily correct, or it may only be correct if legislative counsel is prepared to spend an inordinate amount of time and words explaining the complex concept simply.

Neither 'expiry' nor 'passage' captures the precise meaning which effluxion conveys. If time effluxes, it runs out. It conveys the notion that there was a fixed quantity of time and now that time has naturally flowed out – there is none left. The passage of time or the expiry of time do not give that same sense of the fixed quantity running out by a natural process. Effluxion may not be as readily understandable but it is the more precise term. In my opinion, this is a case where precision trumps understandability and as such, plain language must give way. Having said this, "expiry" is a relatively good approximation to the meaning of efflux, and has the benefit of being easily understood. Drafting is always a delicate balance between concepts such as precision and simplicity.

### 'That is to say'

The definition of landlord includes the phrase, 'the following conditions, that is to say' and then goes on to list the conditions. The phrase 'that is to say' is redundant. It adds no meaning to the definition. It harks back to the use of the Latin phrase '*viz*.' (usually translated as 'that is to say'). The phrase can be traced back to section 28(1) of the 1964 Act. It is an outdated mode of expression and as such goes against the principles of plain

[10] P Ramanatha Aiyar, *The Law Lexicon* (Wadhwa Nagpur, 2007).

[11] JCW Wylie, *Irish Land Law* (3rd ed, Butterworths, 1997) at paragraph 17.075.

[12] Quantum physicists may disagree! It was said in 1919 'that only three persons in the world can understand [Einstein's theory of] relativity'. See further Jean Eisenstaedt, *The Curious History of Relativity: How Einstein's Theory of Gravity was Lost and Found* (Princetown University Press, 2006).

language drafting. In this context, I agree with the application of those principles in this context. The only thing this superfluous phrase adds to the legislation is clutter.

### 'Thereof'

The definition of landlord includes the phrase 'in relation to that tenancy by the immediate landlord or tenant thereof'. 'Thereof' is an archaic word meaning 'of the thing just mentioned'. It, along with 'thereat', 'hereby', 'hereinafter' and similar words, is a classic target for the plain language movement. In this context, 'thereof' adds no meaning. If the Order is talking about a tenancy and then immediately mentions a landlord and tenant, it is perfectly clear that it means the landlord and tenant of that tenancy. 'Thereof' adds nothing and although it may have been included to copper-fasten the meaning as 'relating to the tenancy that we have just mentioned' it is not necessary. As such it is a superfluous word and should be removed from the Order.

### Numbered list

The 1996 Order uses a numbered list (of four roman numerals) to describe the four ways in which the tenancy could come to an end within 14 months. Plain language encourages using lists to break up text. A list is much easier on the eye than a solid wall of text. The user can readily scan down the list and identify the separate items and determine which item on the list has particular relevance. Compare this with the previous definition in section 28(1) of the 1964 Act:

> that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice already served being a notice served in relation to that tenancy by the immediate landlord or tenant thereof in accordance with the terms of that tenancy or a notice to determine as defined in section 3 or a notice under section 5 requesting a new tenancy;

The 1964 definition requires careful attention in order to determine where one element of the definition stops and a new one begins. Even worse, no assistance is given by any punctuation – even a comma would have helped. Although the drafter of the Order may not have been familiar with plain language principles in 1996, it is clear that the standard professional approach of making legislation clearer is consonant with those principles. The numbered list is a positive step in improving the quality of legislation.

### Visual Aids – Formatting

The same reasoning pertains to formatting as pertains to numbered lists – the text of a statute should be broken up and arranged in a way that facilitates easier reading and quicker scanning. This plain language principle has much to recommend it. The definition of

landlord is in the same format as in the original text of the 1996 Order. The paragraphs are indented and the sub-paragraphs are further indented.

The net effect of these indentations is to make the text much easier to read and understand. At a glance, the reader can see that the definition of landlord has two main components and that the second component has four sub-components. Sub-paragraphs (i) to (iv) relate to paragraph (b), not (a) as they are indented in from paragraph (b). The drafter could have attempted the same result without formatting, but it would have taken much more text to explain it, and it would not facilitate as intuitive an understanding of the text. Plain language principles improve clarity.

There is an additional minor technical point here. For some reason, the indents in the Order are in different positions from the indents in the 1964 Act. There does not seem to be any reason for this difference, nor can I see a difference in meaning.

However, legislative counsel should beware of dismissing such a small thing as a trifling inconsequence. In the notorious case of *Casement*,[13] one small point of punctuation was the difference between freedom and execution by hanging. Roger Casement was an Irishman tried for treason after he made contact with the Germans during World War I in order to obtain support for the Irish revolution. Treason would be committed by acting in concert with the King's enemies either inside or outside the realm. The question was whether it was the 'enemies' who were inside the realm, or the 'acting in concert' which was done inside the realm. It was held that 'enemies' could be inside or outside the realm. The simple lack of a comma in the definition of treason in the *Treason Act* 1351 facilitated this interpretation. It was said at the time that Casement was 'hung on a comma'.[14]

### Definition of 'Controlling Interest'

The definition of 'controlling interest' contains four sub-conditions before reaching the actual meat of the definition. The key point in the definition is that the person can secure how the affairs of the company are conducted. However, before reaching this key point, the reader must first wade through four different ways in which the person could have this power – by means of holding shares, by means of having voting powers, by powers contained in the articles of association or by powers contained in any other document.

Anthony Watson-Brown would describe this as a classic case of front-loading a legal proposition with conditions.[15] He traces this practice back to George Coode and Lord Thring. Although he excuses them (they were trying to reduce the use of the proviso), he

[13] *King v Casement* (1917) 1 KB 98.

[14] Nobel prize winning author Mario Vargas Llosa has published Casement's full story in *El sueño del Celta* (The Dream of the Celt). The English translation is expected to be published by Faber in 2012.

[15] "Defining 'Plain-English' as an Aid to Legal Drafting" (2009), 30 SLR 85.

does not accept that front-loading should be used today in modern drafting. The reasoning behind this principle is clear-cut. It is difficult for readers to link the first part of the sentence to the last part of the sentence if they have to push their way through four conditions in the interim. The law should be set out first (that controlling interest means securing that the affairs of the company are carried out in accordance with your wishes) and then the four ways in which this may occur should be set out (preferably in a numbered list). The application of plain language principles would improve the quality of this definition.

### 'Relevant Tenancy'

In the definition of the landlord, an extra concept is created – the 'relevant tenancy'. The concept is slightly circuitous, it means the tenancy which relates to the landlord we are defining. The purpose of creating this concept is so that later on in the definition, we can say the 'relevant tenancy' without having to say the 'tenancy which relates to the landlord that we are defining'.

Turnbull, in discussing the practice in Australia proposes a greater use of definitions.[16] Definitions don't just help to define complex concepts, they also can make sentences shorter.

Creating a shorthand way of referring to a long-winded concept can improve the quality of legislation. For example, consider references to a company which has failed to submit its annual accounts by the due date. If there are to be repeated references, it will be much simpler to say 'the defaulting company' rather than 'the company which has failed to submit its annual accounts by the due date' on each of those occasions.

In the context of the definition of landlord in the 1996 Order, the 'relevant tenancy' is not particularly helpful. If the definition is of a landlord, then self-evidently it is the landlord of a tenancy. Of the first three lines of the definition, approximately half could be removed, specifically, all the references to 'in relation to a tenancy' and 'the relevant tenancy'. There is scope for simplification here in accordance with plain language principles, such simplification being an improvement to the Order.

### 'Estate in Reversion'

An estate in reversion expectant upon termination of the tenancy is probably the most unintelligible concept in the 1996 Order. Plain language principles suggest drafting in a language that everyone can understand. Ruth Sullivan makes a powerful case for this when she says 'even though legislation is addressed to the public at large, it is written for a small class of official interpreters who function as mediators between the statute book and the

[16] Turnbull (note 7).

public'.[17] She argues that the requirement to have a mediator diminishes the legitimacy of legislation.

The difficulty is that there is no simple and brief way to redraft the phrase. People cannot 'own' land in the strict legal sense in Northern Ireland. What they own is termed an 'estate' in land. The legal owner of all land, since feudal times, is the Crown. For present day practical purposes, if the estate is a 'fee simple' estate, this is equivalent to full ownership – the Crown no longer forfeits your land if you don't provide enough knights! The feudal concept of estates is a fundamental part of land law in Northern Ireland.

An estate is in reversion if it is not a present estate but is subject to an intervening estate. The reversionary estate may be dependent upon some condition being passed in order for it to become a present estate. The condition in this case is the termination of the tenancy, the 'expected' event is the termination of the tenancy.

There is clearly a certain amount of meaning packed into the phrase 'estate in reversion expectant upon the termination of the tenancy'. To unpack this meaning would take some time and add considerable length to the Order. The primary purpose of a statute is not educative, it is to effect a change in the law. Expounding upon meaning is a laudable aim, but if taken too far will add length and clutter to the statute. As a term of art, this phrase cannot be reduced down by the application of plain language principles.

What has been argued above is correct within the narrow confines of the 1996 Order. The Order is bound to the use of this phrase as the phrase precisely encapsulates the legal concept. However, the Northern Ireland Law Commission has recently proposed taking an axe to the forest of archaic land law concepts. The Commission has predicated its suggestions for reform very firmly on the principles of clarity, simplicity and precision. It recommends abolishing 'both feudal tenure and the doctrine of estates which are conceptual fictions, since by making radical change a simpler concept of ownership could be introduced'.[18]

Therefore, piecemeal plain language reform of some archaic concepts in the Order is not feasible. Genuine and effective reform requires revision of the entire statute book. Clearly this is not a simple task – it necessitates consideration of statutes going right back to *Quia Emptores* in 1289.[19] Plain language drafting merely scratches the surface of this reform and the reform will only be meaningful if it incorporates root and branch amendment of the statute book. This is not to detract from the benefits of plain language drafting, merely to set out some of its limits. The reforms proposed by the Commission share the same purpose as plain language principles – to make the law simpler and easier to understand. Legislative

[17] 'Implications of Plain Language Drafting' (2001) 22 SLR 145, 157.

[18] Northern Ireland Law Commission, *Consultation Paper Land Law* (NILC 2C 2009) at page xvii.

[19] Statutes of Westminster the Third 1289-1290 18 Edw. I cc. 1, 2, 3.

counsel can only go so far in this exercise of simplification, sometimes the legislator will also need to agree to simplifying the substance of the law.

### Who is the 1996 Order For?

The starting point is that law is for the population as a whole – the rule of law means we are all subject to the law and therefore we should all be able to read and understand it.

Some laws are addressed broadly and publicly, some are directed at particular communities. The 1996 Order is a specific law with a reasonably discrete group of users: landlords, business tenants and their advisers. Do they form a semiotic community? They form such a community if they share a common understanding of words and phrases which the larger community do not share. For example, there is a semiotic community of oil producers who understand the definition of 'light oil' within the meaning of the *Hydrocarbon Oil Duties Act* 1979. The technical definition ('not less than 90% by volume distils at a temperature not exceeding 210C') is probably meaningless for most people, but meaningful for them.

Empirical research on the Order has shown that its user group is not a semiotic community.[20] Many users are small business-people. They do not understand the complex legal concepts contained within the Order. They rely on solicitors to explain its meaning to them.

This has implications on the need for plain language drafting in the Order. The law is reasonably complex. There are risks for business tenants if they fall foul of it. Negotiating a lease can be a complex thing and it is appropriate to have legal advice. It has been shown that plain language principles can improve the quality of legislation. It has also been shown that certain words and phrases which are less intelligible to the lay reader of average intelligence should remain in the Order.

There is a limit to the use of plain language in the Order and where it becomes more complex, it is understandable and useful to engage the professional assistance of a lawyer.

### A Warning from Case Law

A landlord and tenant case from Northern Ireland should serve as a caution on the limits of using plain language. The lease in *Northern Ireland Carriers v Larne Harbour*[21] contained a covenant 'not to assign, sublet or part with possession of the said premises without the previous consent in writing of the lessor'. Section 18 of the *Landlord and Tenant Law Amendment (Ireland) Act* 1860 states that 'it shall not be lawful for the Tenant to sub-let the said lands or any Part thereof [without the consent of the landlord]'. The landlord would therefore have a reasonable assumption that the tenant couldn't sublet.

[20] Northern Ireland Law Commission, *Consultation Paper Business Tenancies* (NILC 5 2010).

[21] [1981] NI 171.

The judge made two rulings, both against the landlord. Firstly, he ruled that although the lease disallowed subletting the entire premises, it didn't disallow subletting part of the premises. To achieve that effect, the lease should have said 'not to sublet the premises or any part of the premises'. Secondly, s.18 only applied where an agreement prohibited subletting, that is, an absolute bar on subletting. It didn't apply to this covenant as this was an agreement regulating subletting i.e. subletting only with consent of landlord.

At first glance, plain language principles would seem to support drafting "sublet the premises" rather than "sublet the premises or any part of the premises". Similarly, at first glance, plain language principles would regard "an agreement against subletting" as including an agreement against subletting without the consent of the landlord. This approach would fall foul of the judge in this particular case. The difficulty is knowing with certainty how a particular judge will interpret a particular phrase. Within Irish land law, there is a desire to facilitate freedom of alienation of land, which means that courts will take a restrictive and limiting approach to any provision which would prevent someone from disposing of land as they please. Legislative counsel will need to have this background legal knowledge of the subject matter. If there is any doubt that subletting the whole includes subletting a part, then the draft should take the more expansive approach. Plain language should not be taken to mean glossing over small but important legal distinctions.

## Conclusion

I have analysed how the application of plain language principles could have improved the 1996 Order. In six instances, plain language principles would have improved the quality of legislation. The two instances where plain language would not have helped are both connected with technical terms of art. Most plain language drafters acknowledge that terms of art may not be suitable for simplification (even section 3 of the *Administration of Justice (Language) Act* Ireland 1737 allows the use of French or Latin phrases to describe technical names of things).

The evidence from this case study is clear – plain language principles can improve the quality of legislation. Plain language promotes clarity, and clarity is a fundamental goal of all legislation.

The first caveat to this conclusion is that plain language should be a servant not master of legislative counsel. The automatic and mechanical application of plain language principles to a statute will not work. Each instance needs to be separately considered – this case study shows that plain language won't work in two instances. If plain language becomes the new orthodoxy, its universal and unthinking application will cause serious problems. Plain language should be encouraged but not required.

The second caveat is that the use of plain language cannot be a solo endeavour of legislative counsel – it requires the willing collaboration of those who interpret law. If the plain

meaning intended by legislative counsel is to be the plain meaning applied by the courts, then judges will have to recognise and accept the validity of plain language. A recent survey in Australia found a high degree of awareness of many of the new plain language innovations and furthermore a high degree of acceptance of them amongst the judiciary.[22] Most Northern Ireland judges do express a desire for simple and clear legislation. They also assume that legislative counsel mean what they say and say what they mean. Gillen J recently stated that "Precision drafting rather than disorganised composition is presupposed".[23]

Plain language drafting will be frustrated if judges expect statutes to exhaustively list every possible permutation and combination of words. If we want statutes that are clear, simple and precise, then all concerned in drafting and interpreting legislation have to assimilate plain language principles within our legal consciousness.

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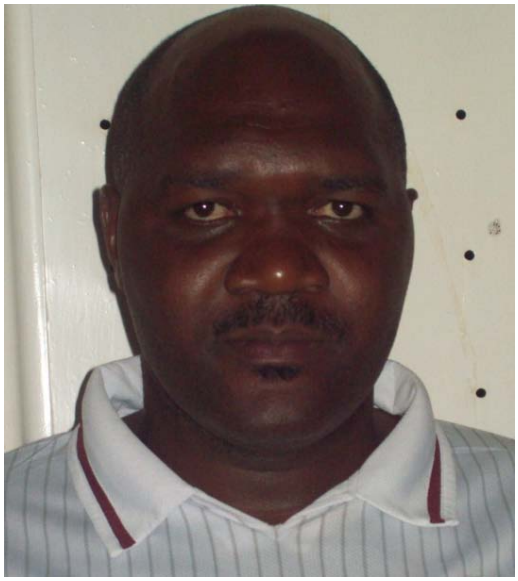
[22] Office of Parliamentary Counsel, Results of the 2010 Legislation Users Survey (May 2010).

[23] *In the matter of an application by Christine Forde for judicial review* [2008] NIQB 40 at para. [47]. In this context, the *Northern Ireland Carriers* case does seem to jar with this general approach.

# Aspects of Legislative Drafting: Some African Realities

Lambert Dushimimana[1]



*Abstract:*

This article highlights some of the challenges that African legislative drafting faces, particularly in terms of improving the intelligibility of legislation for those outside the legal community. It concludes that African legislative counsel need to present legislation in a style that is accessible to parliamentarians enacting it, administrators responsible for implementing it, courts required to interpret it, and all others whose rights it may affect. But this requires training in drafting and in research skills to equip African countries with competent and experienced personnel in legislative drafting

## Introduction

Drafting is an extremely onerous, exacting and highly-skilled task. What is clearly conceived in the mind may not be easily expressed with clarity and precision in words. Drafters are wordsmiths, and good policy may become a bad law as a result of the poor arrangement of words in a legislative sentence - creating ambiguity, vagueness, obscurity, or even absurdity. As Edmund Burke observed, "bad laws are the worst form of tyranny";[2] and

[1] Principal State Attorney, Legislative Drafting, Ministry of Justice, Rwanda.

[2] Edmund Burke, cited by Florence N. Dollo, Tax legislation and the lawyer's training needs - an African perspective, available at, www.unitar.org, accessed on 15 August 2011.

equally, laws badly drafted or inaccessible in terms of readability and clarity are also a form of tyranny.

This is true not only in developed countries but also - and especially - in developing ones, where the majority of citizens cannot read. Most African statutes are not well-drafted and often speak in legalese, a language that only judges and lawyers can read and understand.

The challenges that African legislative drafting faces are many. This paper highlights some of them. In particular, the paper considers the lack of skill and experience of African legislative counsel, and the effects that their drafting has on citizens.

## Lack of skill and experience

Drafting legislative documents is a challenging process. Onerous tasks range from the organization of complex ideas to troublesome provisions to problems of logic. Those charged with drafting legislative or legal documents need a solution to help them navigate through these challenges.

A good legislative counsel requires a good basic legal knowledge, a feeling for the proper use of the language in which legislation is drafted, a critical ability, lots of imagination, and plenty of practice. General legal ability by itself is not sufficient. A competent lawyer without practical experience cannot perform the craft satisfactorily.

Unfortunately, lawyers trained and skilled in legislative drafting are very rare in Africa. And yet each jurisdiction needs drafting capacity. Governments need legislation covering a multiplicity of issues. Indeed, not only are new laws needed, but existing laws require revision; most African countries (such as Rwanda and Burundi) are undertaking law revision. All these endeavours need lawyers skilled in drafting. The need for training is urgent.

Some attempts are being made. The University of Pretoria has developed the “Legislative Drafting Program for South Africa” to meet South Africa’s goals for revising and amending legislation after the new Constitution of December 1996. In Ghana, each year, a twelve-week course offers short-term training for legislative counsel based on a curriculum developed by the Commonwealth Secretariat in consultation with member states. This training programme was introduced three years ago at the request of Commonwealth law ministers, who asked the Commonwealth Secretariat to help fill the near vacant field of legislative drafting in some parts of the Commonwealth. The Institute of Legal Practice and Development in Rwanda is revising its curriculum to include a drafting course. All these attempts are a response to requests from African drafting departments to find a sustainable solution to address the perennial shortage of legislative drafters in the region. There are other endeavours of a similar nature in Uganda and Zambia. All this is good - but it is still not enough.

The courses on legislative drafting throughout Africa reflect the desire of African leaders to have strong legislative drafting offices. Good legislative drafting is a key to the rule of law. A poorly-drafted statute may lead to a violation of liberties, and other consequences that the drafter did not intend. So courses of the kind must not only be multiplied in number, but must be made accessible to all drafters in Africa. For this, adequate funding is required, for most courses of this kind are beyond the financial reach of drafters. The Commonwealth Secretariat is doing much in the field; it would be good if other transnational organizations or agencies would follow the example.

The majority of drafters in different African jurisdictions are relatively young or fresh graduates. They need training to learn the art of legislative drafting. The leading Canadian drafter, Elmer Driedger, believed that it takes about ten years to train a competent drafter.[3] Learning the rules of swimming does not make a person a swimmer; one has to get into the water. So upon training, one needs to practise the art of legislative drafting. The consequence is that many African statutes are drafted by foreign consultants who don't know the reality on the ground. They copy statutes from their countries and reproduce them, merely changing names. Very often the statutes are inappropriate for the jurisdiction to which they are transplanted.

### Use of language only lawyers can understand

One of the principal purposes of any legislation is to communicate the law from the law-making authority to society.[4] The communication of legislation is of a special kind. The framework of society depends largely on it, and much that is dear to the heart is frequently affected - liberty, life, property, marriage, taxes, indeed all aspects of human conduct within society. For Joseph Kimble, "the purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible"[5]. So any legislation should be written in clear and precise language to help the people concerned with it to well capture what it says.

Most African lawyers working in the field of legislative drafting have a legalistic-style background. They occupy high positions in governments or they are heads of legislative units in various private or governmental institutions. They would prefer to leave the style of statutes unchanged. When asked about this issue, their response is that they don't see any other style for legal documents. For them, legalese leads to greater precision: the close

[3] E.A. Driedger, cited by R. B. Seidman, "Law, development and legislative drafting in English-specking Africa", (1981), 19 Journal of Modern African Studies 131.

[4] G.C.Thorton, *Legislative Drafting*, 4th ed., Great Britain, Tottel Publishing, 2006.

[5] Joseph Kimble, Answering the critics of plain language, available at www.plainlanguagenetwork.org, accessed on 16 August 2011.

limitation of judicial and official discretion.[6] They say that all professions have their own language, and that legalese is a specialised language for lawyers; it serves as a formula that triggers predictable judicial responses. "A lawyer who would write in a simpler style and be easily understood by everyone is not a lawyer"[7], a lecturer at a law School might say. "A lawyer must impress in both writing and speaking", he might add.

At some level, this kind of thinking is understandable. All in-groups have their own style, usually reinforced by the processes of socialisation into the group. Lawyers learn legalese in law school; they read it in appellate opinions, in statutes and wills and contracts and deeds ... for most of their professional lives. Various peoples all around the world come to value as beauty all sorts of disfigurements and strange adornments - in China, bound feet; in Africa, facial scarification; in the Pacific, painful body tattooing; in 18th century England, 'beauty patches', red facial paint, and outrageous wigs. In the same way, lawyers came to value legalese.[8] Why the use of multiple redundancies? Why the use of specialised legal words when perfectly adequate lay-language words exist? They have valued legalese for a long time. Like any other traditional lawyers, African lawyers do not want to divorce "their" traditional style because they have become familiar with it.

### Can plain language be used in African legislative drafting?

Before responding to this question, I should start by explaining what plain language is. Several definitions have been provided by different authors. They all have in common that good writing delivers its message clearly and concisely - the kind of writing that is centred on the reader. Professor Peter Butt and Richard Castle define plain language as the language that is not artificially complicated but is clear and effective language for its intended audience.[9] For Professor Robert Eagleson,

> Plain language is clear, straightforward expression, using only as many words as are necessary. It is a language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not a baby talk, nor is it a simplified version of the language.[10]

[6] Seidman, above n. 3.

[7] I heard these comments from a lecturer at a Law School addressing his students in 2000.

[8] R. B. Seidman, Law, development and legislative drafting in English-specking Africa, *The Journal of Mordern Studies,* 19, I, (1981).

[9] Peter Butt & Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language*, 2ed., Sydney, Cambridge University Priss, 2006.

[10] Robert Eagleson, *Plain English*, available at: www.stylewriter.org, accessed on 16 August 2011.

He went on by saying that "writers of plain language let their audience concentrate on the message instead of being distracted by complicated language. They make sure that their audience understands the message easily."[11]

Coming back to the main question of whether plain language can work with African Statutes, the answer is simple: it can. The only obstacle to its use is an instinctive resistance to change, a resistance heightened by historical background and the need to invest time to acquire new skills. All jurisdictions that have successfully adopted plain language as the language of legislation have encountered the same resistance. For example, after experiencing resistance to the use of plain language in US, the former US President Clinton in 1998 issued a memorandum to the heads of US federal executive departments and agencies directing them to begin using "plain language" to make government more responsive, accessible, and understandable in its communications with the public.[12]

Another obstacle to the expansion of plain language in Africa is a simple lack of awareness. Many African drafters are not aware of the existence of the plain language movement. They resist because they have not yet had the opportunity to taste plain language's benefits. After all, who wouldn't like their documents to be clearly understood?

Consider the following example, taken from the *Constitution of the Republic of Rwanda* of 04 June 2003:

> The Prime Minister and the other members of the Cabinet may attend the sessions of each Chamber of Parliament if they so wish. They take the floor whenever they request to do so.

The provision is written in two sentences, of 34 words. It could easily be shortened to one sentence of 26 words:

> The Prime Minister and other members of the Cabinet may attend the sessions of each Chamber of Parliament and take the floor whenever they request it.

Who would not wish to save readers' time by using short sentences and avoiding redundancies? Surely, if called to choose between the two above provisions, most drafters would choose the second because of its brevity and clarity.

Examples are numerous. Consider the following provision from Zambia's *Co-operative Societies Ordinance* of 1961:

> In order to be qualified for membership of a cooperative society a person other than a registered society, company or other association of persons, corporate or unincorporate, must have attained the age of sixteen years.

[11] Ibid.

[12] Memorandum for the Heads of Executive Departments and Agencies, June 1, 1998, http://www.plainlanguage.gov/whatisPL/govmandates/memo.cfm.

The message is simply that a person who is at least sixteen years may join a cooperative. But the drafting style and language make the message unclear and hard to understand. It could be redrafted as follows:

> "Anyone who is 16 years of age or over may join a co-operative".

A long provision of 35 words is rewritten in only 13 words. Which of the two provisions is clearer? Which is more time-conscious? Which one can lay readers more easily understand? In my view, African drafters still use traditional writing because it is the only style they know.

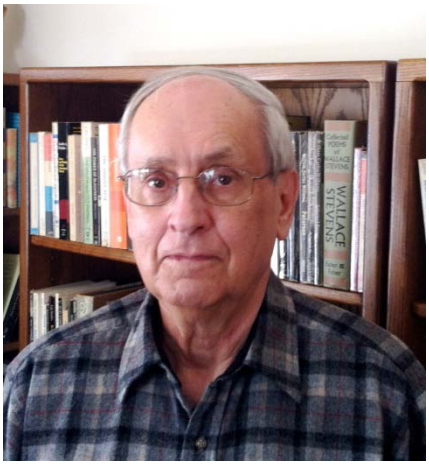
This brings us again to the point discussed above about the need for training in legislative drafting. African legislative counsels need training in legislative drafting, a new field to the continent. African lawyers have used legalese for a long time (for some, since primary school), trained in it, and worked in it. Resistance is a normal reaction. But the more they are introduced to plain language, the more change will occur, as statutes become more readable, precise and able to be understood by the citizens to whom they are addressed.

## Conclusion

The challenge for legislative drafters is to produce laws which not only implement policy effectively, but do so in a manner that is self-evident to all who can reasonably be expected to read and use them. Legislative counsel will always need to frame legislation robustly enough to allow it to withstand the intense scrutiny of legal challenge. To do so, they must be skilled in drafting and experienced enough to ensure that what they write is clear and unambiguous. That is what African legislative counsel need to do: to present legislation in a style that is accessible to parliamentarians enacting it, administrators responsible for implementing it, courts required to interpret it, and all others whose rights it may affect. But this requires training in drafting and in research skills. Only by training will Africa be equipped with competent and experienced personnel in legislative drafting.

# Tools for Statutory Drafters

Jack Stark[1]




*Abstract:*

This article is based on the assumption that statutory drafting is a unique type of writing. Ludwig Wittgenstein would have called it a language game, one of many. Drafting performs its own complement of functions, so the set of tools, or tactics, that can be used to do it well differ from the complements that work for other kinds of writing. The article identifies and explains a number of tools that can be used to do statutory drafting. The most important is a group of five functions; most statutes perform one or more of them. The article also sets forth a number of tools that drafters can use when they are stuck. This group of tools ought to be useful because of the time pressure under which most drafters work.

## Introduction

As everyone who does it professionally knows, statutory drafting is devilishly difficult. Like any other craft, it is done more easily and better if one has and expertly uses appropriate tools. Each craft, including statutory drafting, has its own set of tools and cannot simply adopt another craft's. Drafters might find it to be efficacious to add some tools to their toolboxes.

It will be useful to delineate the assumptions on which the tools discussed below were selected.

First is the belief that drafting is in fact a craft. That is, it is not something that can be done well either intuitively or mechanically.

[1] Retired bill drafter, Legislative Reference Bureau, State of Wisconsin, 32 Glen Arbor Way, Fitchburg, Wisconsin, USA.

Secondly, legislative drafting is a unique kind of writing; it cannot be modeled on any other kind of language game, including ordinary speech. The underpinning of that view is the use theory of language, which holds that the ways in which language is used is the key to meaning. That contrasts with the representational theory of language, which holds that language merely mirrors reality. It follows from the use theory that there are a large number of language games, statutory drafting being one of them. Tactics that might work for another game will not necessarily work for drafting. Some features that help make drafting unique are its high degree of conventionality, its search for accuracy (accomplishing the intended results) above all else and the functions that it performs. Based on those assumptions, one can begin to analyze drafting by identifying its unusual features and by simply looking very carefully at a large number of statutes, performing a functional analysis as one proceeds.

## Tools for Drafting

### The Functions of Statutes

An excellent way of understanding anything is first to identify its function. The function of statutes is to direct behavior. To be more specific, most statutes perform five functions as they direct behavior.

There are three behavioral directives. One is to forbid, which is often accomplished by using “may not” or “shall not”, and “shall not” is a stronger directive than “may not.”

A second behavioral directive is to authorize. That is usually accomplished with “may.”

A third behavioral directive is to require. That should be accomplished with “shall.” In some circles it is accomplished with “must” because it is thought that that word is used for that purpose in ordinary speech. However, ordinary speech and statutory drafting are different language games. To assume that the same tactics work for all kinds of writing makes no sense. Elizabethan sonnets are written differently from telephone directories.

The fourth function is to state conditions to flesh out the behavioral directives. Conditions are the factors that must be present for the directives to apply. Definitions are conditions, for example.

Finally, consequences are also present in statutes. That is, the results of the performance or non-performance of behavioral directives are stated. Examples are criminal penalties.

The next question is the use of these tools. The first task in using them is to determine which function is to be accomplished. The next question is who is addressed; that is, who is being forbidden, authorized or required. It is important to identify that person precisely and to avoid addressing a thing or other non-personal entity. Finally, a drafter needs to determine whether conditions or consequences apply. If they do apply, they need to be connected to the behavioral directive logically and either syntactically or structurally. The most effective

way to connect them to the directives syntactically is to write long sentences that contain subordinate clauses. That results in frequent recourse to clauses that are introduced with "if."

An example will make the use of these tools clearer. Imagine a statute that creates a committee and includes "There shall be a quorum." The use of "shall" is the first indication that something is amiss. That sentence, because of the "shall," appears to be requiring. However, an abstraction is addressed; a quorum is directed to exist. That makes no sense. The sentence actually states a condition. It ought to be rewritten thus: "if a quorum is present, the committee may conduct business". That states the directive that follows from the presence of a quorum, and it implies what happens—business may not be conducted—if the condition involving quorums is not fulfilled. In the rewriting the drafter discovers and identifies the proper directive. Like all tools that work in language games, the tools working in this instance help their user think about the subject matter, which, not thinking about writing something that is easy to read, is the proper task of a statutory drafter.[2]

### The Interlocker

A glance at the way that statutes sit on a page – paragraphing – reveals that many statutory passages look like an outline. That is, they look like this:

(1)…:

(a)

(b)…:

1.

2.

The statutory units are frequently locked together with indentations, each level having a distinctive numbering or lettering. To use this tool effectively one needs to recognize several of its features. First, it forms a hierarchy and the passages that follow the previous numbers or letters amplify and develop the material that precedes them. Second, a drafter should use this framework to isolate common material so that it applies to all the passages that are included in it and have smaller numbers. Third, the hierarchical arrangement shows which passages are of the same order of magnitude. It is generally better to write an interlocked statutory unit than it is to write a shapeless glob of material. However, a drafter should be wary of over-using them. For example, a brief definition that is used only once probably ought to appear next to the term that it defines rather than in a separate statutory unit.

Like using the five functions, using the interlocker helps a drafter think about his or her material. That is, constructing interlocked statutory units encourages a drafter to think in

[2] For an argument that plain language inevitably creates errors, see my article that will appear in May 2012 on the Internet site of the National Conference of State Legislators' Legal Services Staff Section: http://www.ncsl.org/legislative-staff.aspx.

terms of those units, rather than in terms of passages that resemble paragraphs in discursive prose. In doing all kinds of writing it is useful to determine the unit of discourse: the unit that the writer thinks he or she is writing. For example, in discursive prose it is helpful to think that one is writing paragraphs. In statutory drafting it is useful to think that one is writing statutory units. In amending statutory units one should look up one level of generality (to a larger numbered unit) and down one level (to a smaller numbered unit) to make it more likely that all the ripple effects of the original amendment are traced.

### The Complex Sentence

As I mentioned, complex sentences (a sentence composed of a main clause, which could stand alone as a sentence, and a subordinate clause, which could not stand alone as a sentence due to the presence of a subordinating word such as "if,") are useful tools for drafters. Their usefulness can be seen by comparing them to the other two kinds of sentence.

Simple sentences have no subordinate clauses. Examples are "A person who is licensed to practice optometry in another state shall pay a $25 fee. The clerk shall issue a license." The ideas expressed in the two sentences are unconnected to each other; thus, their relationship is open to question. In a compound sentence there are two clauses that could stand alone as sentences and they are connected with "and," "but" or "or." An example is "If a person who is licensed to practice optometry in another state shall pay a $25 fee, and the clerk shall issue a license." The two ideas appear in the same sentence but the relationship between them is vague because the connector is "and," which signifies only that the ideas are related.

In contrast, a complex sentence is one like "If a person who is licensed to practice optometry in another state pays a $25 fee, the clerk shall issue a license." This arrangement makes it clear that the first idea is a condition related to the second idea, which requires. Again, the tool instigates thought. Writing that complex sentence reveals to the drafter the fact that one idea is a condition of the other idea. In fact, using the tool cries out for the addition of "to that person." The complex sentence also provides other benefits. It makes prepositions, weak verbs such as variations of "to be" and imprecise subjects less frequent.

### The Definition

As I mentioned, definitions are conditions. This can be seen in an example: "a doctor is a person who is licensed to practice medicine in this state." That is the equivalent of the condition "if a person is licensed to practice medicine in this state, he or she may do so." Again, a functional analysis is useful. However, first one needs to back up one step. Analyses of writing can be done from three perspectives: that of the writer, that of the reader and that of the text.

From the latter two perspectives definitions tell the meaning of words and phrases. Unfortunately that is not very helpful to drafters. The perspective that is the most revealing

for issues of drafting is that of the writer, because the tactics that a drafter chooses should be designed to help him or her think about the subject matter. It is helpful to continue the functional analysis at this point.

Among the functions that definitions perform are achieving economy of expression, fitting into a system of definitions, setting standards, stating applications and closing loopholes. The last of these functions is the most important for a drafter to have in mind as he or she writes definitions. One result of that is the minimization of administrative and judicial misinterpretation. Those are worthwhile goals of drafters, who, after all, work for legislative entities and thus are obliged to see that the legislative entity's conception of the purpose of a statute, not the conception of an administrator or judge, prevails. Closing loopholes also makes it more likely that a statute serves its purpose or, in other words, is accurate. Accuracy, not clarity (easy reading), should be the primary concern of drafters.

### The Spectrum of Generality

One can imagine a spectrum related to statutes and their interpretation. It stretches from the most specific to the most general. On this spectrum there are pulls in each direction. On the one hand, promoting accuracy, including accuracy of judicial and administrative interpretation, pulls a statute toward the specific pole. On the other hand, the need for flexibility of interpretation pulls the statute toward the general pole.

The right point on the spectrum also varies significantly with the general subject matter of the draft, minimally by the nature of the draft itself. A statute should be moved toward the specific pole if its general subject matter is a battleground or if there is available a plethora of technical information relative to the statute's subject matter. For example, tax legislation is a battleground fought over by, on the one side, tax lawyers and accountants and, on the other side, tax administrators. The drafter should move a statute toward the general pole of the spectrum if there is a large range of situations to be covered. An example of that kind of statute is one in the realm of the criminal law.

Finally, a drafter should remember his or her loyalty toward the legislative branch of government, which suggests the efficacy of moving toward the specific pole.

### The Reality Check

Drafters need to divest themselves of the unconscious assumption that they simply are writing words. Rather they should think that they are mapping the five functions onto the read world. Because accuracy is paramount, this is a crucial concern. It should done before one begins to produce words on a page, occasionally as one drafts and after one has written a rough draft. Various kinds of checks should be made.

First, because statutes direct behavior, the effects of a draft on behavior need to be checked. Secondly, it is necessary to contemplate possible interpretations, including intentional

misreadings. Thirdly, it helps to look at the draft from various perspectives: an ordinary citizen, an administrator and a judge among others. Fourthly, it sometimes helps to compose a visual aid such as a map or diagram. Finally, drafters should ask themselves whether a reader who is determined to read the statute correctly has received sufficient and accurate guidance from the draft.

### The Organizer

In writing drafts that create new portions of the statutes, one has the problem of organizing material. This should be done at a very early phase of the process. That is, a drafter should create order soon, rather than waiting for it to evolve during the composition stage.

One of Dickerson's suggestions is using a template based on federal statutory law. It has definitions, followed by primary material, then secondary material and then administrative details. To follow that pattern a drafter will think in unhelpful ways. For example, sorting material into primary and secondary will not help a drafter write an acceptably accurate draft. The architectural dictum of form follows function is often more helpful. For instance, a draft that creates a process should be organized chronologically. That will help a drafter understand the process. Statutory units being the unit of discourse in drafting, they should be the basis for organizations.

### The Leash

Statutory drafters, particularly quick-witted ones, need to make sure that they are not going too fast. In light of the time pressures inherent in drafting, this is difficult to do. A drafter who has finished a draft very quickly should ask himself or herself whether it really was as easy as it seemed. Other questions to be asked are "what are my assumptions?" and "are my assumptions valid?" Also consider the possibility that the draft needs amplification. One particular area of concern in this regard is the possibility that definitions are needed in order to make it more difficult to misread the statute.

In order to make this questioning process more likely to bear fruit it is often wise to put aside for awhile drafts that were produced very easily. They might look more difficult on a delayed second reading. Another tactic that slows down a drafter as well as making accuracy more likely is to avoid the temptation automatically, without sufficient pondering, merely to add only a word or phrase to an existing statute, merely to automatically add an item to a list or to follow a structure slavishly.

### The Systems Checker

The statute book as a whole is an intricate, enormous system. It is composed of systems within systems. A statute that is being created or amended will be part of at least one system.

In drafting one needs to check the applicable systems. In particular one must be sure appropriately to create, control or prevent ripple effects related to the statute on which one is working. Knowledge of the statutes and such mechanical aids as tables of cross-references abet this project. Reading the statutes in the immediate area of the statute on which one is working is part, but only part, of the job of checking systems.

#### The Specter of the Result-oriented Judge

If a drafter wishes to imagine a reader for his draft the best bet is a judge. There is always a chance that one's statute will be litigated. Even if it is not, a draft will profit from such an imagining, particularly if one imagines the judge-reader to be result-oriented. That is, it is useful to think of the drafting process as a duel between a drafter who is trying to effect the legislative body's purpose and a result-oriented judge who is bent on looking for weaknesses in the draft. It is useful for a drafter to imagine a dialogue between himself or herself and such a judge. In doing so the drafter should think that he or she is playing defense against the judge. Some defensive tactics have already been mentioned. They include adding definitions, getting the functions right, firmly connecting conditions and consequences to behavioral directives and getting the degree of generality and specificity correct.

#### The Focuser

One of the chief requisite talents of a first-rate drafter is the ability to focus. That is, to be first-rate a drafter needs the ability to rivet his or her attention on a draft's main purpose, to relate that purpose to secondary material and to avoid superfluities. Keeping the five functions constantly in mind will help a drafter accomplish those achievements. Other helpful tactics are writing complex sentences and carefully using statutory units. Occasionally doing too much research makes it more difficult to focus, which is not to say that one ought to draft in ignorance.

### Tools for Getting Unstuck

Drafting being difficult, every practitioner of it is occasionally unable to proceed. There are, fortunately, tools for that situation.

#### The Sticking Point Finder

The trick here is to ask in what way you are stuck, not at which point in a draft are you stuck. It is important to ask that question rather than the alternative because the trouble might not be caused at the point in the draft where you have ground to a halt. Some possible sticking points are an illogical organization, an unclear purpose, a missing or incorrect function, a missing connection between conditions or consequences and the relevant

behavioral directive, missing knowledge and an inept fit of the statute into its systems. Once the sticking point is identified one can concentrate on remedying it.

### The Reverse Gear

A highly useful process in the effort of getting unstuck is to go back one level in the thought process. For example, if a drafter cannot find the right word the problem might really be faulty syntax, or if a detail is fuzzy the real cause might be a lack of understanding of the draft's purpose. Sometimes the requester has led the drafter astray. That can be fixed by remembering the conversation that took place at the time that the request was made. Try to discern the requester's assumptions and the problem that he or she wants to solve.

### The Analogy

Sometimes an analogy can be found for an entire draft. For example, a gross receipts tax is an income tax without deductions. Sometimes an analogy exists between a detail of the draft being created and a detail elsewhere in the statutes. For example, an appropriation that needs to be created might resemble an existing appropriation. At other times the analogy is to a solution to a problem, such as creating a viable organization. One needs to be wary of analogies in the statutes of another jurisdiction, because the contexts are likely to vary significantly and thus so will the statute's meaning. One can allow for that problem by keeping a file of examples.

### The Colleague

Sometimes the means for getting unstuck is a colleague. To avail yourself of that possibility regularly you need to determine who knows what. Some colleagues will be good at a particular drafting problem, such as constructing appropriations. Others will have a good understanding of a branch of the law, such as a particular constitutional provision. If a drafter has identified the likely helpers it will not take long to get unstuck by using this method. A drafter should not hesitate to use a colleague. Certainly they are busy, but it is flattering to be asked to help.

## Conclusion

All these tools are worth adding to a drafter's toolbox. It is probably possible to discover or create additional tools. Those new tools are more likely to be useful if they accord with the assumptions delineated above and if they result from a careful functional analysis of statutes.

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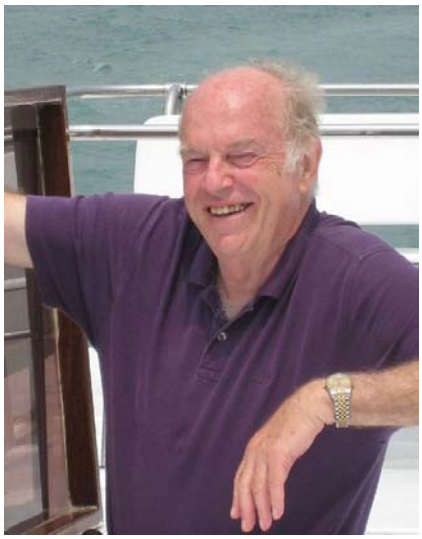
# Is it sufficient for legislative counsel merely to state the rules?

Duncan Berry[1]



*Abstract:*

It is axiomatic that legislation sets out the rules by which a society is governed. This paper poses the question whether it is sufficient for those who are responsible for preparing legislation merely to set out the rules. It seems to the author that far too often legislative counsel (in conjunction with policy framers) fail to specify the consequences of failing to comply with statutory requirements, of contravening a statutory prohibitions, or of fulfilling a condition that is a prerequisite to the exercise of a power, right or jurisdiction. This means that interpreters and other users of the legislation are left to guess what those consequences might be. This paper canvasses this problem and what should be done to address it.

## Introduction

The failure of legislation to communicate effectively arises not only from what is said in the legislation but also from what is not said. Legislation may fail to address a relevant matter either because legislative counsel thought the matter was implicit in the legislation or because they overlooked it. Not infrequently legislative counsel (particularly inexperienced ones) fail to specify the consequences of not complying with a requirement, or contravening

[1]SJD, LL.M, MPP, GDComMan; Consultant Legislative Drafting Counsel, Kenya State Law Office. I wish to acknowledge the contribution of the Hong Kong Law Draftsman, Eamonn Moran, who read and commented on drafts of this article.

a prohibition, imposed by legislation. As Bennion has pointed out, legislative counsel find it all too easy to use the language of command:

> They say that a thing shall be done. Too often they fail to consider the consequence when it is not done.[2]

Take the following example. An Act providing for the issue and execution of search warrants prescribes the procedure for police officers and others when seeking to obtain or to enforce warrants to search premises with a view to finding evidence relating to a suspected offence. Does non-compliance with the procedure render the search warrant invalid so that evidence obtained under the warrant cannot be used in a subsequent prosecution for such an offence? If nothing in the Act tells us what are the consequences of failing to comply with the procedure, then surely the position is unsatisfactory.

This means that the courts, lawyers and other users of legislation are being left to guess what might be the consequences of not complying with statutory requirements, or of contravening statutory prohibitions. At best, the user may be able to obtain guidance from judicial decisions on other similar legislation. At worst they will be left in the dark until the doubt is judicially determined. Surely, the essence of a statutory requirement or a statutory prohibition is that there should be a sanction for the failure to comply or the contravention. Otherwise the requirement or prohibition would be a mere entreaty or "pious aspiration".[3] What is overlooked by legislative counsel is not expressed in the legislation, leaving lacuna that can only be resolved by judicial interpretation.

### The problem as I see it

The following provision (taken from the *Interpretation and General Clauses Act* of a Commonwealth country) exemplifies the problem:

> **31.** Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—
>
> ……..;
>
> (b) *no subsidiary legislation shall be inconsistent with the provisions of an Act*;[4]

The italicised proposition is unsatisfactory on at least two grounds. Firstly, it appears to say the opposite of what its framers intended. On one reading it could mean that subsidiary legislation is capable of being inconsistent with the provisions of an Act. Secondly, even if

[2] Bennion, F.A.R *Statutory Interpretation*, 5th ed. (London: LexisNexis, 2010) at 46.

[3] *Cutler v. Wandsworth Stadium Ltd*. [1949] AC 398, per Viscount Simonds at 407.

[4] Sections 31 of the Kenya *Interpretation and General Provisions Act* (Cap. 2). Also see section 28 of the Hong Kong *Interpretation and General Clauses Ordinance* (Cap 1).

it means that a drafter of legislation should ensure that subsidiary legislation is not inconsistent with its parent enactment, it does not state the consequences of such an inconsistency. I believe that what was intended was that if subsidiary legislation were to be found to be inconsistent with an Act, it should be regarded as *ultra vires* and void to the extent of the inconsistency.[5] Assuming I am correct in this belief, why was paragraph (b) not drafted in the following way?

(b) subsidiary legislation that is inconsistent with a provision of an Act is invalid to the extent of the inconsistency.

A second possible interpretation is that, where feasible, apparently inconsistent subsidiary legislation must be interpreted in a manner consistent with the Act, but who is to say what meaning the drafter intended?

The problem is further exemplified by the House of Lords decision in *Attorney-General v. De Keyser's Royal Hotel Ltd*[6]. In that case, the conferring of a statutory power to take possession of property for defence purposes was taken to imply the suspension of a similar prerogative power because the statutory power, unlike the prerogative power, was coupled with a duty to pay compensation. Lord Dunedin explained the basis for implying the suspension by rhetorically asking: "What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on the prerogative?"[7] It seems probable that, although the policy framers intended that the statutory scheme should make exclusive provision for the wartime compulsory acquisition of property, the drafter of the legislation overlooked the pre-existing prerogative power. Allowing the prerogative power to operate concurrently with the statutory power would have frustrated that intention. In the event, the Court took the view that Parliament must have intended to suspend the prerogative power. An Australian case that has similar overtones is the decision in *Australian Capital Television v. The Commonwealth*,[8] where the High Court of Australia implied a right of free political speech from explicit constitutional provisions that provided for a system of parliamentary democracy.

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[5] The former interpretation has been upheld by a court on at least two occasions. In *Ho Kin Chung v Tsang Hiu-sang & or* [2001] HKC 110, the court stated that It is elementary principle of constitutional law that no subsidiary legislation may override a principal legislation. See *Irving v. Askew* (1870) LR5 Q.B. 208. I would have been surprised if the court had decided otherwise, given that the long standing common law principle that (in the absence of an express provision to the contrary in the parent Act) subsidiary legislation cannot override its parent Act. But the very fact that section 28(1)(b) of the Hong Kong *Interpretation and General Clauses Ordinance*) was the subject of litigation surely indicates that there was at some point a disagreement as to how the provision should be interpreted.

[6] [1920] AC 508.

[6] Ibid. at 526.

[8] (1992) 177 CLR 106.

A further example that manifests the problem is to be found in the following section in the *Companies Act 2006* [UK]. Section 1092 reads as follows:

> **Issue of process for production of records kept by the registrar**
>
> (1) No process for compelling the production of a record kept by the registrar shall issue from any court except with the permission of the court.
>
> (2) Any such process shall bear on it a statement that it is issued with the permission of the court.

Two questions immediately occur to me. One is, what is the effect of process issuing from a court without its permission? Perhaps the process is ineffectual and the Registrar of Companies can ignore it? If that is the case, then why does the provision not say so? The second one is, what is the effect of such a process that fails to bear on its face a statement that it is issued with the permission of the court? And would it make a difference if it could be shown that the court had in fact given the necessary permission but the process did not bear the requisite statement? Shouldn't the drafter of the provision have provided answers to these questions?

Another aspect of the problem is manifested by provisions that empower some authority or other to require a person to do something without stating that the person has an obligation to comply with the requirement.[9] Will a court imply such an obligation? It might, but I think it unlikely unless the context provides compelling reasons for it to do so. There will surely be circumstances in which the person would be justified in not complying with the requirement, for example because in the particular case the requirement is not capable of being complied with. And it almost goes without saying that if the provision does not even state that the person has an obligation to comply with the requirement, the provision will be silent on the question of what consequences are intended to flow from failing to comply with the requirement.[10]

In *Cutler v. Wandsworth Stadium Ltd*,[11] the question was whether a breach of section 11 of the *Betting and Lotteries Act 1934* conferred on bookmakers a right to sue for damages on

[9] And such provisions are by no means rare!

[10] Although beyond the scope of this paper, a similar kind of problem arises when the drafter of a legislative provision leaves too much to implication. This too can give rise to interpretation difficulties. For example, it is not unusual to find a legislative provision that confers a right to apply to a court or tribunal for a particular kind of order without going on to actually empower the court to make such an order. See section 1113 of the *Companies Act 2006* [UK], which enables an application to be made for an order requiring a company (or any of its officers) to make good a default in complying with an obligation under the Act. Although the section enables the Court to require the company or any of its officers to pay the costs of the application, nowhere does the section confer on the Court jurisdiction to hear and determine the application.

[11] [1949] AC 398.

the ground that the occupier of a dog-racing track had failed to provide space for them to carry on bookmaking. The section was silent as to the consequences. Although the action in that case failed, Lord Justice Du Parq, in the course of his judgment, had this to say:

> To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state *explicitly* what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by careful examination and analysis of what is expressly said, what that intention may be supposed to be...
>
> I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not be safely abandoned.[12]

On the whole, legislative counsel seem to have ignored this plea. Very few legislative documents prepared since 1949 have contained provisions along the lines envisaged by Lord Du Parq.[13]

## Issues that legislative counsel should consider

Depending on the context, there are a number of questions that legislative counsel need to consider when drafting a provision that imposes a particular requirement, imposes a condition as a pre-requisite to the exercise of a power, right or jurisdiction or prohibits particular conduct.

### Is Invalidity Intended

If the consequences of failing to comply with a statutory requirement are not specified, a court charged with enforcing the requirement will have to decide what consequences the legislature intended to follow from the failure. If the drafter of the legislation fails to specify those consequences, then the court is faced with the task of solving the problem. In most cases action taken that does not strictly comply with the requirement will be held to be invalid. However, as Bennion[14] has pointed out, it would be draconian to hold that in every case failure to comply with a particular requirement should invalidate the action taken. So how have the Courts addressed this issue?

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[12] Ibid. at 410.

[13] Some exceptions are the *Consumer Credit Act 1974* (UK); the *Sex Discrimination Act 1975* (UK); the *Race Relations Act 1976* (UK); the *Competition and Consumer Protection Act 2010* (Cwlth), section 82; *Fair Trading Act 1984* (NSW), section 65; and the *Anti-Discrimination Act 1977* (NSW).

[14] Above, n. 2 at 46.

In a case where the consequences of a failure to comply with a statutory requirement is not prescribed, the courts have created a distinction between requirements that are "mandatory"[15] and requirements that are "directory". In *Woodward v. Sarsons*, Lord Coleridge expressed the proposition this way: "… the general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment is obeyed or fulfilled substantially."[16] But as Bennion has demonstrated some judges have criticised the long standing distinction between mandatory and directory statutory requirements as being too rigid. For example , although the distinction is seemingly well established in English law, in recent years Australian courts have taken a different view. Following the New South Supreme Court decision in *Tasker v Fullwood*,[17] the High Court of Australia had this to say in the case of *Project Blue Sky Inc v. the Australian Broadcasting Authority*:[18]

> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements"[19] and the division of directory acts into those which have

[15] Some lawyers use the word "imperative", but it amounts to the same thing.

[16] [1875] LR 10 CP 733, at 746-7.

[17] [1978] 1 NSWLR 20. In this case, the NSW Supreme Court formulated the following propositions:

(1) The problem is to be solved in the process of construing the relevant statute. Little, if any, assistance will be derived from the terms of other statutes or any supposed judicial classification of them by reference to subject matter.

(2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance.

(3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute.

(4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement .[*Victoria v. The Commonwealth and Connor* [1975] HCA 39; (1975) 134 CLR 81]

(5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true inquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations.

(6) In particular, it is wrong to say that, if a statute is couched in directory terms, the act will be invalid, unless substantial performance is demonstrated. [*Attorney-General (NSW.) ex rel. Franklins Stores Pty. Ltd. v. Lizelle Pty. Ltd. and Others* (1977) 2 NSWLR 955.]

[18] [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 at para. [93]. Emphasis added.

[19] *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 146 per Gummow J.

> substantially complied with a statutory command and those which have not. *They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid*. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning.[20] That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. *A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.* ... In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute."[21]

Elsewhere in its judgment, the High Court expounded on the issue further:

> A provision which directs the manner of the exercise of a power is quite different from a provision which prescribes an act or the occurrence of an event as a condition on the power - that is, a provision which denies the availability of the power unless the prescribed act is done or the prescribed event occurs. In one case, power is available for exercise by the repository but the power available is no wider than the direction as to the manner of its exercise permits; in the other case, no power is available for exercise by the repository unless the condition is satisfied.[22] A provision which prescribes such a condition has traditionally been described as mandatory because non-compliance is attended with invalidity. *A purported exercise of a power when a condition has not been satisfied is not a valid exercise of the power*.
>
> A third kind of provision must be distinguished from provisions which restrict the ambit of the power and provisions which prescribe conditions on its availability for exercise. A provision may require the repository or some other person to do or to refrain from doing something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power:[23] the provision does not condition the

[20] *McRae v Coulton (*1986) 7 NSWLR 644 at 661; *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 147.

[21] *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

[22] See, for example, *Spicer v Holt* [1977] AC 987.

[23] *Osborne v The Commonwealth* [1911] HCA 19; (1911) 12 CLR 321 at 336-337; *Buchanan v The Commonwealth* [1913] HCA 29; (1913) 16 CLR 315 at 329.

> existence of the power.[24] Such a provision has often been called directory, in contradistinction to mandatory, because it simply directs the doing of a particular act (sometimes within a prescribed period) without invalidating an exercise of power when the act is not done or not done within the prescribed period. *The description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance can be determined; rather, the consequences must be determined before a provision can be described as either mandatory or directory*.
>
> …
>
> When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of a power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power may be exercised. *If the purported exercise of the power is outside the ambit of the power or if the power has been purportedly exercised without compliance with a condition on which the power depends, the purported exercise is invalid. If there has been non-compliance with a provision which does not affect the ambit or existence of the power, the purported exercise of the power is valid.* To say that a purported exercise of a power is valid is to say that it has the legal effect which the Parliament intended an exercise of the power to have.[25]

Finally, the High Court emphasised,

> the classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginninghttp://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1998/28.html?stem=0&synonyms=0&query=Project%20Blue%20Sky - fn74.[26] That being so, a court, determining the validity of an act done in breach of a statutory provision, might easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision.[27]

The approach adopted by the High Court of Australia in *Project Blue Sky* and the Supreme Court of New South Wales in *Tasker* has been almost universally followed in Australia in

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[24] See, for example, *Clayton v Heffron* [1960] HCA 92*;* (1960) 105 CLR 214 at 246-248*; Simpson v Attorney-General [*1955] NZLR 271*; Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286; [1995] 1 All ER 367.

[25] Above n. 18 at paras. [37-38] and [41]. Emphasis added.

[26] *McRae v Coulton* (1986) 7 NSWLR 644 at 661*; Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 147.

[27] Above n. 18 at para. [93].

recent years, particularly in New South Wales.[28] For more recent decisions in which the approach has been followed, see *Plaintiff S157/2002 v Commonwealth of Australia*;[29] *Attorney General of New South Wales v World Best Holdings*;[30] and *Royal Queensland Aero Club ACN 009 660 806 v Civil Aviation Safety Authority;*[31]

However, it seems that the position in the United Kingdom remains the same. Although there has been, as Bennion has shown[32], a recent tendency of some judges to criticise the long standing distinction between mandatory and statutory requirements as being too rigid, it seems that not only is it well established in British jurisdictions, but also it is recognised by the UK Parliament.[33] Bennion believes that the dichotomy is too well entrenched to be overturned by judicial *obiter dicta*. So for the time being it seems that the mandatory/directory dichotomy remains good law in those jurisdictions.

In order to remedy the deficiency of the legislature[34] in failing to specify the intended legal consequence of non-compliance with a statutory requirement, it has been necessary for the courts to develop rules to address the situation. These rules lay down that it must be decided from the wording of the relevant enactment whether the requirement is intended to be mandatory or merely directory.[35] The court will be more willing to hold that a statutory requirement is merely directory if any breach of the requirement is necessarily followed by an opportunity to exercise some judicial or official discretion in a way which can adequately compensate for that breach.

The following case illustrates how judges have hitherto approached the problem. In *Re Saunders (A bankrupt),*[36] Lindsay J held that the apparent prohibition in section 285(3) of

[28] *Hatton v Beaumont* [1977] 2 NSWLR 211 at 213, 226; *Attorney-General (NSW); Ex Rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 965; *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400 at 408; *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 102; 62 ALR 63 at 71; *McRae v Coulton* (1986) 7 NSWLR 644 at 661 and see *Australian Broadcasting Corporation v Redmore Pty Ltd* [1989] HCA 15; (1989) 166 CLR 454 at 457-460; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1 at 24-26; 98 ALR 68 at 90-92. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: *Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR 1 at 5; *Collins Radio Constructions Inc v Day* (1997) 116 NTR 14 at 17; and *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377.

[29] [2003] HCA 2.

[30] [2005] 63 NSWLR 557

[31] [2000] FCA 848.

[32] See n. 2 at 45.

[33] For example, see section 50(4)(b) of the *Local Government Act 2000* [Eng] (which provides that a model code of conduct may include provisions that are mandatory).

[34] But in reality the policy framers in conjunction with the legislative counsel.

[35] Note that the same requirement may be mandatory as to some aspects and directory as to the rest.

[36] [1997] Ch 60.

the *Insolvency Act1986* (UK), prohibiting a creditor from starting legal proceedings against an undischarged bankrupt without the leave of the Court, was directory only. One of the cases on which he relied was that of *In re Horsham Kyosen Engineering Co. Ltd*.[37] In the course of his judgment in that case, Gowans, J had this to say:

> ... the courts are not disposed to give an annihilating effect to a provision of this kind if the purpose of the provision can be achieved by treating it as directory.[38]

The court in *Saunders* also followed a line of authority holding that if proceedings have been started without the requisite leave, the practice is to grant leave *nunc pro tunc* (now for then).

If a statutory requirement is held to be mandatory, an act done in breach of it will be held to be invalid, but if it is directory the act will held to be valid even if the non-compliance may give rise to some other penalty or legal consequence provided by the statute.[39] On the other hand, if the requirement is merely directory, what is done or not done will be unaffected. But what is meant by "invalidated" here is not always the same. In some cases, the action will be declared void and others it will be declared voidable, as may be seen from the decision in *Calvin v. Carr*. In that case Lord Wilberforce enunciated the principle this way:

> This argument led necessarily into a difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their lordships opinion would be, if it became necessary to fix on one or other of those expressions, that a decision made contrary to natural justice is void, but that until it is so declared by a competent body or court it may have some effect, or existence, in law.[40]

So how have the courts gone about ascertaining whether a provision is mandatory or directory? There is no hard and fast rule about this matter. Whether or not an enactment is mandatory or directory depends on what is perceived to be the intention of the legislature and not on the language in which the "intent" is clothed. In ascertaining that intention, not only has the wording of the provision been considered, but also its "nature, design and the consequences that would flow from construing it one way or the other". According to Lord Campbell *in Liverpool Borough Bank v. Turner*:

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts to try to get to *the intention of*

[37] [1972] V.R. 403 at 406. Ironically, a decision of the Supreme Court of the Australian State of Victoria.

[38] Ibid.

[39] So held by the Supreme Court of India in *Diraj Kuer (Rani) v. Amar Krishna Narain Singh (Raja)* AIR 1960 SC 444 and in *Rubber House v. Excelsior Industries Pty. Ltd* AIR 1989 SC 1160.

[40] [1980] AC 574 at 589-90, a case involving the need to observe the rules of natural justice.

> *the legislature* by carefully attending to the whole scope of the statute to be construed.[41]

And in a later case,[42] Lord Penzance had this to say:

> ... in each case you must look at the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect, decide whether the matter is what is called imperative[43] or only directory.

However, it is all very well to say that it is necessary to ascertain the legislative intent, but if the framers of the enactment (and in particular the legislative counsel concerned) failed to address the problem by prescribing the consequences that are to follow should the enactment be contravened or not complied with, the best the Courts can do is to second guess what the legislative intention is.

The following are some of the principles that can be deduced from the relevant cases:[44]

1. If a statutory requirement has been categorised as mandatory, then it has usually been assumed that the defect cannot be remedied and that it has the effect of rendering subsequent events dependent on the requirement void or as being made without jurisdiction and thus of no effect. However, the position is more complex than this and this approach diverts attention from the important question of what the legislature intended should be the consequence of failing to comply with the requirement.

2. However, if it appears to the court that a serious injustice would ensue if a statutory requirement were to be treated as mandatory, it will usually treat the requirement as being directory only. As stated in *Montreal Street Railway v. Normandin*:

   > When the provisions of a statute relate to the performance of a public duty, the case is such that to render void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable does not affect the validity of the acts done.[45]

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[41] (1860) 30 LJ Ch 379, at 380. Emphasis added.

[42] *Howard v Bodington* (1877) 2 P.D. 203, at 211

[43] A synonym of 'mandatory'.

[44] See P. St.J. Langan, *Maxwell on The Interpretation of Statutes*, 12th Ed, (Sweet & Maxwell, London: 1969) at 314 -315.

[45] [1917] AC 170, dicta of Sir Arthur Channell at 174.

This approach is illustrated by many decisions relating to the performance of public functions out of time, and by many relating to the failure of public officers to comply with formal requirements.

3. In the majority of cases in which a court or tribunal feels it necessary to determine whether a statutory requirement is to be categorised as mandatory or directory, it will consider what, in the context of all the facts and circumstances of the case in which the issue arises, would be the consequences of failing to comply with the requirement. In such a situation the task of the court or tribunal will be to seek to do what is just in all the circumstances (see *Brayhead (Ascot) Ltd v Berkshire CC*,[46] which was applied by the House of Lords in *Clydeside Estates Ltd v Aberdeen DC*).[47]

4. When an act or thing required by the statute is a condition precedent to the exercise of a power or right, or of the jurisdiction, generally speaking compliance cannot be dispensed with and, if compliance is not possible, the power, right or jurisdiction cannot be exercised. In the absence of other overriding considerations, it would not be competent for a court or tribunal to dispense with what Parliament has prescribed as an indispensable condition to the exercise of the power, right or jurisdiction. See *R. v. Armitage*[48] and *James v. South Western Railway Co*[49].

   By contrast, it seems that a court will be more likely to treat a statutory requirement as directory if failure to comply with the requirement is followed by an opportunity to exercise some judicial or administrative discretion in a way that will compensate for the failure.[50] For example, a statutory requirement will clearly be directory if it lays down a time limit but a court or tribunal is given an express power to extend the time for compliance. If the court or tribunal grants or refuses an extension of time, the position is clear. If the time limit is extended, the requirement is of no significance. If an extension is refused, the requirement becomes critical. It may, for example, deprive a member of the public of a right to appeal, which if exercised in time would have been bound to succeed. In the latter situation, a directory requirement has consequences that are as significant as any mandatory requirement.

5. Enactments relating to the steps to be taken by the parties to legal proceedings (using the term in the widest sense) are usually construed as mandatory. If, however, a requirement, even if in mandatory terms, is purely procedural and is imposed for the

[46] [1964] 1 All ER 149, [1964] 2 QB 303.

[47] [1979] 3 All ER 876, [1980] l WLR 182.

[48] (1872) LR 773.

[49] (1872) LR 7 Ex. 287.

[50] See *Re T (a minor)* (adoption: requirement for parental consent) [1986] Fam 160.

benefit of one party alone, that party will normally be able to waive the requirement.[51]

6. Enactments requiring a public authority to comply with formalities as a prerequisite to making a person liable to a levy have generally been held to be mandatory.

7. The view that provisions conferring private rights have been generally treated as mandatory is less easy to support; the decisions on provisions of this type appear, in fact, to show no really marked leaning either way.

8. If a requirement is found to be mandatory and a duty to implement it is imposed directly on a person, a failure to comply will normally constitute the tort of breach of statutory duty.[52] If, instead, it is to be implemented as a part of a specified procedure, a failure to comply will normally render the act done invalid.

9. If the requirement is found to be directory only then the failure to comply will be without direct legal effect, though there might be indirect consequences such as an award of costs against the offender. It has been said that mandatory provisions must be fulfilled exactly, whereas it is sufficient if directory provisions are substantially fulfilled.[53]

10. If a statutory requirement is complied with at the relevant time, the act done is not vitiated by later developments that, had they occurred before that time, would have meant that the duty should have been performed in a different way.

In addition to the principles just expressed, Bennion[54] has identified the following circumstances in which the courts have wrestled with the failure of legislative counsel to specify the consequences of contravening, or failing to comply with, an enactment.

*Enactments that impose more than one requirement:* If an enactment that requires an act to be done in a particular manner, then, according to Millett L J, it seems that it might be possible to regard the requirement that the act be done as mandatory, but that the requirement that it be done in a particular manner as directory.[55]

*Proportionality*[56]*:* If a court were to hold that the most trivial failure to comply with a seemingly absolute requirement is to be treated as vitiating a particular transaction, the consequences would be out of all proportion to the failure.[57]

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[51] See discussion on waiver below at p. 82.

[52] See further discussion as to whether a breach of a statutory requirement gives rise to action in damages.

[53] See dicta of Lord Coleridge in *Woodward v. Sarsons*, above n. 16.

[54] Above n. 2 at 48-49.

[55] *Gurney (HM Inspector of Taxes)* EWCA Civ 27 (27 May 1994).

[56] What Bennion referred to as "consequential construction".

*Implied duties:* It seems that the courts will draw the distinction even in cases where the requirement is implied. Bennion cites *Disher v. Disher*.[58] In that case, Rule 14(2) of the *Magistrates' Courts Rules 1968*[59] stated that at the conclusion of the evidence for the complainant "the defendant may address the court". By implication, this imposed on the court a duty to hear the defendant. This duty was mandatory, so failure to comply with it would render the conviction void.

The following examples illustrate other areas of the law in which the distinction between mandatory and directory provisions is drawn.

*Constitutional enactments:* The consequences of holding a requirement in a constitutional provision to be mandatory might be so draconian that a court interpreting the provision will consider itself forced to treat the requirement as directory.[60] In the Canadian decision in the *Manitoba Language Rights Reference*, the court held that the requirements were mandatory, but, in order to allow time for the laws to be translated into French, it suspended the declaration of invalidity for a limited period.[61]

*Courts exceeding jurisdiction:* An order made by a court or tribunal whose jurisdiction is prescribed by statute is void if the statute does not confer the necessary jurisdiction.[62] If a court or tribunal whose jurisdiction is prescribed by statute is obliged not to make a certain kind of order, the requirement is mandatory and an order made contrary to that requirement will be void as being in excess of jurisdiction.[63]

*Statutory procedures:* In many regulatory statutes, a Minister or public authority is empowered to take coercive action to enforce those statutes. If a statute prescribes a procedure to be followed, the question arises as to what consequences are to follow from a failure to observe a required step in the procedure. If, on the one hand, a court were to hold the step to be mandatory, that would render the purported exercise of the power to be void. On the other hand, if the court were to hold the step to be directory, the failure would not necessarily vitiate the exercise of the power. How does the court decide which course to follow? The answer is that it will ascertain the broad policy of the statute in question and the principle of fairness to the person affected. The broad policy of the statute will not be frustrated by a mere procedural irregularity.[64] However, the citizen is not to be unfairly prejudiced because of a failure to observe a

[57] See *Bellamy v. Saull* (1863) 32 LJQB 366.

[58] [1965] P 31.

[59] SI 1968/1920.

[60] Above n. 3 at 49.

[61] [1985] SCJ No. 68.

[62] See *Barker v. Palmer* (1818) 8 QBD 9.

[63] See *B v B* [1961] 1 WLR 856.

[64] See Balcombe L J in Secretary of State for Trade and Industry v Langridge [1991] Ch 402 at 415.

procedural safeguard specifically intended by the legislature to protect his or her interests.

*Interference with liberty*: If an enactment confers a power to interfere with a citizen's freedoms, a court will treat any condition prescribed as pre-requisite to the exercise of that right as mandatory.[65]

*Interference with property*: Similarly, a court will normally treat as mandatory any pre-condition prescribed for the exercise of a statutory power authorising a public authority to claim money from a person or to interfere with a person's property rights.[66]

*Conferring a right or benefit*: If an enactment confers a right or benefit on a person, the courts will treat as mandatory any condition prescribed as pre-requisite to the enjoyment of the right or benefit. Consequently, such a right or benefit will not accrue to a person who fails to comply with the condition.[67] It seems that the presumption that statutory conditions are mandatory is even stronger in the case of a benefit payable out of public funds.[68]

*Electoral provisions:* The courts will normally treat a condition attaching to a right to vote at an election as being mandatory.[69] A failure to comply with the condition will normally invalidate the vote unless the failure is trivial or is not likely to affect the outcome of the election.[70]

*Notice requirements:* While a court will normally treat as mandatory a requirement that a notice or other document be served on a person, it will, it seems, take a more lenient view of a requirement as to the contents of the form or document. As long as the substance of the required contents is provided, a court will usually treat the requirement as directory only.[71]

*Enactments that contain both mandatory and directory requirements*: The same requirement may be mandatory as to some aspects and directory as to others. See

[65] See *R v Rossiter* [1994] 2 All ER 752; *R v. Cambridge* [1994] 1 WLR 971; *R v. Pinder (*1885) 24 LJQB 148.Also see *R v. Phillips* [1939] 1 KB 63, in particular dicta of Hewart CJ at 68.

[66] See Bennion, above n. 2 at 52.

[67] For example, *Newton v. Cowie* (1827) 5LJOSCP 159; *Avanzo v. Mudie* (1854) 10 Exch 203; *Spice v. Bacon* (1877) 2 Ex D 463.

[68] *Jones v Zahedi* [1993] 1 WLR 1445.

[69] *Afzal v. Ford Motor Co. Ltd* [1994] All ER 720.

[70] As to what is immaterial, see for example *Woodward v. Sarsons* (1875) LR 10 CP 733; *Phillips v. Goff* (1886) 17 QBD 805.

[71] See *Samuel Montagu & Co Ltd v. Swiss Air Transport Co. Ltd*. [1966] 2 QB 306 (and in particular Lord Denning MR at 314.Also see *R v. Immigration Appeal Tribunal, ex p. Jeyeanthan* [1999] 3 All ER 231.

*Hughes (Inspector of Taxes) v. Viner*,[72] where it was held that while the requirement to give the requisite notice was mandatory, the requirement with respect to the period within which the notice must be given was directory, so that a notice given 6 days after the deadline did not invalidate the notice.

*Minor technical contraventions*: A court will not normally invalidate a purely formal or machinery defect even if the relevant statutory requirement appears to be mandatory.[73]

*Matters occurring after a requirement has been complied with*: If an act is done in purported compliance with a statutory requirement, the act is not rendered void by a later development that, had it occurred earlier, would have meant that the requirement should have been undertaken in a different way: see *Chelmsford RDC v. Powell*.[74] In that case, the relevant enactment required an appellant to specify the grounds on which the appeal was brought. The court held that if, after service of notice of appeal, an additional ground of appeal arose, the additional ground could nevertheless be considered on the hearing of the appeal.

*Mandatory orders*: In determining whether a court should exercise a discretion to order mandamus or impose a mandatory injunction to compel compliance, the question whether the requirement is mandatory or directory is relevant. It seems that the court will be more likely to exercise the discretion if the requirement is mandatory and the person affected has refused to comply with it.[75]

*Conclusion:* Like the High Court of Australia, I believe that the mandatory/directory dichotomy has outlived its usefulness. This is because, as that Court pointed out in *Project Blue Sky*,[76] it deflects attention from the real issue, which is whether an act done in breach of a statutory requirement is valid or invalid. As was stated in that case, the classification of a statutory provision as mandatory or directory merely records a result which has been reached on other grounds. It does not provide a means for deciding whether such a breach should be held to be valid or invalid. The classification is the end of the inquiry, not the beginning.[77] As the Court in that case said, a better test for determining the issue of validity is to ascertain whether it was a purpose of the legislation that an act done in breach of the provision should be valid or

[72] [1985] 3 All ER 40.

[73] See *Munnich v Godstone RDC* [1966] 1 WLR 427; *Hewlings v. McLean Homes East Anglia Ltd* [2001] 2 All ER 281.

[74] [1963] 1 WLR 123.

[75] See *Epsom and Ewell Corporation, ex p R B Property Investment (Eastern) Ltd* [1964] 1 WLR 1060.

[76] See n. 18.

[77] *McRae v Coulton* (1986) 7 NSWLR 644; *Australian Capital Television Pty Ltd v Minister for Transport and Communications*.

> invalid. Be that as it may, this should not deflect from the fact that the courts would not be forced to apply such a test or to decide whether a statutory requirement is to be construed as being mandatory or directory if the framers of legislative policy (and legislative counsel) properly analysed the possible consequences of not complying with such statutory requirements and providing for outcomes that are consistent with achieving the objects of the statute.

### Is contravention of, or failure to comply with, the provision intended to be an offence?

Secondly, is a failure to comply with the requirement, or a contravention of a prohibition, to be an offence and, if it is, what is the appropriate penalty for the failure or contravention? In some cases, to make such a failure to comply or contravention an offence may be inappropriate, either because using a criminal sanction as an enforcement mechanism would be akin to using a sledge hammer to crack a nut or because some other kind of sanction might be a more effective means of enforcement.

For example, in the case of a contravention of a provision of a statute designed to protect consumers, an offending supplier of goods or services may be ordered to publish the details of a punitive order made by the consumer affairs regulator condemning the conduct of the supplier in a particular case. Only if the order were not complied with would the supplier commit an offence and become liable to a criminal sanction; see section 86D of the *Competition and Consumer Protection Act 2010* [Cwlth].[78] Another example is when a person who is a director of a company is guilty of some malfeasance. Whether or not the director commits an offence, he or she may be liable to a disqualification order prohibiting the person from being concerned in the management of a specified kind of business: see for example sections 206C to 206EA of the *Corporations Act 2001* [Cwlth] and section 12GLD of the *Australian Securities and Investments Act 2001* [Cwlth].

In some cases (such those involving occupational health and safety legislation), it may be considered unfair to render a person who has failed to comply with a particular safety requirement liable to a criminal sanction without warning. It may be desirable to provide for a warning notice or compliance order to be served on the person in order to allow time for the requirement to be complied with. Only if the requirement is not complied with within a period specified in the notice or order would the person commit an offence.

If no consequences are stated, the courts are placed in a quandary. If a provision prohibits an act, by clothing the command in a negative form, there appears to be a clear intention that it is mandatory. In his work, *Statutory Construction*, Crawford, said:

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[78] Also see section 1324B of the *Corporations Act 2001* [Cwlth], which empowers the issue of orders requiring a corporation to disclose information or to publish a specified advertisement. However, noncompliance with such an order would be an offence.

> Prohibitive or negative word can rarely, if ever, be directory. That is so even though the statute provides no penalty for disobedience."[79]

But if no consequences are specified, perhaps the best a court can do is to award a prohibitory injunction in the case of repeated or threatened contraventions. In any event, the position is most unsatisfactory.

### If the relevant breach is to be an offence, is it intended that it should be dealt with as a criminal matter or a civil matter?

Thirdly, even if a pecuniary penalty is considered to be an appropriate sanction for such a failure or contravention, it is often worth considering whether it might be preferable to provide for the penalty to be recoverable through the civil rather than through the criminal courts. For examples of enactments providing for the imposition of a pecuniary penalty see section 1317G of the *Corporations Act 2001*; section 12GBA of the *Australian Securities and Investment Commission Act 2001*; and section 76 of the *Competition and Consumer Protection Act 2010* (all Australian Commonwealth enactments).

### Is a breach of an enactment intended to give rise to an action in damages at the suit of a person who has sustained injury or loss as a result of a breach of the enactment?

Fourthly, even if a criminal or civil penalty is prescribed for failing to comply with a statutory requirement, or contravening a statutory prohibition, the question may arise as to whether a person who sustains an injury or loss as a result of the contravention or failure should be entitled to recover damages. The general rule seems to be that if a statute contains a provision that is intended to confer an advantage on a person, the person should have a remedy to recover the advantage.[80] However, not every failure to comply with, or contravention of, an enactment will confer a right of civil action as may be seen from the decisions in *Philips v. Britannia Hygienic Laundry*[81]; *Cutler v. Wandsworth Stadium*[82]; and *Solomons v R. Gertzenstein Ltd.*[83]

If the drafter of the enactment has been silent on the matter, the question can only be resolved by considering the enactment within the context of the Act as a whole.[84] However, there may be indicators that show how the 'intention of the legislature' may be ascertained. One is whether the enactment imposes a requirement for the benefit of the general public or

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[79] Crawford, Earl T., *The Construction of Statutes.* St. Louis: Thomas Law Book Co. (1940), at 520.

[80] See dicta of Holt C.J. in *Anon* (1704) 6 Mod 26.

[81] [1923] 2KB 832.

[82] See n. 11 above.

[83] [1954] 2 QB 243.

[84] See Lord Simons in *Cutler v. Wandsworth Stadium Ltd* , n. 11 above at 407.

for an identifiable class of persons. In the latter case, the courts are more likely to confer a right to recover damages for injury or loss as can be seen from the decision in *Groves v. Lord Wimborne*[85], where it was held that a worker injured as a result of the failure of the occupier of a factory to comply with a statutory requirement to fence dangerous machinery could recover damages for that failure. The court found that the relevant enactment was passed for the benefit of a particular class of persons, which, in this instance, was workers employed in factories.[86] In other cases, it has been held that a person who has sustained injury or damage that might have been fairly attributed to a failure to comply with, or to a contravention of, an enactment has no right to recover damages for the injury or loss.

Another indicator is that, if an enactment provides for the imposition of a penalty for a failure to comply with, or contravention of, an enactment, it is less likely that a court will render a party who is at fault to be also liable to an action in damages. See *Atkinson v. Newcastle Waterworks Co*.[87], where it was held that no action for damages lay at the suit of a plaintiff whose premises had been destroyed by fire because the water pressure in the defendant's water pipes was insufficient. In that case, the English Court of Appeal relied mainly on the fact that section 43 of the *Waterworks Clauses Act 1847* imposed a penalty for breach of the defendant's statutory requirement and was silent on the question of civil liability. In another case, *Pasmore v. Oswaldthwistle UDC*,[88] the House of Lords held that the sole remedy for breach of the local authority's statutory obligation to provide such "sewers as may be necessary for effectually draining their district" was the statutory right to make a complaint to the Local Government Board. In *Square v. Model Farm Dairies (Bournemouth) Ltd*[89], the English Court of Appeal held that plaintiffs who had been infected with typhoid fever because of contaminated milk had no right to claim damages as a result of the defendants' breach of a statutory requirement under section 2 of the *Food and Drugs (Adulteration) Act 1928* to supply "food of the nature, substance and quality demanded" The main reason for the decision was that it did not appear to the court that the legislature intended to confer a right of action for damages on persons injured as a result of a breach of section 2. And in *Monks v. Warbey*,[90] the court found, moreover, that, in the case of a requirement imposed by statute, a civil action could only be brought "by a person pointed out ... as being one whom the legislature desired to protect".

[85] [1898] 2 QB 402.

[86] Also see *Reffell v. Surrey County Council* [1964] 1 WLR 488; *Solomons v. R. Gertzenstein Ltd* [1954] 2 QB 243; *London PTB v. Upson* [1949] AC 155; *Kelly v. WRN Contracting Ltd* [1968] 1 WLR 921; *Sephton v. Lancashire River Board* [1962] 1 WLR 488; and *Monks v. Warbey* [1935] 1 KB 75.

[87] (1877) 2 Ex.D 441.

[88] [1898] AC 387.

[89] [1939] 2 KB 365.

[90] [1935] 1 KB 75, per Maugham LJ at 85.

In a number of other cases where the relevant statute was silent on the question whether breach of a statutory requirement gave rise to an action in damages for injury or loss sustained as a result of the breach, the court held that the plaintiff had no right to damages, presumably on the grounds that if the legislature had intended to confer such a right it would have said so in the relevant legislation.[91]

Another point to be considered is that an action for breach of a statutory requirement is constrained by the object of the relevant statute. In other words, such an action lies only in respect of the kind of harm contemplated by that statute: see *Gorris v. Scott*[92] and *Batley v. Ayr Engineering & Constructional Co. Ltd.*[93] But there is no hard and fast rule as can be seen from the decision in *Grant v National Coal Board.*[94] So how the court will find is by no means predictable.

It is thus clear from this review of the relevant cases that it is not possible to predict how the court will find in a case in which a person has sustained injury or loss as a result of a breach of a statutory provision. It seems to me therefore that it is essential for the drafter of the relevant enactment to consider the matter and specify in the enactment whether or not a breach of it should confer a right of action for damages. For examples of provisions conferring such a right, see section 65 of the *Fair Trading Act 1984* (NSW) and section 82 of the *Competition and Consumer Protection Act 2010* (Cwlth). Whether or not the members of the legislature[95] would, had they put their collective mind to the matter, have prescribed the same solutions as those arrived at by the various courts is a matter for conjecture. However, I would be very surprised if the solutions would have been the same in every case.

### In drafting a statutory requirement, the drafter should consider whether the requirement should be absolute or qualified

Fifthly, the drafter of a statute that imposes a requirement ought to consider whether the requirement is to be absolute or qualified. If the requirement is absolute, it will be no defence for the defendant to claim that he or she took all reasonable steps to comply with it. If, on the other hand, the requirement is not absolute, it will be open to the defendant to raise a defence of that kind. Contrast the following examples:

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[91] See *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832; *Badham v. Lambs Ltd* [1946] KB 45; *Clarke v. Brims* [1947] KB 497; *Cutler v. Wandsworth Stadium Ltd* [1949] AC 398*; Keating v. Elvan Reinforced Concrete Co. Ltd* [1967] 3 All ER 611, affirmed [1968] 1 WLR 722.

[92] (1874) LR 9 Ex 125.

[93] 2 QB 183.

[94] [1956] AC 649.

[95] But in reality the executive's policy framers in conjunction with the legislative counsel concerned.

> The operator of a workplace must ensure that all persons employed in the workplace are kept free from harm.
>
> The operator of a workplace must take all reasonably practicable steps to ensure that persons employed in the work place are kept free from harm.

On the one hand, in proceedings relating to a failure to comply with the requirement in the first example, the operator will be liable to an employee who suffered harm while employed in the workplace irrespective of whether all practicable steps were taken to comply with the requirement. On the other hand, in proceedings relating to a failure to comply with the requirement in the second example, the operator will not be liable to an employee who suffered harm while employed in the workplace if it is established that the operator took all practicable steps to comply with the requirement.

The following are some of the cases in which a statutory requirement has been held to be absolute: *John Summers & Sons Ltd v. Frost*;[96] *Galashiels Gas Co Ltd v. O'Donnell*;[97] and *Smith v. Cammell Laird and Co Ltd*.[98] Cases in which a statutory requirement has been held to be qualified include *Brown v. The National Coal Board*;[99] and *Brazier v. Skipton Rock Co.*[100] However, in some cases defendants have been absolved from liability, even though the relevant statutory requirement would at first sight appear to be absolute: see *Hammond v. Vestry of St Pancras*;[101] *Stretton's Derby Brewery v. The Mayor of Derby*;[102] and *Read v. Croydon Corporation*.[103] In these cases, confusion might have been avoided if the drafter of the relevant statutes had made it clear whether the requirements were intended to be absolute or qualified.

### Should a continuing contravention of a statutory prohibition or a continuing failure to comply with a statutory requirement, be enforced by injunction or mandatory order?

Sixthly, the drafter of a regulatory statute should consider whether, in addition to or in instead of making a contravention of a statutory prohibition an offence, a continuing contravention or persistent contraventions should be capable of being restrained by injunction. As a general rule, an enactment prohibiting specified conduct can be restrained by injunction. For example, persons who have been refused licences to operate a public

[96] [1955] AC 740.

[97] [1949] AC 275.

[98] [1940] AC 242.

[99] [[1962] AC 574.

[100] [1962] 1 WLR 471.

[101] (1874) LR 9 CP 316.

[102] [1894] 1 Ch 431.

[103] [1938] 4 All ER 631.

transport service but who, at considerable profit to themselves, have contravened the statutory prohibition in operating such services otherwise than under the authority of a licence have been restrained by injunction from doing so.[104] Similarly, an enactment requiring the performance of a statutory requirement may be enforced by a mandatory injunction. Although a court will be slow to grant an injunction on the application of the Attorney General in a case where a clear breach of the law is established,[105] the existence of other available remedies will not usually be a barrier to the grant of an injunction. The general rule is as follows:

> Where an Act creates an offence and provides a remedy the only remedy is that provided by the statute... [However,] the public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.[106]

And as *Attorney-General v. Harris* establishes,[107] the mere fact that the law is being broken is sufficient public detriment to support the Attorney-General's action, and the court will not refuse an injunction on the ground that the persistent breaches of the law being committed by the defendant are trivial or that they in fact confer a material benefit on the public.

Nevertheless, it is now quite common for a statute to make specific provision for the enforcement of continuing breaches of prohibitions by conferring on courts power to make restraining orders and, in the case of persistent failures to comply with statutory requirements, by conferring on courts power to make compliance orders to secure compliance with those requirements. For examples, see section 80 of the *Competition and Consumer Protection Act 2010*; section 12GD of the *Securities and Investment Commission Act 2001*; section 1324 of the *Corporations Act 2001* [all Australian Commonwealth enactments]. I advocate therefore that, to secure certainty and uniformity of application, that legislative counsel who are charged with the responsibility of drafting legislation that contain provisions prohibiting specified conduct or requiring performance of specified acts, should follow the Australian practice in this regard.

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[104] See AG v. Sharp [1931] 1 Ch 121; *AG v. Premier Line Ltd* [1932] 1 Ch 303. Also see *AG v. Shrewsbury (Kingsland) Bridge Co* (1882) 21 Ch D 752; *AG v. Ashbourne Recreation Ground Co.* [1903] 1 Ch. 101; *AG v. Bastow* [1957] 1 QB 514; and *AG v. Wimbledon House Estate Co Ltd* [1904] 2 Ch 34.

[105] *AG v. Westminster CC* [924] 2 Ch 416; *AG v. Harris* [1961] 1 QB 74.

[106] *AG v. Premier Line Ltd* [1932] 2 QB.

[107] [1961] 1 QB 74.

The prerogative order of mandamus[108] will lie at the discretion of a court to compel performance of a statutory requirement of a public nature. In the context of the performance of statutory requirements of a public kind, such orders have a similar effect to a mandatory injunction. Examples of enactments empowering a court to impose an injunction to mandate the performance of a statutory requirement include those Australian enactments listed in the previous paragraph.[109] Failure to observe an injunction will of course be contempt of court and be punishable accordingly.[110]

### In drafting a statutory requirement, the drafter should consider whether the requirement is capable of being complied with

Although it seems that a court will normally dispense with compliance with a statutory requirement the performance of which would in a particular circumstance be impossible,[111] it seems to me advisable that, in drafting such a requirement, the legislative counsel concerned should always subject the relevant provision to a reality check in order to ensure that there are no circumstances in which compliance with the requirement would not be possible. For examples of cases in which a court has dispensed with compliance with a statutory requirement the performance of which is impossible see: *R. v. Leicestershire Justices*;[112] *Mayer v. Harding*;[113] and *Rippingale Farms Ltd v. Black Sluice Internal Drainage Board*.[114] Such cases should be contrasted with ones in which a statute imposes a pecuniary liability. In such cases it seems that a court will impose a penalty for failure to comply with the relevant requirement even though compliance with the requirement is impossible in the particular case (because of an 'Act of God' for example). See dicta of Lord Cairns in *River Wear Commissioners v. Adamson*.[115] Also see *J & J Makin v. London & North Eastern Railway Co*.[116]

In all these cases, the need to resort to the courts to interpret the relevant legislation might well have been avoided if the circumstances in which compliance might be impossible had been identified and by careful drafting.

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[108] Note that in many jurisdictions such orders have been replaced by other kinds of statutory orders that have a similar effect.

[109] Those enactments not only empower a court to make orders restraining contraventions of prohibitions but also empower a court to make an order requiring the performance of a statutory requirement.

[110] Consequently, there is no need for legislative counsel to provide for the consequences of contravening or failing to comply with an injunction.

[111] The maxim *lex non cogit ad impossibilia*.

[112] (1850) 15 QB 88.

[113] (1867) LR 2 QB 410.

[114] [1963] 1 WLR 1347.

[115] (1877) 2 App. Cas. 743.

[116] [1943] KB 467.

### Can a statutory prohibition or requirement imposed for the benefit of a particular person or class of persons be waived by the person or a member of the class?

Normally a person will have a right to waive the benefit of an enactment designed to protect the person in his or her private capacity.[117] A person may, for example, waive the benefit of the *Limitation Act*.[118] But full knowledge of the facts is required if a waiver is to be effective.[119] And it is only the person (or a member of the class of persons) for whose benefit the statutory provision is made who can waive the performance of the relevant requirement or observance of the relevant prohibition.[120] However, a person cannot waive the benefit of a statutory provision that has been enacted to protect the public interest. For example, an accused person cannot consent to waive what the law requires in the course of the person's trial.[121] An example of a statute that prevents a person from excluding or restricting his or her liability resulting from negligence (and by implication prevents a consumer from waiving his or her right to the benefit of the provision) is the *Unfair Contract Terms Act 1977* [UK].

At the end of the day, whether or not a person can lawfully waive performance or contract out of a statutory requirement will depend on the wording of the provision containing the requirement. If the wording of the requirement is not clear, the matter will have to be resolved by judicial interpretation with all the time and expense that that entails. But if the relevant statute is well drafted, it will state whether waiver or contracting out is permitted. Consequently, the drafter of such a statute should always ascertain whether or not there is a public interest that would preclude a person from waiving the benefit of, or from contracting out, of an enactment made for the person's protection.

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[117] The principle is encompassed in the maxim *quilibet renuntiare juri pro se indtroductio* (a person may renounce a right introduced for his benefit) See *Great Eastern Railway Co. v. Goldsmid* (1884) 9 App. Cas. 927.

[118] *East India Co. v. Paul* (1849) 7 Moo PC 85, per Lord Campbell; and *Lubovsky v. Snelling* [1944] KB 44. Other examples are to be found in *Markham v. Stanford* (1963) 14 CB (NS) 376; *Rumsey v. North Eastern Railway* (1863) 14 CB (NS) 641; *Corporation of Toronto v. Russell* [1908] AC 493; *Park Gate Iron Co Ltd v. Coates* (1870) LR 5 CP634; *R v. West Riding of Yorkshire Justices* (1815) 3 M & S 493; and *Pike v. Michael Nairn & Co Ltd* [1960] Ch 553.

[119] See dicta of Eve J in *Chapman v. Michaelson* [1908] 2 Ch 612 at 622.

[120] See *Hebblethwaite v. Hebblethwaite* (1869) LR 2 P & D 29.

[121] See *AG for NSW v. Bertrand* (1867) LR 1 PC 520. Also see *Equitable Life Assurance Society of US v. Reed* [1914] AC 587; *Guardians of Salford Union v. Dewhurst* [1926] AC 619; *Soho Square Syndicate Ltd. v. E. Pollard & Co. Ltd* [1940] Ch 638; *Bowmaker Ltd v. Tabor* [1941] 2 KB 1; *Edward Ramia Ltd v. African Woods Ltd* [1960] 1 WLR 86.

## Conclusion

The failure of legislative counsel to ensure that the legislation they draft is clear and, in particular, to consider what should be the legal consequences of failing to comply with a statutory requirement, or of contravening a statutory prohibition, is bound to affect the application and interpretation of the legislation, not to mention its comprehensibility. What is left out of a legislative document can be as crucial as what is expressly stated.

Good drafting practice requires that, in conjunction with the policy framers, legislative counsel provide answers to likely questions: they should not be posing questions for which they do not provide answers. Whenever drafting a provision that imposes a requirement, or prohibits an act or conduct, or prescribes a condition that must be satisfied or observed as a prerequisite to the exercise of a power, right or jurisdiction, the drafter should ALWAYS ask himself or herself 'WHAT IF ……'. The politics of the situation should not be an excuse for putting such issues in the "too hard basket".