Bennion on Statute Law

Part 1 - Statutory Texts

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Statutory Instruments

The last chapter began with the statement that no one should expect to understand a provision of any Act of Parliament without thorough knowledge of the *form* of an Act. In chapter 2 a similar remark was made about the parameters which govern drafting. Now we complete the picture by describing briefly the main type of delegated legislation, the statutory instrument. The object will then be accomplished of giving the reader a sufficient understanding of the nature of the *basic texts*, preparatory to going on to deal with their promulgation, interpretation and processing. The special attributes of European Community texts are described in the next chapter. (For fuller accounts of delegated legislation sees Miers and Page 1982, Chapter 6 and Bennion 1984 (1); pp 131-158.)

What are statutory instruments?

The definition of the term statutory instrument is contained in s 1 of the Statutory Instruments Act 1946. Orders in Council made under statutory authority are automatically comprised in the term, but the inclusion of other instruments depends on the wording of the Act under which they are made.

Pre-1948 empowering Acts

If the empowering Act was passed on or before 31 December 1947, the position largely turns on the Rules Publication Act 1893 (a measure replaced by the Statutory Instruments Act 1946). The 1893 Act was the first to regularise and control the system of delegated legislation in Britain. It coined the phrase 'statutory rules', and defined it to cover delegated legislation made by what it called 'rule-making authorities'. Any document by which such a power is exercised after 31 December 1947 is now known as a statutory instrument, provided it is of a legislative and not an executive character. (For the difficulties involved in drawing this distinction see Bennion 1962, pp 262-269).

Post-1947 empowering Acts

Section 1 (1) of the 1946 Act provides that where by any Act passed after 31 December 1947 a power is conferred on a Minister or government department to make, confirm or approve orders, rules, regulations or other subordinate legislation, and the power is stated by the empowering Act to be 'exercisable by statutory instrument', then any document by which the power is exercised is to be known as a statutory instrument.

Statutory instuments are required by the 1946 Act to be published by Her Majesty's Stationery Office in a numbered series. The numbering begins afresh at the commencement of each calendar year.

The text of a statutory instrument

A statutory instrument is an extension of the Act under which it is made. It is to be construed as one with the Act, and expressions used in it have, unless the contrary intention appears, the same meaning as they bear in the Act (Interpretation Act 1978, s 11).

It is reasonable to ask why, if this is so, the instrument is made separately and not incorporated into the Act. Would it not be more satisfactory to have the material set forth in a single unified text, rather than split between the Act and one or more statutory instruments? The answer is yes, but two points have to be made. First, relevant material may under our system be spread between two or more *Acts*, never mind statutory instruments. Second, there are compelling reasons why it may be necessary to produce statutory instruments separate from the parent Act.

The need for statutory instruments

Statutory instruments enable the final detail of a regulatory scheme to be separated from the main legislation requiring parliamentary scrutiny. Since they do not need to go through the full process of parliamentary validation, statutory instruments provide a quick and flexible method of statutory control. They can be easily altered to meet contingencies. This usually applies whether or not Parliament is in session. In the case of commencement orders the Act, or the part of it in question, can be brought into force at a convenient time when all necessary preparations have been completed. If an instrument proves defective, or a new situation arises, an amending instrument can be rapidly produced.

Parliament retains control of statutory instruments in various ways. At the beginning of each session it appoints (in Britain) a Joint Select Committee to scrutinise all new instruments and report on any which need to be drawn to attention, for example because they

constitute an unusual or unexpected use of the power. The use made by a minister of such powers is subject to questioning and debate in Parliament in all cases. Where however a power is of unusual importance, say because it enables a tax to be imposed or an Act to be amended, Parliament may word the power so that it requires a draft of the instrument to be approved by each House before the instrument can come into force. A less stringent control is to make the instrument subject to annulment by Parliament. These methods are respectively known as affirmative resolution procedure and negative resolution procedure. The former requires the government whips to keep the House. Under the latter it is the government's opponents who must persuade sufficient members to attend the debate and vote in their favour.

The arrangement of a statutory instrument

A statutory instrument may be an Order in Council or other order, or it may consist of regulations or rules. These are the principal types, though others are possible (for example a scheme or warrant). The name depends on the wording of the empowering Act. The drafter of this will have selected the term which seems most appropriate, though there are no fixed principles. An Order in Council can be made only at an actual meeting of the Privy Council attended by Her Majesty or a Counsellor of State. This procedure is reserved for statutory instruments which are of constitutional importance or otherwise deal with matters of weight. The term 'order' is used for instruments embodying executive acts, such as the bringing of an Act into operation, the making of an appointment, or the disapplying of an Act in certain cases. Many orders nevertheless have legislative effect. The term 'regulations' is generally used for provisions which have a continuing regulatory effect, but procedural instructions relating to a court, company or other body are called 'rules'.
In describing the arrangement of a statutory instrument, we first deal with the introductory matter, and the explanatory notes, which are common to all types of instrument, and then go on to describe the body of the instrument.

Introductory matter

Under the heading STATUTORY INSTRUMENTS printed between parallel lines there appears first the number of the instrument, then an indication of the subject matter, then the title. This is followed by the date of making, and any other relevant dates. Here is an example:

1980 No 54 CONSUMER CREDIT

The Consumer Credit (Advertisements) Regulations 1980

Made	*17th January 1980*
Laid before Parliament	*29th January 1980*
Coming into Operation	*6th October 1980*

After this comes a recital naming the person making the instrument and the powers under which it is made. To safeguard against accidental omission of a relevant power, the recital of powers ends with sweeping up words in an ancient formula. Thus the opening given above continues as follows (after setting out the arrangement of regulations):

The Secretary of State, in exercise of powers conferred on him by sections 44, 151(1) and 182(2) and (3) of the Consumer Credit Act 1974 and of all other powers enabling him in that behalf, hereby makes the following Regulations:—

Then follows the body of the instrument, ending with the signature and description of the minister making it. A government department must not issue a statutory instrument unless the minister responsible for the department has personally approved it, or it conforms to his known views or is of secondary importance. It is a rule of constitutional practice that a minister cannot be expected to give his personal attention to matters of secondary importance arising in the ordinary course of administration *(Local Government Board* v *Arlidge* [1915] AC 120).

Explanatory note

After the conclusion of the instrument there is printed an explanatory note, stated to be 'not part of the instrument. The practice of including these notes dates from 1943, though it was done in individual cases much earlier. The practice was regularised by the House of Commons in June 1939 by a ruling which stated that the memorandum must represent the facts, must be essentially of an uncontroversial and explanatory nature, and must be not predjudice readers in favour of the instrument.

Body of the instrument

This follows a form very similar to that described in the previous chapter in relation to Acts. There can be the same allocation of subsidiary matter to Schedules, and the same division into Parts. The only significant difference is that instead of being called sections the main divisions are named according to the type of instrument. In an order they are called articles. If the instrument consists of

a set of regulations or rules each division is a regulation or rule accordingly. In all cases, subdivisions are called paragraphs. The divisions do not have marginal notes in the same way as Acts. Instead, they have headnotes. By contrast with Acts, formal provisions (such as those giving the title of the instrument or containing definitions) are placed at the beginning.

Prerogative instruments

Instruments made under the Royal prerogative are not within the category of statutory instruments. They are a form of primary legislation, though of little importance now. Usually they take the form of Orders in Council. For an example see the Territorial Waters Order in Council 1964, discussed in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740.

Drafting

In Britain, nearly all statutory instruments and prerogative instruments are drafted by lawyers employed in the government department responsible for the instrument or (where this does not have its own legal branch) in the office of the Treasury Solicitor. Only instruments of exceptional importance or difficulty are drafted in the Parliamentary Counsel Office.

This division of labour constitutes a basic weakness in the system. As we have seen, the parent Act and its statutory instruments form one unit of law. They should hang together coherently and consistently. Yet, the person who drafts the Act normally has nothing to do with the instruments made under it. He is not even called on to advise. Furthermore the instruments are not even drafted in the same office as the Act. The Parliamentary Counsel Office has existed for more than a century and developed its own doctrines and approach. These are not known to the departmental lawyers, who receive no training as drafters. The risks of going astray are obvious. The Canadian draftsman Mel Hoyt agreed that all legislative drafting should be done in one office: see Bennion 1980(7).

Drafting parameters

Since statutory instruments cannot be amended in Parliament, and are rarely debated, the drafting parameters described in chapter 2 have a restricted application. ***Debatability*** is of little relevance. ***Procedural legitimacy*** imposes fewer demands, though the new factor of compliance with the ***ultra vires*** doctrine emerges. Care must be taken to ensure that the terms of the instrument are within the powers conferred by the parent Act (as amplified by the Interpretation Act). ***Timeliness*** too is less demanding, since the making of subordinate legislation is not constricted by the limits

of the parliamentary session. ***Acceptability*** is not a potent factor. Parliament has already approved the principle of the legislation, and will not scrutinise statutory instruments in detail. The instrument must be acceptable to the Joint Committee however (see p 54). The only relevance of ***brevity*** lies in the need to avoid unnecessary strain on the resources of the administering department and the outside interests affected.

When it comes to the operational parameters, we see that all these apply to statutory instruments as they apply to Arts. Only the greater ease of amendment when things go wrong makes them less constricting on the drafter of the former.