Bennion on Statute Law

Part III - The Need for Processing of Texts

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Doubt-factor II: The Broad Term

In the previous chapter we saw how, in a search for brevity, the legislative drafter is forced to create doubt by leaving out what it is not essential to state. Now we examine another technique of brevity. By use of a word or phrase of wide meaning, legislative power is delegated to the processors whose function is to work out the detailed effect. Again, doubt is necessarily created. Until the details are worked out, it will be doubtful what exactly they are. The statute user must use his own judgment. Moreover, under our system there is rarely if ever a point at which it can be said that the detail is complete. Even such detail as can be discerned tends to be obscured by the inexact methods used by processors, particularly judges.

A broad term may consist either of a single word or a phrase. In *Regan & Blackburn Ltd* v *Rogers* [1985] 1 WLR 870, 873 Scott J said of the phrase 'pending land action' in the Land Charges Act 1972, s 17(1): 'those words are very broad and cannot be given their full literal meaning'. They were what may be described as a multiple broad term.

A broad term may perform the function of a verb, adverb, adjective or substantive. If a substantive, it is what was described in *Hunter vBowyer* (1850) 15 LTOS 281 as a *nomen generate*. Other descriptions of the broad term include 'open-ended expression' *(Express Newspapers Ltd* v *McShane* [1980] 2 WLR 89, 94), 'word of the most loose and flexible description' *(Green* v *Marsden* (1853) 1 Drew 646), and 'somewhat comprehensive and somewhat indeterminate term' *(Campbell* v *Adair* [1945] JC 29, 23).

The drafter selects a broad term which is either a processed term or an unprocessed term. Either way it is likely to have a core of certain meaning and a penumbra of uncertainty. It may be mobile or static. Its meaning will be coloured by the context, and the legislative purpose.

An implied intention that an unqualified broad term shall be construed as if a narrowing provision had accompanied it will not be found where the absence of such a provision is explicable only on the ground that it was not intended. Thus in *Puhlhofer* v *Hillingdon LBC* [1986] AC 484 the House of Lords declined to treat the term 'accommodation' in the Housing (Homeless Persons) Act 1977, ss 1

and 4 as qualified by an implied epithet such as 'appropriate' or 'reasonable' because if Parliament had intended such a narrowing of its meaning it would surely have said so. Moreover such a narrowing ran contrary to features of the Act. The Act did not increase the stock of housing available to authorities governed by it, and was clearly not intended to enable persons to jump the queue of those whose names were on the waiting list for housing.

Processed **and** unprocessed terms

When the drafter decides to attain brevity by using a broad term, he looks for one which has been processed. If the courts have already worked out the meaning of a term, and that meaning corresponds with the drafter's intention, the term is suitable for adoption. Instead of there being uncertainty about whether subsequent processors will adopt the meaning he desires, the drafter can be reasonably sure that the established meaning will be followed.

Usually, the processed term will be one used in previous legislation. Only rarely will a term whose meaning has been worked out solely at common law present itself as suitable for adoption. The drafter of AP Herbert's Divorce Act, the Matrimonial Causes Act 1937, used a processed verb when he expressed as a ground of divorce that the respondent 'has deserted the petitioner without cause' for three years. The verb 'deserted', used by itself, is a typical broad term. There are many different acts which might be held to fall within it. One is a simple refusal of sexual intercourse. But it had been held in *Jackson* v *Jackson* [1924] P 19 that such refusal did not constitute desertion within the meaning of an earlier Act. When the point was raised under the 1937 Act Tucker LJ took the same line: 'I think the Legislature in. . . refraining from defining desertion must be taken as accepting the tests which had hitherto been applied in the courts . . .' *{Weatherley* v *Weatherley* [1946] 2 All ER 1, 8).

Doubt may arise as to whether use of a processed term in a new Act brings in the processed meaning or the ordinary (dictionary) meaning. Often there is no significant difference. Where there is a difference, the point may turn on whether the new Act is *in pari materia* with the earlier Acts in which the term appeared. The rule was thus laid down by Lord Buckmaster in *Barras* v *Aberdeen Steam Trawling and Fishing Co* [1933] AC 402, **411:**

> It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase *in a similar context* must be construed so that the word or phrase is interpreted according to the meaning that has previously been ascribed to it (emphasis added).

Two points should be noted. It is not the practice of drafters (who

tend to be over-cautious) to attract processing by saying expressly in the new Act that the term has the same (undefined but processed) meaning as in the previous Act. This renders unrealistic the remark by Lord Simon of Glaisdale that 'If Parliament wishes to endorse the previous interpretation it can do so in terms' *(Fairell* v *Alexander* [1977] AC 59, 90). Second, the courts will be reluctant to attach previous processing to the term in its new use if they think the processing defective (eg *Royal Crown Derby Porcelain Co* v *Russell* [1949] 2 KB 417, 429).

While the borrowing by the drafter of a term already processed may be convenient, it can give rise to a conceptual difficulty. A word or phrase used in an Act is to be construed in accordance with the purpose of that Act. Decisions on its meaning may be misleading if it is borrowed for another Act with a different purpose (eg *Hanlon* v *The Law Society* [1981] AC 124).

Core and penumbra

Doubt arises from the drafter's use of a broad term only where its meaning is to some extent uncertain. There are terms which are broad in the sense that they cover many different cases, but whose meaning is certain in virtually every case: for example 'mammal' or 'moving'. We are not here concerned with these.

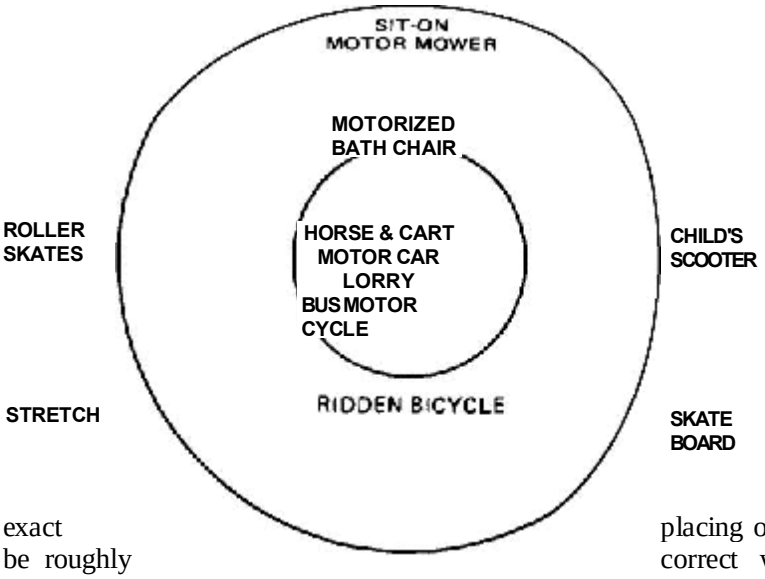
On the other hand, it is unlikely that the application of a statutory term will be doubtful in *every* case. Selection by the drafter of such a term would almost certainly be an error, since it would mean that the entirety of the legal rule in question was founded upon uncertainty; which is not the nature of law. A will may be declared void for uncertainty, but this rule does not apply to Acts of Parliament. Nevertheless a modern Act whose application was uncertain in every case would certainly be considered ill-drawn: at least if drafted on common-law lines.

It follows that what we are in practice concerned with is the broad term whose application to some cases is clear and to others doubtful. A *penumbra* is defined as a partial shade bordering upon a fuller or darker one; in other words a twilight. This is a good description here because we are all familiar with the difficulty caused by a phrase such as 'during the hours of darkness'. Midnight is clearly within it, and noon equally clearly outside it. But there are periods around dawn and sunset during which it must be debatable whether darkness has ceased or fallen.

The drafter tries to choose phrases whose penumbra of doubt is as small as possible. At common law, burglary was committed when a dwelling-house was broken and entered *by night* with intent to commit a felony. Night was understood as the period between sunset and sunrise. A later common-law refinement held it not to be night if there was sufficient light from the sun to tell a person's face. Finally, when statute intervened, night was precisely defined

as the period between 9 pm and 6 am. Although the penumbra remained in nature, it vanished from the law of burglary.

An unnecessarily wide penumbra is an instance of bad drafting. A standard example used in juristic discussions of what Hart calls the 'open texture' of language is the notice reading 'No vehicles allowed in the park' (see Twining and Miers 1982, p 205). We can depict the uncertainty this causes by a diagram in which the inner circle depicts the core of certain meaning while the space between the circles marks the penumbra of doubt about what is allowed in the park. Outside this penumbra the meaning is once again certain—in the opposite sense. Not everyone would agree with the exact placing of these objects, but assuming it to be roughly correct we have three doubtful cases. There could be genuine argument with the park-keeper over whether it is allowed to take into the park a ridden bicycle, a motorised bath chair, or a sit-on motor mower. Other doubtful objects can readily be imagined, and we can vary the condition of the ones mentioned. Does it make a difference if the bicycle is pushed instead of ridden, or the motor mower belongs to the council? Is an ambulance allowed in to take away the victim of an accident on the slide? Suppose a car chassis, minus wheels and engine, is carried in by mischievous youths? The possibilities of doubt are endless.



Greater precision can be achieved by detailed wording, but then we end up with the closely-printed park notice that nobody reads.

Even the park-keeper may not read it, and so lack conviction in trying to repel the practical villains: motorists and motor cyclists. The modern legislative drafter goes into as much detail as he considers practicable. For the rest, he relies on ellipsis or selects broad terms with the smallest penumbra of doubt.

Cutting down the broad term

Sometimes, by usage or judicial decision (or a combination of both) the width of a broad term is drastically cut down. The term 'immoral purposes' is very wide. Yet as used in s 1(1) of the Vagrancy Act 1898 (reproduced in s 32 of the Sexual Offences Act 1956) it has been held to be doubly limited. First, it excludes all forms of immorality except sexual immorality. Second, even as respects sexual immorality, it excludes all but homosexual acts. (See *Crook* v *Edmmdson* [1966] 1 All ER 833). This illustrates that the term selected by the drafter as his 'broad term' may itself be elliptical. Here the courts have processed the term 'immoral purposes' as if it were 'purposes involving sexual immorality of a homosexual nature'.

Static and mobile terms

Broad terms can be divided into two types. First there is the case where the content of the term is static or constant, in both place and time. The circumstances that fall within it are basically the same wherever they happen, and at what historic moment. An example is the term 'accident'. Secondly there is the *mobile* phrase. What falls within it may differ according to time or place (or both). For instance one person may or may not be regarded as belonging to another person's 'family' according to the place, or the period, in which they live.

We now consider the two categories in turn, examining these and other examples from decided cases. We shall see later that failure by the drafter to understand the distinction between the categories can have important consequences.

The static broad term

The term 'accident' has been frequently employed in legislation. One famous example of its use was in the Workmen's Compensation Acts, which gave a workman a right to compensation for 'an accident arising out of and in the course of his employment'. This is a multiple broad term of epic proportions. Many thousands of judicial decisions proved necessary to process it. The process began with the first case to reach the House of Lords under the 1909 Act. This concerned a workman suffering from a form of heart disease induced by natural causes, an aneurism. The aneurism might have burst and killed the workman at any time—even while he was asleep in bed. In fact

it did so while he was at work, engaged in manual labour of a by no means strenuous kind. Was this an 'accident'? Yes, said the House of Lords in a judgment we are not surprised to find lacked unanimity. The fact was that the policy of the Act plainly required the term 'accident' to be given a wide meaning. As Kennedy LJ said in deciding that it even covered the murder of a cashier by a thief:

An historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would fairly, I suppose, be charged with a misleading statement of fact. . . But whilst the description of death by murderous violence as an 'accident' cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable . . . *(Nisbet* v *Rayne and Burn* [1910] 2 KB 689).

This neatly illustrates the difference between the case where the drafter has selected a term which is etymologically capable of the wide meaning it should bear and the case where he has erred by making his wording narrower than the object (as to the latter see pp 264-266 below).
Other examples of static broad terms are the following:

Repairing Rules made under the Railway Employment Prevention of Accidents Act 1900 protected workers engaged in 'relaying or repairing' the permanent way. Did this include the routine oiling and maintenance of apparatus working the points? In *London and North Eastern Railway* v *Berriman* [1946] AC 278 the House of Lords, by a majority of three to two, held that it did not. [Here the wording was *narrower than the object,* a frequent drafting defect: see p 264].

Supply Section 1(1) of the Finance Act 1972 introduced a new tax in these words: 'A tax, to be known as value added tax, shall be charged . . . on the supply of goods and services in the United Kingdom . . .'. In *Customs and Excise Commissioners* v *Oliver* [1980] 1 All ER 353,354, Griffiths J said: 'There is no definition of "supply" in the Act itself, but it is quite clear from the language of the Act that "supply" is a word of the widest import'.
Many more instances could be given of static broad terms, but this is not necessary. The terms are 'static' in the sense that, by processing, detailed rules can be worked out which will be of universal application despite differences of time or place.

The mobile broad term

Section 4(1) of the Obscene Publications Act 1959 provides a defence against a charge of publishing an obscene article 'if it is proved that publication of the article in question is justified as being for

the public good on the ground that it is in the interests of science, literature, art or learning, or of other *objects of general concern'* (emphasis supplied). In *R* v *Jordan* [1976] 2 WLR 887, 893, Lord Wilberforce said that the italicised phrase 'is no doubt a mobile phrase; it may, and should, change in content as society changes'.

Changes of this kind may occur in time or in place. Often they occur in both. Since an Act is always speaking, it must be worded so as to accommodate them. The drafter of the Obscene Publications Act 1959 assumed that, throughout the life of the Act, science, literature, art and learning would be of general concern. It was safe therefore to specify them (and helpful to do so, since they gave shape and colour to his proposition). But other topics were to be judged not on what was of general concern in 1959 but on what was of general concern at the time of an alleged offence. If the Act lasted 50 years, and a prosecution was brought at the time of its golden jubilee, the drafter intended the case to be judged by what was of general concern in 2009 not 1959. Let us take some other examples, first of changes in time and then in place.

Suppose it is desired to impose control over firearms but exempt any antique weapon. The term 'antique' is vague. The drafter might seek precision by referring instead to a weapon 'manufactured more than 100 years before the passing of this Act'. But that would be illogical. If the Act were passed in 1968 a gun made 105 years earlier would be exempt. By 1978 however, a gun made 105 years earlier would not be exempt, because it would have been made only 95 years before the passing of the Act. What is wanted is a rolling period, so that at any moment the Act will exempt guns which *at that moment* are 100 years old. The drafter of s 58(2) of the Firearms Act 1968 did not adopt this. Instead, he provided a flurry of broad terms: 'Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament.' No definitions were provided for 'antique', 'curiosity' or 'ornament'.

The question of the meaning of 'antique' in s 58(2) came before the Divisional Court of the Queen's Bench Division in *Bennett* v *Brown* (1980) *The Times*, 12 April. The prosecutor appealed from magistrates' acquittal of a defendant in relation to three guns 'dating from possibly 1886, and after 1905 and 1910'. He told the court that prosecuting authorities needed guidance on what was 'antique' for this purpose. Eveleigh LJ said it was a question of fact, but guns manufactured in the present century 'could not be antique'. The court directed the magistrates to convict in relation to the guns made after 1905 and 1910. Regarding the gun possibly made in 1886, Eveleigh LJ said that the magistrates were entitled to come to their conclusion, though he would not have done so himself. This judgment seems to put excessive weight on the arbitrary division of time into centuries.

Is 'book' a mobile term? It might not seem so. Everyone knows what is and is not a book. Or do they? Section 9 of the Bankers' Books Evidence Act 1879 defines 'banker's book' as including ledgers, day books, account books, 'and all other books used in the ordinary business of the bank'. In 1879 it was no doubt unthinkable that banks would keep their records in anything but bound books. One cannot blame the drafter for failing to envisage the invention of microfilm. Yet in seeking to make copies of all bank records admissible in evidence he might have managed to find a phrase of more general meaning. In *Barker* v *Wilson* [1980] 1 WLR 884, the Divisional Court had no hesitation in coming to the drafter's rescue. They treated 'book' as a mobile term wide enough to embrace microfilm—and indeed 'any form of permanent record kept by the bank by means made available by modern technology'. It did not worry Caulfield J that a microfilm 'is not normally called a book'.

Another technological development came before the court in *Aerated Bread Co* v *Gregg* [1873] LR 8 QB 355. At the time of the passing of the Bread Act 1836 a certain type of bread, of a certain shape, was widely sold as 'fancy bread'. The Act used this term without definition. Quain J held that 40 years later the term could be applied to bread of the same kind, even though of a different shape and produced by an altered mode of baking.

Social change has frequently to be accommodated by the mobile term. When 'single woman' was first used in Affiliation Acts it referred solely to an unmarried woman. The growing frequency with which marriages broke up led to its ultimate extension to a married woman living apart from her husband—even where they shared the same roof *{Watson* v *Tuckwell* (1947) 63 TLR 634).

It follows that a judicial decision on the meaning of a term will be disregarded if the meaning changes. The Rent Acts give protection, where the tenant dies, to a member of the tenant's 'family'. In 1950 it was held by the Court of Appeal that this did not include the tenant's common law husband *(Gammons* v *Ekins* [1950] 2 KB 328). In another case 25 years later the same court reversed its ruling. The case was *Dyson Holdings Ltd* v *Fox* [1976] QB 503, where Bridge LJ said (p 513):

> If the language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the courts have constantly affirmed that the word is to beunderstood in its ordinary meaning.

By this Bridge LJ clearly referred to the fact that a mobile term is to be applied to facts arising at a particular time in accordance with its meaning *at that time.*

Another matrimonial term of long standing is 'cruelty' as a ground of divorce. Here we see the effect of a social change attributable to advancing civilisation. As the times become less rough and

barbarous, and the standard of comfort advances, people will put up with less hardship. What was once part of the give-and-take of marriage becomes 'cruelty'. Mental cruelty enters the scene, alongside physical ill-treatment. There is a similar progression with broad terms like 'riotous', 'disorderly', 'indecent' and 'insulting' as descriptions of public behaviour. A dog may now be held 'dangerous' within the meaning of the Dogs Act 1871 even though its behaviour is something less than savage or ferocious *(Keddle* v *Payn* [1964] 1 WLR 262).

Sexual *mores* are notoriously mobile in time. Section 32 of the Sexual Offences Act 1956 (a consolidation Act), reproducing s 1(1) of the Vagrancy Act 1898, makes it an offence for a man to solicit for 'immoral purposes'. In *Crook* v *Edmondson* [1966] 2 QB 81, this was held to mean purposes considered immoral by 'the majority of contemporary fellow citizens' *(per* Winn LJ at p 90).

Here are two other examples of broad terms whose content varies from place to place:

Section 59 of the Highways Act 1980 gives a highway authority power to recover compensation from an operator responsible for damage 'caused by *excessive* weight passing along the highway, or other *extraordinary* traffic thereon'. Both these broad terms are modified by reference to the average maintenance expenses of highways in the *neighbourhood.* Here the variability of the content is expressed in the statute.

In the other example the variability is not expressed, but has been held by the courts to be implied. Section 74(4) of the Licensing Act 1964 (reproducing earlier legislation) empowers justices to extend permitted licensing hours for the sale and consumption of alcoholic liquor on a 'special occasion.' No definition of this term is provided. In a case decided under earlier legislation, Lord Coleridge C] said 'the question what is a special occasion must necessarily be a question of fact in each locality'. He added: 'Each locality may very well have its own meaning to those words, and it is for the justices in each district to say whether a certain time and place come within the description' *(Devine* v *Keeling* (1886) 50 JP 551, 552). Thus the Saturday before a bank holiday may be a 'special occasion' in a seaside holiday resort but not in an industrial town (/? v *Corwen Justices* [1980] 1 WLR 1045).

Static term—mobile concept

Not only should the processor be alert to the distinction between the static and mobile broad term, but the drafter needs to be aware of it too. It is really a distinction between static and mobile *concepts.* If the concept for which the drafter needs a term is static, then he should select a static term, and vice versa. If he fails in this he may create unnecessary difficulties of interpretation. The commonest error, and the most troublesome, is where the

drafter with insufficient imagination thinks his concept is fixed when it is in fact mobile. The Canadian Criminal Code made it an offence to trade or traffic in 'any bottle or syphon' which had upon it the trade mark of another person, or fill it with any beverage for sale, without his consent (cited Driedger 1974, p 86). It is obviously possible for beverages to be sold in other forms of container, such as cartons. By looking only at the conditions prevailing at the time he was writing, and failing to exercise his imagination, the drafter made his text unnecessarily and unjustifiably narrow. He could easily have written 'container' instead of 'bottle or syphon'. We saw earlier how a similar difficulty arose in connection with bankers' books.

The reverse error, of using a mobile term for a static concept, creates unnecessary vagueness. It would not have been sensible to say 'container' instead of 'bottle' in a provision intended to guard against danger from broken glass.

The broadest term

As we have seen, the wider the penumbra of doubt attached to a broad term the greater the discretion effectively delegated to the processor. There is an important class of cases where, because the limiting framework is virtually non-existent, delegation occurs practically across the whole field. In effect the legislator abdicates completely. For his judgment is substituted that of the processor, guided only by vague concepts such as what is 'reasonable' or 'just' or 'fit and proper'.

There are many examples of this form of delegation. Here is one, drawn from the Consumer Credit Act 1974. In this instance the processor is an official, the Director General of Fair Trading. Section 25(1) states that a licence to carry on a credit or hire business shall be granted on the application of any person if he satisfies the Director General that he is 'a fit person to engage in activities covered by the licence'. If this stood alone, as it well might have done, it would empower the Director General to set his own standards of fitness. Parliament has thought it right to lay down guidelines however, and the section goes on to instruct the Director General to have regard to specified factors—such as whether the applicant has a record of dishonesty or violence.

Parliament has been more ready to entrust unfettered discretion to judges than officials. In the early days of divorce law for example, the court was empowered in relation to the children of dissolved marriages to 'make such provision as it may deem just and proper' with respect to their custody, maintenance and education (Matrimonial Causes Act 1859, s 35).

The modern tendency is for judges to receive (and indeed expect) more positive guidance. When the grounds for divorce were recast in 1969-70 elaborate criteria were laid down for maintenance,

including the momentous requirement to put the parties as nearly as possible in the position they would have been in if the marriage had not broken down (Matrimonial Proceedings and Property Act 1970, s 5(1) and (2)); see now Matrimonial Causes Act 1973, s 25(1)).

Guides to meaning

Sometimes, as we have seen, guides to the interpretation of the broad term are stated expressly in the legislative text. Even where this is not done, the meaning is not left completely at large. Under the *noscitur a sociis* principle (pp 195-196), terms are recognised to gain colour from their context.

The context may not always furnish assistance. The Housing Act 1980 laid down the repairing covenants that are to apply where the secure tenant of a flat exercises his statutory right to acquire a long lease (see Sched *2*, paras 13 to 17). It enabled the landlord to charge the tenant a 'reasonable' proportion of the cost of non- structural repairs. Often when the broad term 'reasonable' is used, as with the concept of a 'reasonable' rent, the factors by reference to which it is to be applied are obvious. Here they are not. The Act imposed on the landlord the duty to repair whether or not it was 'reasonable' that he should be saddled with this. It then enabled him to transfer to the tenant such part of the duty as might be 'reasonable'. If, from an objective viewpoint it was wholly unreasonable in a particular case to saddle the landlord with repairs, how could it be 'reasonable' to transfer only a part of the cost to the tenant? The courts are forced to grope for a meaning in such cases, without guidance from the legislature. (For further details see Bennion 1981(6)).

Above all, the broad term must be construed so as to further the purpose and intention of the instrument in which it is used. The ways in which broad terms are processed in this way are examined in Part IV.