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Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at *www.francisbennion.com/topic/understandinglegislation.htm*.

Threading the Legislative Maze - 6

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President Clinton showed the importance of drafting technique in the Lewinsky tapes, televised worldwide on 21 September 1998. The definition of "sexual relationship" formed the centrepiece of the President's testimony to the grand jury. This important event is an answer to those (and they are many) who seem to think drafting and its techniques to be of less than compelling interest, scarcely worth teaching to law students. In truth those techniques have a profound influence, one way or another, on the way law operates, or should operate. That is why I am devoting this and the next article to the topic.1

Definitions

Definitions are required for various purposes, the most obvious of which is to clarify the intended meaning of a term being used. The Lewinsky case turned mainly on whether the President committed perjury when he denied on oath that he had had a sexual relationship with Ms Lewinsky. In his testimony he alleged that he, in common with the ordinary citizen, would say that a couple have a sexual relationship if, *and only if*, vaginal intercourse takes place. On that basis he did not have a sexual relationship with Ms Lewinsky because their sexual acts together did not go beyond the commission by her of fellatio on him. An alternative definition was that laid down by the judge in the Paula Jones case, in which the President testified. This involved saying that a person has a sexual relationship with another person if, *and only if*, the two have sexual relations, this being defined as follows:

> ". . . a person engages in 'sexual relations' when the person knowingly engages in or causes . . contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person . . . Contact means intentional touching, either directly or through clothing."

The President claimed that on this definition too he did not have a sexual relationship with Ms Levinsky because the sexual acts were done solely by her, the President taking a wholly passive role. He argued implausibly that while A has sexual relations with B, B may not be having sexual relations with A. These legalistic arguments may save him from impeachment. The case illustrates the need for care and skill in the drafting and construction of definitions, which is not easy.

Another example of this need is furnished by a definition, recently drawn to my attention, of "resides with". This, like the definitions which concerned President Clinton, is what is called a clarifying definition. The

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1 Previous articles in the series are at pages 356, 436, 516, 596 and 696 above.

Housing Benefit (General) Regulations 1987 reg. 7 says that a person is to be treated as not liable to make payments in respect of a dwelling if he resides with a person to whom he is liable to make such payments and that person is a close relative of his or his partner. Regulation 3(4) says "A person resides with another only if they share any accommodation, except a bathroom, a lavatory or a communal area". As I will show, the drafting of this is disfigured by a common error, producing ambiguity.

The type of definition just cited can be reduced to: "Situation A exists only if condition B is satisfied". But this has two possible meanings: (1) "Situation A exists if, and only if, condition B is satisfied", or (2) "Situation A exists only if condition B is satisfied, but does not necessarily exist even if condition B is satisfied". In each case an additional term is implied. In case (1) this additional implied term can be expressed as "Situation A always exists if condition B is satisfied" , while in case (2) the additional implied term can be expressed as "Situation A does not necessarily exist even though condition B is satisfied". A person called on to decide between the two meanings will need to do so by applying the basic rule of statutory interpretation, namely that "it is taken to be the legislator's intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned".2 The ambiguity could have been avoided by spelling out the intended additional implied term in the original definition.3

The Interpretation Act 1978, which lays down many statutory definitions of general application, states that they apply "unless the contrary intention appears".4 Similar statements usually appear in Acts providing *ad hoc* definitions. Whether the defining enactment says so or not, a statutory definition does not apply if the contrary intention appears from the place in which the defined term is used. The legislator is always free to disapply a definition, whether expressly or by implication.

Other Types of Definition

In addition to clarifying definitions there are at least five other types of statutory definition, which I will now briefly describe.

A *labelling definition* uses a term as a label denoting a complex concept that can then be referred to merely by use of the label, instead of the drafter having to keep repeating the full description. This technique has long been adopted to avoid the unnecessary prolixity previously displayed in our legislation, for example in the statute 16 & 17 Cha. 2 c. 7 of which the following is a brief sample-

> ". . . every proprietor of books and maps and charts and cuts and pictures, and all prints whatsoever within the City of London, or in any other place, except the two Universities, shall reserve 3 printed copies on the best and largest paper of every book and map and chart and cut and picture and of all prints whatsoever now printed or reprinted by him with additions or alterations; and shall before any public vending of the said books or maps or charts or cuts or pictures or other prints bring them to the Master of the Company of Stationers . . ."

This is a taste of what used to be common before the setting up in 1869 of the Parliamentary Counsel Office, where all Government Bills are now drafted. It is what I call disorganised composition. The above passage presents several problems of construction, but an obvious amelioration would be to avoid constant repetition of the phrase "books and maps and charts and cuts and pictures" (which also occurs elsewhere in the Act) by the use of a labelling definition such as "In this Act 'prints' means books, maps, charts, cuts, pictures or other printed matter".

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2 See Bennion, *Statutory Interpretation* (3rd edn, 1997) s 193. I shall explain this basic rule more fully in a later article.

3 As with the above examples concerning President Clinton, this shows the need to add the words "and only if" where these are intended.

4 Interpretation Act 1978 s 5, which relates to definitions set out in Schedule 1 to the Act.

Where an Act contains numerous amendments of another Act with a complex title it is common practice to refer to the latter by the labelling definition "the principal Act". A labelling definition may be in indirect form, as in the following: "Any reason by virtue of which a dismissal is to be regarded as unfair in consequence of subsection (1) or (3) is in this Part referred to as an inadmissible reason".
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A *referential definition* attracts a meaning already established in law, whether by statute or otherwise. For example the Charities Act 1960 s 45(1) says "'ecclesiastical charity' has the same meaning as in the Local Government Act 1894". This method carries a danger, since the Act referred to may later be amended or repealed. Here the principle is that unless the amending or repealing Act contains an indication to the contrary, the amendment or repeal does not affect the legal meaning of the referential definition.

An *exclusionary definition* deprives the term of a meaning it would or might otherwise be taken to have. One of the earliest exclusionary enactments is the Treason Act 1351, stated in its preamble to be enacted because "divers opinions have been made before this time what case should be adjudged treason, and what not". By not mentioning them, the Act excluded certain forms of violently anti-social conduct which had earlier been charged as treason, such as highway robbery and kidnapping for ransom. It tends to mislead if a wide term is artificially cut down by an exclusionary definition. The long title of the Animal Boarding Establishments Act 1963 says it is "An Act to regulate the keeping of boarding establishments for animals". All the way through, the Act refers to "animals". Only when the reader gets to the definition section at the end (section 5(2)) is he informed that in the Act "animal" means "any dog or cat".

An *enlarging definition* is designed to make clear that the term includes a meaning that otherwise would or might be taken as outside it. Section 454(3) of the Income and Corporation Taxes Act 1970 began: "In this Chapter, 'settlement' includes any disposition, trust, covenant, agreement or arrangement . . ." Lord Morton said: "the object of the subsection is, surely, to make it plain that . . . the word 'settlement' is to be enlarged to include other transactions which would not be regarded as 'settlements' within the meaning which that word ordinarily bears".{*Thomas v Marshall* [1953] AC 543 at 556.} The typical form of an enlarging definition is "T includes X". This is taken to signify "T means a combination of the ordinary meaning of T plus the ordinary meaning of X". In other words the mention of X does not affect the application of the enactment to T in its ordinary meaning.{*Nutter v Accrington Local Board* (1878) 4 QBD 375 at 384; *Deeble v Robinson* [1954] 1 QB 77 at 81-82; *Ex p Ferguson* (1871) LR 6 QB 280 at 291.}

A *comprehensive definition* sets out to provide a full statement of everything that is to be taken as included in the term. Section 46 of the Charities Act 1960 says: "'charitable purposes' means purposes which are exclusively charitable according to the law of England and Wales". This comprehensively describes the concept in question. It is also an example of a referential definition, since it draws on the legal meaning of "charity".

A definition may be qualified by what is known as *the potency of the term defined*. Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court: it is impossible to cancel the ingrained emotion of a word merely by an announcement.{R. Robinson, *Definition* (1952), p 77.} Thus Lord Browne-Wilkinson had regard to the potency of the term defined when he said of the definition of "wages" in the Wages Act 1986 s 7(1) "it is important to approach such definition bearing in mind the normal meaning of that word".{*Delaney v Staples* [1992] 1 AC 687 at 692.} In a criminal case the prosecution alleged that the conduct of a salaried manager of a tied public house in selling his own beer on the premises and pocketing the proceeds fell within the statutory definition of theft as set out in the Theft Act 1968 s 5. Rejecting this argument, Lord Lane CJ said "If something is so abstruse and so far from the understanding of ordinary people as to what constitutes stealing, it should not amount to stealing".{*Attorney General's Reference (No 1 of 1985)* [1986] QB 491 at 507.}

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5 Employment Protection (Consolidation) Act 1978 s 56(5).

Weightless drafting

Reverting to the theme of sexual intercourse, I turn finally to a point suggested by the article at page 676 above, "Rape and Indecent Assault - Changing Perceptions" by Stephen O'Doherty. Mr O'Doherty says of the Sexual Offences Act 1956 that its draftsman{I use the preferred spelling rather than Mr O'Doherty's "draughtsman", which is usually regarded as referring to persons who draw pictures, plans or diagrams. It is in any case now customary to use the sex-neutral "drafter", since much legislation is today drafted by women. It is time our judges caught up with this development.} had no doubts about the meaning of the term "sexual intercourse" in s 44 "because he gave no definition for it". The conclusion does not follow from the premiss, and this uncovers an interesting aspect of drafting technique. The good drafter, who has much to do, declines to waste time on matters that carry no weight. Wherever possible he or she engages in what might be called weightless drafting. This shortens and simplifies wording where there is no weight on its exact meaning.

Section 44 says: "Where on the trial of any offence under this Act it is necessary to prove sexual intercourse (whether natural or unnatural), it shall not be necessary to prove the completion of the intercourse by the emission of seed, but the intercourse shall be deemed complete upon proof of penetration only". Why was no definition of "sexual intercourse" provided? It was not, as Mr O'Doherty says, because the drafter had no doubts about what it means. It was because there was no weight on its meaning and so it was unnecessary to spend time devising a definition. In effect the drafter was saying "whatever this phrase may or may not mean, it does not require emission, just penetration". The purpose was limited to resolving a doubt relating to the question of emission only.

There is another piece of weightless drafting in s 44. If it mattered, there would be hot dispute nowadays about what the 1956 drafter thought he (it was probably he) thought he was talking about when he referred to unnatural intercourse. Gays now tend to take offence if anyone hints that what they do in bed is "unnatural". Probably the drafter did not stop to think just what he meant about that term either, because again there was no weight on it. Its sole purpose was to prevent anyone arguing that s 44 did not apply to offences such as buggery because it was by implication limited to "natural" sexual intercourse.

Summary

- Drafting techniques have a profound influence on the way law operates, or should operate. They are particularly important in relation to definitions.

- Definitions are required for various purposes, the most obvious of which is to clarify the intended meaning of a term being used.

- The Interpretation Act 1978, which lays down many statutory definitions of general application, states that they apply "unless the contrary intention appears". Similar statements usually appear in Acts providing *ad hoc* definitions. Whether the defining enactment says so or not, a statutory definition does not apply if the contrary intention appears from the place in which the defined term is used.

- In addition to clarifying definitions there are at least five other types of statutory definition, as follows.

- A *labelling definition* uses a term as a label denoting a complex concept that can then be referred to merely by use of the label, instead of the drafter having to keep repeating the full description.

- A *referential definition* attracts a meaning already established in law, whether by statute or otherwise.

- An *exclusionary definition* deprives the term of a meaning it would or might otherwise be taken to have.

- An *enlarging definition* is designed to make clear that the term includes a meaning that otherwise would or might be taken as outside it.

- A *comprehensive definition* sets out to provide a full statement of everything that is to be taken as included in the term.

- A definition may be qualified by what is known as *the potency of the term defined*. This indicates that whatever meaning may be expressly attached to a term, its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court.

- Wherever possible the good drafter engages in what might be called *weightless drafting*. This shortens and simplifies wording where there is no weight on its exact meaning.