

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 - 7

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In this article I am continuing the examination of drafting techniques begun in the last article.¹ I begin with the vexed question of retrospectivity.

Retrospectivity in Legislation

In response to the Omaha bomb outrage committed by the so-called Real IRA, the Parliament of the Irish republic (the Dail) passed an emergency Act in one day, under which the Irish police, or Garda Siochana, were expected to be able to arrest the leaders of the Real IRA on the following day. Because of a drafting error this did not happen. The drafter had overlooked the need to give the Act some retrospective effect, so that the police could take account of evidence gathered before it was passed.²

There are two aspects to this story. The first is that it shows that a drafter needs to possess and use imagination. The second concerns the general question of retrospectivity in legislation, a thorny subject.

On the first aspect I will quote from the first of my books to deal with the technique of legislative drafting, written nearly forty years ago.

"The draftsman ought not to be concerned with policy as such, but he is concerned, and has a duty, to see that the policy decision is effected in a way that will be workable. He should therefore be alert to observe flaws in the policy scheme which may interfere with its smooth working when transformed into law. For this he also needs some degree of imagination. By visualising what a scheme will mean in terms of real life when it comes to be put into operation, the draftsman may be able to suggest improvements and point out defects. . . . As Sir Courtenay Ilbert said in *Legislative Methods and Forms*, page 240: 'If a parliamentary draftsman is to do his work well, he must be something more than a mere draftsman. He must have constructive imagination, the power to visualise things in the concrete, and to foresee whether and how a paper scheme will work out in practice'. "³

The question of retrospectivity in legislation requires more detailed examination. Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. The essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward

¹ Previous articles in the series are at pages 356, 436, 516, 596, 696 and 856 above.

² *Sunday Times*, 6 September 1998.

³ Bennion, *Constitutional Law of Ghana* (Butterworths, 1962), p. 344.

adjustment of it. Such, we believe, is the nature of law. Those who have arranged their affairs in reliance on a law which has stood for many years should not find that their plans have been retrospectively upset.⁴

Dislike of ex post facto law is enshrined in the United States Constitution⁵ and in the constitutions of many American states, which forbid it. The principle is that *lex prospicit non respicit* (law looks forward not back).⁶ Retrospectivity is "contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."⁷ The basis of the principle against retrospectivity "is no more than simple fairness, which ought to be the basis of every legal rule".⁸

Transitional provisions

This all very well, but in real life it is often necessary, as our Irish story above shows, to give a statute some retrospective effect. The drafter needs to think very carefully about this, visualising just how the legislative scheme will work out in practice. It is all part of the story of transitional provisions, perhaps the most neglected area in statute law. Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where the drafter has forgotten to include such provisions expressly, the court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended.

Express transitional provisions spell out precisely when and how the operative parts of the Act are to take effect. They serve a very useful purpose, since merely to say that an enactment comes into force on a specified date is often insufficient to produce a clear legal meaning in all possible circumstances. Lord Bridge said that the purpose of a transitional provision is "to facilitate the change from one statutory regime to another", citing Thornton's statement that "The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force".⁹ Failure by the drafter to include adequate transitional provisions is a frequent cause of avoidable difficulty to statute users. Faced with the task of working out the intended transitional operation of the Local Government, Planning and Land Act 1980 s 47, Waller LJ said: "The absence of any transitional provisions has made the construction of this section difficult because it is possible to argue in favour of more than one date."¹⁰

It is important for the interpreter to realise, and bear constantly in mind, that what appears to be the plain meaning of a substantive enactment is often modified by transitional provisions located elsewhere in the Act. Often these are tucked away in an obscure place, where they are easily overlooked. Consequences of overlooking them can be severe. The transitional provisions in the Magistrates' Courts Act 1980 (a consolidation Act) were overlooked by numerous prosecutors and others concerned with the working of magistrates' courts. In several cases this required the discharging of juries and the obtaining of bills of indictment in the High Court. One commentator said: "The confusion has arisen because many magistrates' courts have been committing all cases for trial under provisions of the Magistrates' Courts Act 1980, which

⁴ See *EWP Ltd v Moore* [1992] QB 460 at 474.

⁵ Art. I, s. 9(3).

⁶ D. Jenkins, *Eight Centuries of Reports* (1734), p. 284.

⁷ *Phillips v Eyre* (1870) LR 6 QB 1, per Willes J at 23.

⁸ *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, per Lord Mustill at 525.

⁹ *Britnell v Secretary of State for Social Security* [1991] 2 All ER 726 at 729-30.

¹⁰ *Cardshops Ltd v John Lewis Properties Ltd* [1983] QB 161 at 165.

came into force on July 6 [1981]. Yet tucked away in a schedule to the Act¹¹ is a transitional provision unnoticed by many courts, to the effect that where proceedings began before July 6, committals should be made under the old enactments."¹²

Who is the intended reader?

A vexed question concerning the drafting of legislation is this. For what type of reader is the text intended? Is it for lawyers only, or anyone who rides the Clapham omnibus? No one can word a text correctly if they haven't first decided who the intended reader is.

There has been much confusion on this point. As we saw in the first article in this series, ignorance or mistake as to the legal meaning is not accepted as an excuse for non-compliance, yet most people who are bound by the law are non-lawyers. Many of those who make the law are non-lawyers. Even some people who have to apply the law are non-lawyers. Does all that mean legislation must be drafted so as to be understood by the lay person? The readership of this journal includes many lay magistrates, who might be expected to answer in the affirmative. Would they be right to do so? Certainly there are judicial dicta favouring that stance.

In a 1949 case¹³ Lord Justice Cohen formulated what has since been called the Cohen question.¹⁴ It had to be decided whether a Mrs Wollams was a "member of the family" within the meaning of the Rent Acts. On appeal Cohen LJ said that the question the county court judge should have asked himself was: "Would an ordinary man, addressing his mind to the question whether Mrs Wollams was a member of the family or not, have answered Yes or No?"

Lord Evershed MR borrowed from Shakespeare's Henry V to amplify the description "an ordinary man" in the Cohen question as a man "base, common, and popular".¹⁵ This appears misconceived, having regard to Shakespeare's use of the latter phrase. Pistol challenges the disguised King Henry, who replies that he is a friend. Pistol goes on: "Discuss unto me; art thou officer? Or art thou base, common, and popular?"

The standard can hardly be that of the ordinary man in this sense; and it seems that the Cohen question needs reframing. The words to be construed are put together by legislative drafters, and these are not ordinary men. Like learned judges, they are highly educated men - and women too. The standard must be at least that of the ordinary person of good education. When choosing their words, drafters do not consciously don the mental equipment of a Pistol (even supposing they were able to). Lord Justice Buckley referred to the statute user as "a man who speaks English and understands English accurately but not pedantically".¹⁶

Yet it is important that the law should be ascertainable by the citizen. Lord Diplock said—

"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates."¹⁷

¹¹ Sch. 8, para. 2(1).

¹² Terence Shaw (Legal Correspondent), *The Daily Telegraph* 30 September 1981.

¹³ *Brock v Wollams* [1949] 2 KB 388 at 395.

¹⁴ So described by Lord Diplock in *Carega Properties SA (formerly Joram Developments Ltd) v Sharratt* [1979] 2 All ER 1084 at 1086.

¹⁵ *Langdon v Horton* [1951] 1 KB 666 at 669. See *Henry V* iv i 37.

¹⁶ *Benson (Inspector of Taxes) v Yard Arm Club Ltd* [1979] 1 WLR 347 at 351.

¹⁷ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 at 638.

The last sentence means that legislation should be drafted so as to be understood by a lay person, and not necessarily one who is educated to Lord Justice Buckley's standard. It carries the weighty authority of the late Lord Diplock. Many would instinctively agree with it. Yet is it right? The question is so important that we must investigate further.

Seeking Utopia

In his *Utopia* Sir Thomas More said: "All laws are promulgated to this end, that every man may know his duty; and, therefore, the plainest and most obvious sense of the words is that which must be put upon them". This is an argument for the literal rule of construction, which I discussed in the third article in this series. It assumes that legislative texts are indeed addressed to lay persons. Yet there are many factors indicating the other way. One was pointed out by the Association of First Division Civil Servants: "What appears clear to the layman may not be certain in meaning to the courts; and much of the detail in legislation, which can appear obfuscatory, is there to make the effect of the provisions certain and resistant to legal challenge"¹⁸.

Another inexorable constraint on legislative wording is the need to conform to the language of the existing law. An Act intended to amend the law (as most Acts are) must fit into the existing corpus juris or body of law as well as expressing the reforming intention of the legislator. It must fit not only the existing language (which may well be unnecessarily complex if we could start again) but also the existing concepts. Where the two aims conflict, as they sometimes do, it is more important that the text should be effective than that it should be clear. I say this remembering desperate occasions when I strove to draft a Finance Bill clause so that it fitted effectively into the frightful mess that is the Income Tax Acts and did not cost the country millions in lost tax revenue.

Furthermore obscurity in legislation is very often caused not by unnecessary complication of language but by complication (whether unnecessary or not) of thought. When I started drafting the Sex Discrimination Act 1975 for example I began by writing "A person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man". The intolerable complexity of that Act arose not from any wish of mine but because those instructing me insisted on overlaying it with innumerable refinements, exceptions, conditions and exclusions. In doing so they were genuinely seeking to conform to the popular will as manifested in representations from trade unions, women's groups, employers' organisations and other lobbies. The price of that was complication.

There are other causes of legislative complexity. An obvious one is that a Bill has to run the gauntlet of parliamentary debate and amendment in both Houses. This imposes specific requirements on the drafter, who could usually produce a much better final text if free to start all over again rejigging Parliament's product.

What of the legislator who, like most, is a non-lawyer? Am I really accepting that Bills and draft statutory instruments have to be beyond the understanding of their nominal creators? This would appear paradoxical, if not perverse. There is quite a long history about this aspect, too long to examine here. Until recently Bills were drafted according to the four corners doctrine, under which legislators were supposed to be able to understand the gist of a Bill without going beyond its four corners (that is without looking at any other document). Unfortunately this distorted the finished product, so a system of textual amendment was adopted instead. This is difficult to understand by MPs but improves the finished product. As the Renton Committee said in its 1975 report on the preparation of legislation, a Bill or statutory instrument needs to be drafted in the way that is best from the point of view of its ultimate user. Which brings us neatly back to our original question. Who is the ultimate user?

¹⁸ Cited in paragraph 219 of *Making the Law*, the report of the Hansard Society Commission on the Legislative Process, issued on 2 February 1993.

Conclusions

Despite Lord Diplock, Sir Thomas More, and the many others who think law should be comprehensible by all, I fear the answer is plain. Whether we like it or not, law like medicine is an expertise. A lay person would not think they could do better than a professional in assessing symptoms of illness, carrying out a diagnosis, performing a surgical operation, and issuing the prognosis. It's just the same when it comes to the products of our legislative process. That is why we have a legal profession. The duty of its members is to ensure that the lay public have the fullest and clearest explanations it is possible to provide.

Summary

- A legislative drafter must possess and use imagination. By visualising what a scheme will mean in terms of real life, the drafter may effect improvements and avoid defects.
- Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. The basis of this principle is the need for fairness.
- Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions. These regulate the coming into operation of those enactments and modify their effect during the period of transition.
- Where the drafter forgets to include transitional provisions expressly, the court must draw such inferences as, in the light of the interpretative criteria, it considers Parliament to have intended.
- The interpreter must realise, and bear constantly in mind, that what appears to be the plain meaning of a substantive enactment is often modified by transitional provisions located elsewhere in the Act.
- A vexed question concerning the drafting of legislation is: For what type of reader is the text intended?
- The "Cohen question" is: What would an ordinary man think the enactment in question meant? The following factors indicate this is only rarely the right question.
- What appears clear to the layman may not be certain in meaning to the courts or resistant to legal challenge.
- Legislative language needs to conform to the language of the existing law.
- Obscurity in legislation is often caused not by unnecessary complication of language but by complication (whether unnecessary or not) of thought.
- A Bill has to run the gauntlet of parliamentary debate and amendment in both Houses.
- The conclusion is that, whether we like it or not, law like medicine is an expertise. That is why we have a legal profession.
- So laws are meant to be read exclusively by legal experts; and the duty of lawyers is to ensure that the lay public have the best explanations possible.

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