

Practice Directions: A Need For Order?

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Introductory

In the days of old, when one could say with confidence what every schoolboy knows, it used to be said that every schoolboy knows the scrap of Tennyson's poetry which sums up our ancient country:

It is the land that freemen till,
That sober-suited Freedom chose,
The land, where girt with friends or foes
A man may speak the thing he will;

A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down
From precedent to precedent.

Lawyers used to think of *stare decisis* when they remembered that final line from their schooldays. Now we know better than to use Latin, so call it the doctrine of precedent.

We are also a little uncertain nowadays about that line *A man may speak the thing he will*. It is true that, thanks to Mr Blair and his Human Rights Act 1998, we have firmly embedded in our law article 10 of the European Convention on Human Rights ("Everyone has the right to freedom of expression"). On the other hand we have a growing number of exceptions to it which the police, with their recent invention of the "hate incident", are illicitly bent on spreading. I have written recently on that topic¹, and will not dwell on it now.

I return to the doctrine of precedent, only to leave it at once. It belongs to the vanishing common law, which is being made to vanish by such enactments as the Criminal Justice Act 2003 s. 99(1), which summarily says "The common law rules governing the admissibility of evidence of bad character are abolished". In due course the common law itself will no doubt be "abolished" by the modernizers.

So statute law is spreading at the expense of common law. Judges do not mind this truncating of their powers in one direction, because they are increasing in another. Judges alone have the power to pronounce on the legal meaning of legislation, so as legislation grows that judicial power grows with it.

There is another way in which judicial power is increasing, and this brings me to the dusty subject of Practice Directions. At this point the present article will cease to be readable. I do not apologise for that because I am about to say something which particularly needs saying. So bear with me, as they say in the call centres.

Practice Directions, Protocols etc (Civil)

The Department for Constitutional Affairs operates a website dealing with Practice Directions relating to the Civil Procedure Rules.² The Practice Directions to the Civil Procedure Rules apply to civil litigation in

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¹ See 170 JPN 27.

² http://www.dca.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm

the Queen's Bench Division and the Chancery Division of the High Court and to litigation in the county courts other than family proceedings. Where relevant they also apply to appeals to the Civil Division of the Court of Appeal.

I have discovered that the Practice Directions are made under powers conferred by the Civil Procedure Act 1997 s 5(1). This authorises the making of such directions to provide for any matter which, by virtue of paragraph 3 of Schedule 1 to the Act may be provided for by Civil Procedure Rules. Practice Directions are made-

for the Queen's Bench Division by the Lord Chief Justice as president of that Division;

for the Civil Division of the Court of Appeal by the Master of the Rolls as president of that Division;

for the Chancery Division by the Vice-Chancellor as vice-president of that Division; and

for the county courts by the Lord Chancellor or a person authorised to act on his behalf under section 74A of the County Courts Act 1984.

The detailed position regarding county courts is as follows. Section 74A of the 1984 Act derives from the Civil Procedure Act 1997 s 5(2). From April 1999 to July 2000 the Lord Chancellor authorised the Vice-Chancellor, Sir Richard Scott (as he then was) under section 74A of the 1984 Act. The Vice-Chancellor made all practice directions for county courts during that time. From July 2000 to September 2003, the Lord Chancellor authorised Lord Justice May to make these practice directions. Lord Justice May made all practice directions for county courts during that time. From September 2003 the Lord Chancellor has authorised Lord Justice Dyson to make practice directions for the county courts.

The Criminal Field

The position in the criminal field is illustrated by the Protocol on disclosure of unused material in the Crown Court, which can be downloaded from the internet.³ Professor Michael

Page 509

Zander QC has criticised the content of the Protocol.⁴ In this article I am not concerned with its content but its form. What I say applies also, to varying degrees, to other similar instruments which have been issued recently in connection with changes in the criminal justice system. (For that matter it also applies to the civil justice system.)

Downloading the Protocol produces a document which has at the top the logo of the Court of Appeal but otherwise gives no essential information such as-

by whom it was made,
the power under which it was made,
when it was made,
whether or not it has the force of law,
any reference by which it can be cited,
when it came into force.

An Outline of the Protocol is also available on the internet.⁵ This gives some of the missing information but no means all. It says in paragraph 1.2: "It was drafted by a team led by Mr Justice Fulford and Mr Justice Oppenshaw, which included representatives from the CPS, SFO and RCPO." This is informal, and does not indicate by whom the Protocol was "made" in the legal sense. Moreover there is no indication in the Protocol that the Outline exists, and it could easily be overlooked by a person downloading the Protocol itself.

The legal status of the Protocol is unclear. For example it is not certain whether or not it constitutes subordinate legislation within the meaning of section 23 of the Interpretation Act 1978. It does not assist regularity in the law for there to be such doubt regarding an official instrument.

³ http://www.hmcourts-service.gov.uk/cms/files/disclosure_protocol.pdf

⁴ See 156 *New Law Journal* (14 April 2006), p. 618.

⁵ http://www.hmcourts-service.gov.uk/cms/files/outline_note_concerning_disclosure_protocol.pdf

The Protocol contains statements saying various things “must” be done, and otherwise imposing duties. It also says that certain requirements are “mandatory”. There is no indication of what authority underlies these commands, or what the sanctions for disobedience (if any) are. Does failure to observe them constitute the tort of breach of statutory duty? The answer is not clear.⁶

Another objection is that documents referred to in the Protocol lack proper reference numbers enabling them to be traced by enquirers.⁷ Many abbreviations and initials such as CPIA, PCMH and PDH are used in the Protocol without explanation. These are no doubt familiar to most practitioners, but an instrument of this kind surely ought to be capable of being understood by ordinary people as well.

The Protocol has a general air of being written for experts in the subject as an aide mémoire for the cognoscenti. This is unfortunate, because many lay people may need to understand it (for example private prosecutors or accused persons exercising their constitutional right to defend themselves in person). Lawyers who are not familiar with criminal practice may also need to understand it.

Further Detective Work

On carrying out further detective work I discovered on the internet the existence of the Criminal Procedure Rules 2005.⁸ A note at the beginning says:

“The Criminal Procedure Rule Committee, having power under section 69 of the Courts Act 2003, make the following rules which may be cited as the Criminal Procedure Rules 2005”. A footnote says “the power under section 69 is extended by virtue of relevant amendments to other enactments under Schedule 8 to the Courts Act 2003 and S.I. 2004/2035”.

Is the Protocol made under the Criminal Procedure Rules 2005? I could find no power conferred by the Rules to make Protocols or Practice Directions. However rule 1.2(1) says that each participant in a criminal case must “comply with these Rules, practice directions and directions made by the court”. Rule 1.3 says the court must further the overriding objective (that criminal cases be dealt with justly), in particular when “applying any practice direction; or interpreting any rule or practice direction”.

Further detective work led me to discover that under the Courts Act 2003 s 74 the power to make practice directions as to the practice and procedure of the criminal courts is vested in the Lord Chief Justice acting with the concurrence of the Lord Chancellor. A similar power relating to family proceedings is vested by section 81 of the 2003 Act in the President of the Family Division.

The tangle is compounded by the fact that, as Sullivan J has ruled⁹, these provisions do not remove, or restrict, the *inherent jurisdiction* of the High Court, exercised through the Heads of Division, to issue practice directions governing the practice to be followed in the High Court. Paragraph 6 of Schedule 1 to the Civil Procedure Act 1997, in stating that the Civil Procedure Rules may, instead of providing for any matter, cross-refer to provisions contained in Practice Directions, implicitly accepts that the court does have an inherent jurisdiction to make such directions.

Sullivan J said¹⁰ that the White Book¹¹ correctly summarises the position:

‘In the High Court, practice directions are issued by the heads of division in the exercise of inherent power. Rules in the CPR may, instead of providing for any matter which may be provided for in the CPR, refer to provision made about that matter by directions (see Sched.1, para.6). Among the matters which may be dealt with in the CPR is the removal of proceedings from one court to another as permitted by para.3 of Sched.1. Subs.(1) makes it clear that that matter can be dealt with by practice directions.’

⁶ As to whether a practice direction can legislate see *R (on the application of Ewing and others) v Department of Constitutional Affairs* [2006] EWHC 504 (Admin), [2006] 2 All ER 993.

⁷ See for example paragraphs 10c on page 3, the second paragraph 10 on page 4, and paragraphs 11, 12, 13 etc.

⁸ SI 2005/384.

⁹ *R (on the application of Ewing and others) v Department of Constitutional Affairs* [2006] EWHC 504 (Admin), [2006] 2 All ER 993.

¹⁰ *Ibid* at [14].

¹¹ Paragraph 9A-840.

Why Do We Need To Hunt?

To those faithful readers who have followed me thus far I offer congratulations and commiserations. I also come to the point, which is respectfully to submit to the authorities that practice directions and similar court instruments such as protocols should include the same sort of information as to origin, powers etc as is given in statutory instruments.

This would include the power under which the instrument is made, a title and reference number by which it can be identified, and the person or body by whom it is made and under whose authority it is issued. All that is necessary information which should be stated on the face of the instrument, so that users are not driven to undertake the kind of detective work that, at much expense of time and energy I myself have found it necessary somewhat amateurishly to perform.

ADDENDUM

The following points have arisen since the above article was published.

1. The above article continues a campaign I began some years ago with an article which I have lost track of. It was however the origin of a passage in my book *Statutory Interpretation* (4th edn 2002) section 45 (p. 185). This runs as follows-

Modern position It is now accepted that the authorities have a moral and practical duty to promulgate statute law in an efficient manner. The arrangements for publicising public general Acts of Parliament are inevitably more effective than apply to private Acts, statutory instruments, byelaws and other lesser legislation. It follows that the more important rules should be in statutory form, but this is not always understood or acted upon.

Example 45.2

Schedule 1 to the Indictments Act 1915 (repealed) contained important rules as to the form of indictments. The power to amend these conferred by ss 1 and 2 of the Act¹² was used to remove the rules from the Act altogether. Instead they now appear, in amended form, in the Indictment Rules 1971.¹³ Furthermore the forms of indictment formerly set out in the Act do not even appear in the statutory instrument. Instead, provision is made for such forms to be 'for the time being approved by the Lord Chief Justice'.¹⁴ No provision is made for the forms so approved to be promulgated.'

2. I sent the following letter to Sir Igor Judge, President of the Queen's Bench Division, on 27 July 2006-

I am a former Parliamentary Counsel and author of legal textbooks including *Statutory Interpretation* (4th edition, 2002) and the current *Statutes* title of Halsbury's Laws. For some time I have been anxious about what may seem a rather rarefied point, namely that practice directions and protocols are being issued of which the juridical status appears uncertain. In particular it seems to be uncertain whether or not they technically rank as "delegated legislation" within the meaning of such enactments as section 23 of the Interpretation Act 1978.

I enclose a copy of an article I wrote on this topic which was published in *Justice of the Peace*, 8 July 2006. I am addressing this letter to you because a recent advertisement for the post of Legal Secretary to the President of the Queen's Bench Division says that the holder of this post will "draft criminal practice directions and protocols as well as updating and amending the Consolidated Criminal Practice Direction".

¹² Amended by the Courts Act 1971 s 56 and Sch 8 para 17.

¹³ SI 1971/1253.

¹⁴ Indictment Rules 1971, SI 1971/1253, r 5(2).

As mentioned in my enclosed article, section 74(1) of the Courts Act 2003 confers power on the Lord Chief Justice, with the concurrence of the Lord Chancellor, to give directions as to the practice and procedure of the criminal courts. A parallel power, vested in the Lord Chief Justice alone, is conferred by section 74(4). It does not seem to me clear whether directions under either of these subsections rank as “delegated legislation”. Nor does there seem to be a clear system of publication and numbering of such directions, distinguishing those made under section 74(1) from those made under section 74(4).

Furthermore it does not seem to me clear whether the so-called Consolidated Criminal Practice Direction is made under either or both of these subsections or is merely an informal and unofficial compilation in the nature of an explanatory note which does not have the force of law.

This situation seems to me unsatisfactory to users of the criminal justice system, and I hope it can be remedied. I suggest that, as from a certain date, civil and criminal practice directions should be promulgated in a similar numbered series to that used for statutory instruments. Each practice direction would then carry essential information such as-

by whom it was made,
the power under which it was made,
when it was made,
any reference by which it can be cited,
when it came into force.

I suggest that when this new service is inaugurated it should start with consolidated civil and criminal practice directions, and that thereafter new practice directions should take the form of textual amendments to the consolidated versions. It would also be necessary to publish (and republish as necessary) some form of index to the extant directions.

3. A useful addition to the list at the end of the above letter would be a short title for each practice direction. The clumsiness of the present system is indicated by the following extract from the Consolidated Criminal Practice Direction-

‘The following Practice Directions are included by way of cross-reference only:

- (a) The Practice Direction relating to References to the European Court of Justice by the Court of Appeal and the High Court under Article 177 of the European Communities Treaty [1999] 1 WLR 260; [1999] 1 Cr App R 452.
- (b) The Practice Direction relating to Devolution Issues [1999] 1 WLR 1592; [1999] 3 All ER 466; [1999] 2 Cr App R 486.
- (c) The Practice Direction (Court of Appeal (Civil Division)) [1999] 1 WLR 1027; [1999] 2 All ER 490, paragraph 9 (relating to the availability of judgments given in the Court of Appeal and the High Court) and paragraph 10.1 (relating to the citation of judgments in court).’

4. I have discovered that the Consolidated Criminal Practice Direction was published at [2002] 1 WLR 2870 and [2002] 3 All ER 904. This fact is not mentioned in the Consolidated Criminal Practice Direction as currently posted on the internet at

http://www.dca.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm