

# ACCESS TO LEGISLATION – THE DRAFTER’S ROLE<sup>1</sup>

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**Abstract:** *Making legislation clear and easily accessible to the reader has always been a high priority for the drafter. As legislation increases in volume and complexity, it becomes increasingly important to do what we can to help citizens to navigate around it and to understand it. The courts are increasingly inclined to demand high standards of accessibility in all senses, and to make them a condition of validity wherever due process is a legal requirement. This is a challenge for governments, and drafters have a distinct contribution to make in meeting it. We can and should constantly explore new ways of making the law easily accessible to citizens.*

## **1. Putting the reader first**

The issue of access to law has always been of importance to legislative drafters. One sometimes hears the notion that older drafting standards revolved around “conventional verbose drafting” or the “slavish use of precedents”. But these were never good drafting practice. The great legislative drafters of former years – Sir Courtenay Ilbert, Sir Alison Russell and so on – all lay great stress in their writings on the fundamental importance of clarity and simplicity.

Of course, some things have changed. An examination of popular English literature over the last century or two shows that, for example, there has been considerable change in the tolerance for sentence lengths in the vernacular. Good modern practice in legislative drafting stresses the importance of keeping sentences short. As a result, average sentence length in well-drafted legislation has diminished. But that reflects a general change in English usage, and does not provide evidence that the standard legislative drafting of fifty years ago used sentences that were of unacceptable length, judged by the literary standards of their day, however unacceptable they might be today.

It is also true that legislative drafters have never confused, as some people still do, the concepts of accessibility, clarity and simplicity with the notion of brevity. Lord Renton, an outspoken critic of poor legislative drafting, included the following observation in his Report of 1975<sup>2</sup>—

“On the other hand, the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain.”

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<sup>1</sup> This article is based on a talk given to the 2009 Conference of the Commonwealth Association of Law Counsel in Hong Kong. It has benefited from the scrutiny of Saira Salimi and Jennifer Cartwright, both of the Office of the Parliamentary Counsel (UK).

<sup>2</sup> *The Preparation of Legislation*, May 1975, Cmnd. 6053, para. 11.5.

## 2. New pressures

So the idea of putting the reader first in constructing legislation is not a new idea; but political and technological developments can give it a new flavour. In particular, there are new pressures on accessibility of legislation that require to be considered.

The higher courts have always regarded it as one of their responsibilities to guard citizens from interference with their liberties. One of the ways in which they have pursued this responsibility is to operate a number of presumptions against the legislature and the Executive, in construing legislation, so that express words or clear implication are required to legislate in a way that imposes constraints on the citizens' freedom of action<sup>3</sup>.

The more the pressure on citizens grows as the result of the increasing size and complexity of the statute book, the more determined the courts are to play their part in protecting the citizen. Some people, both inside and outside the legal community, cite the maxim "ignorance of the law is no defence" as though it amounted to a presumption that citizens are aware of all law that concerns them, and as though it implied that it is irrelevant to the lawfulness of legislation whether the citizen is able to discover what it is and requires.

The falsehood of the first part of that proposition was demonstrated by Lord Mansfield as long ago as 1774; and for a relatively modern discussion of the limitations and nature of the *ignorantia* doctrine see the judgment of Goddard LJ in *Bowmaker v Tabor* [1941] 2 KB 1. In essence, the doctrine is not and never has been a presumption of knowledge – rather, it amounts to an assertion that knowledge of the law is not necessarily a pre-requisite of liability for failing to comply with it. The occasions on which, and extent to which, knowledge is required are addressed by the legislature and the courts in different ways in different contexts: so, at one extreme, an offence may be one of strict liability – in the sense that not only is it unnecessary to prove that the defendant knew of the existence of the offence but it is even unnecessary to prove that the defendant had any intent in respect of the matters of which the offence consists – but the courts will presume that strict liability is intended only if the legislature indicates that intention by express words or clear implication.

As to the second part of the proposition, it is not impossible that accessibility may sometimes be relevant to the lawfulness of legislation, and it seems that the class of cases, and the number of ways, in which it may be relevant, may be growing significantly.

The broad question of the accessibility of legislation covers a range of issues. At one extreme, the most fundamental requirement of accessibility is that an accurate and authoritative text of a piece of legislation should be readily available to each citizen whose affairs it concerns or may concern. The case of *ZL & VL v Home Secretary and Lord Chancellor's Department* [2003] EWCA Civ 25 concerned a purported certification of an asylum claim as unfounded, in reliance on a provision of the Nationality, Immigration and Asylum Act 2002 that had not been printed at the time

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<sup>3</sup> See *Craies on Legislation*, 9<sup>th</sup> Edtn. 2008, Chapter 19.

when the certification was purported to be made. The Court of Appeal dismissed the challenge on the grounds of lack of publication: but the terms on which they did so, and the nature of the discussion, may be more significant in the long-term than the decision itself, for reasons discussed further below.

### 3. The concept of valid law

United Kingdom lawyers are used to taking, as the beginning of their approach to legislation, principles learned early in university or law school that more or less equate the principle of Parliamentary sovereignty with the notion that Parliament can do no wrong. In most jurisdictions that is not, of course, the foundation for legislation, the lawfulness or validity of which requires to be tested against its constitutional underpinnings. In the contexts of the law of the European Communities and of the European Convention on Human Rights, too, there is no presumption of lawfulness of legislation just because a legislature – whether primary or delegate – has purported to make it; and it is from these two contexts that the notion of testing the lawfulness of laws passed by Parliament has already entered United Kingdom jurisprudence – most notably in the *Factortame* case.

The discussion of the Court of Appeal in *ZL & VL* addresses another aspect or condition of lawfulness which might enter United Kingdom law by the same route: the general concept is that of “sufficiently good law” and the particular aspect of its goodness raised by that case is that of accessibility.

The Court of Appeal touched upon the Strasbourg case of *Sunday Times v United Kingdom* (1979-80 2 EHRR 245). That case contains the following discussion of the principle that certain interferences with human rights become justifiable and lawful if, and only if, “prescribed by law”—

“In the Court’s opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

From this decision the Court of Appeal distilled what it saw as a rule of the European Court of Human Rights, that it “declines to recognise national laws which are not adequately accessible”. It aligned this to the European Communities’ jurisprudential principle of legal certainty, as discussed in *Administration des Douanes v Gondrand*

*Frères* [1981] ECR 1931 and elsewhere, and also related it to certain principles of American law. Emerging from this discussion is the idea that whenever validity is an issue – whether because the principle of Parliamentary sovereignty is qualified or affected by international obligations of the United Kingdom or because of other considerations arising out of action taken or approved by Parliament itself – accessibility will be a fundamental component of the requirement of legal certainty (see, for example, *Black Clawson Ltd v Papierwerke AG* [1975] AC 591).

#### **4. Aspects of accessibility**

The particular issue of accessibility discussed in *ZL & VL* was that of physical publication or dissemination. But the breadth of the considerations discussed in the *Sunday Times* case shows that accessibility goes beyond the simple question of whether citizens can obtain a text, and enters into the question of whether they can reasonably be expected to understand the text and its application to their lives once they have obtained it.

It is this that catapults the drafter into the centre of the issue, for with him or her alone rests ultimate responsibility for ensuring that the law is drafted in such a way as to make its effect accessible to all those readers who could reasonably require to understand it. If I am drafting a law about the taxation of contracts for options on derivatives, I can assume that my target audience is specialist accountancy and legal professionals – and draft accordingly. If I am drafting a law about carrying weapons in the street, I should assume that my target audience includes every citizen – and again draft accordingly.

Clarity of the law has always been accepted as a key responsibility of the drafter – but for the United Kingdom Parliamentary drafter at least, it may be that this is no longer merely a matter of professional pride and standards, but a component of the validity or effectiveness of the product. It may be that a drafter can no longer warrant to the Ministerial client that a draft serves the policy purpose unless confident that a court will consider it not just accurate but also reasonably transparent.

#### **5. New challenge – new opportunities**

If this suggests that the modern age presents a new challenge to drafters, and increases the pressure on them, it is also true that the modern age presents new opportunities which are available to help to meet the new challenges.

Part of the response of the United Kingdom Government to the *ZL & VL* case was to consider the arrangements for electronic publishing, and aim to accelerate them wherever possible. The Statute Law Database is a relatively recent attempt by the Government to meet its responsibility for making law freely accessible to all citizens – and if and when it can be brought fully up to date it will go a long way towards meeting that responsibility.

But there are dangers in assuming that databases are by themselves the answer to accessibility challenges. Merely shovelling vast quantities of data onto a database can

actually impede accessibility rather than enhance it: a database containing large quantities of data is in itself an entirely illusory aid to accessibility. Unless there are efficient and effective ways of finding out what is on the database, and how to access the documents that are most likely to be relevant to a person's situation, it serves only to instil a false sense of satisfaction in the database owners that they have made the data accessible – the kind of real accessibility demanded by the Strasbourg jurisprudence remains as far away as ever, or further.

The answer to that lies in part in powerful search mechanisms, and effective analytical storage. But that too is only part of the answer. If data is inherently complicated, there is a limit to how much can be done to render it accessible and intelligible by the way in which it is stored and the tools provided for its retrieval.

So once again the drafter finds himself or herself at the centre of the question: it is only we who can address the fundamental question of how to make the raw data, the law itself, easier for databases to analyse and store, and for searchers to retrieve and understand.

## **6. Taxonomic drafting**

That requires more than a commitment to plain English and clear drafting. It requires an acknowledgment that it is only electronic technology that is going to render the mass of modern legislation reasonably accessible to most citizens for most purposes, and that the drafter should therefore work with an eye on making the product as easy as possible for the appropriate technology to process.

That proposition represents a radical change in attitude for the present writer. Like many, his original approach on being offered computers to assist the drafting process was a stubborn unwillingness to adapt his behaviour to suit their convenience, based on the principle that they were there to help him rather than the other way around. But he has very gradually come to realise that a symbiotic relationship with electronic communications is the only approach that is in everybody's ultimate interests, even if it threatens occasionally to constrain the drafter's creative freedom or to challenge long-held notions of propriety or wisdom. It is still true that we should not have to change our behaviour to accommodate what computers cannot do, but we ought to consider changing our behaviour in order to take the greatest advantage of what they can do.

For example, one of the frequent cries for help from the poor law-swamped citizen is for some kind of basic statement of the fundamentals, to help him or her to gain a foothold on the slippery slopes. A traditional answer has been that law must be drafted accurately and comprehensively, and that attempts to preface the detail with simple summaries risk vague but terrible perils associated with the courts' unconstrained construction of apparent repetition. That intransigence was, in effect, embedded by the introduction of Explanatory Notes for United Kingdom Bills and Acts: they were a direct response to the demand for clearer law, and they were presented to some extent as an alternative. Although we were prevented from using a number of techniques to aid clarity in the text of legislation itself, the argument went,

we could use them all relatively freely in accompanying explanatory material, because its lack of direct legal effect would make risks of mis-construction less troublesome.

But this to some extent misunderstands the needs and demands of the citizen. Explanatory material alongside the text of legislation is of some help – and indeed if it is well produced it can be of very considerable help. But it is not a substitute for making the text of legislation itself more accessible. The citizen does not want to have to consult background material to understand the law, unless it is unavoidable: what he or she wants is to be able to navigate around, and understand, as much as possible of the actual law by which he or she is bound.

The challenge for today's drafters is to see whether we cannot do more to render the law itself accessible, in particular by drafting in a way that maximises the usefulness of the electronic processes which will increasingly become the main or only effective portal to the law. Academic writers have become well-used by now to writing with an eye on compliance with a settled taxonomy designed to assist the data-modelling processes through which their writings will be published. Provided the taxonomy is well constructed, with sufficient flexibility for adaptation and development, it need not impede clarity of expression or freedom of substantive innovation. The advantages which it presents, however, can be considerable: for one thing, it enables data to be mass-processed in a way that delivers useful navigational and analytical tools that rely on the predictable and consistent use of standard forms and components.

## **7. New techniques for new times**

By challenging some of the old assumptions, drafters may also be able to do more to help in harnessing the potential of the data-modelling processes underlying electronic databases for improving accessibility of the law.

For example, it is often said that “unnecessary material in legislation has a tendency to go septic”. That is an important counsel when it comes to ensuring that aids to navigation do not do more harm than good, by introducing new uncertainties. But it is only that – a principle to be born in mind. It is not a complete and sufficient objection to the introduction of substantively inert material. Nor is the introduction of inert material as much of a novelty as is sometimes claimed – headings, parenthetical descriptions and other substantively inert material has been inserted for decades: occasionally the courts have regard to it., and occasionally when they do so they arrive at a “wrong” conclusion. But more often than not it is not merely harmless but, rather, enormously helpful, saving many hours of research and helping the reader to understand the law quickly and accurately.

In response to the demand mentioned above for authoritative summaries of the law, the introduction of overview clauses as a routine component of legislation is one way in which the drafter could signal to readers the determination to help, and to help in a way which would fit extremely well with the requirements of electronic data-modelling. One of the difficulties with which the database designer is faced is that legislation does not divide neatly into many sub-divisions, and sometimes the sub-divisions that it does present are not obviously those that are the most helpful for the

reader. If, for example, the overview clause were to become a sufficiently established and distinct component of legislation to enable databases to include it in the way they handle and arrange data, it could provide a new and valuable navigational technique for readers. Imagine being able to print out, at the touch of a single button, what would amount in effect to a series of single-sentence summaries of the topics and sub-topics addressed by a piece of legislation, knowing that each sentence was part of the law itself and was therefore determinative and authoritative in a way that explanatory material, however helpful, of its nature is not.

This is only one example, and it is not necessarily without its disadvantages and will therefore doubtless not be without its opponents. It needs to be discussed from every angle by drafters and others with an interest in drafting. In the same way, every “new” technique, or every increased or altered use of an existing technique, requires to be tested for helpfulness and acceptability both within the drafting profession and amongst our ultimate clients. And we cannot develop these techniques in isolation, in so far as they are designed to maximise the use of computerised data-modelling and processing: we need to discuss our processes with those who understand the capabilities of electronic data-storage, so that we can pool expertise and devise new ways of, in effect, helping each other.

## **8. Conclusion**

At this stage, what emerges from the process is less important than that we should engage in, and be seen to engage in, the question of how much more we can do as a profession to help our audience to access our product. Not only the acceptability of our legislation – but even its lawfulness – may depend on how much we can achieve.