

OFFICE OF THE PARLIAMENTARY COUNSEL

RECOMMENDATIONS AND POLICIES ON DRAFTING MATTERS

INTRODUCTION

This paper summarises recommendations made by the OPC Drafting Techniques Group. It also contains material that reflects policies and other agreed approaches adopted by the OPC as to drafting matters.

The recommendations and policies set out below are intended to apply to all Bills drafted by the OPC. But it is recognised that there will be times when drafters consider that, in the circumstances of the case, it would be appropriate to depart from a recommended approach.

“ABOVE” AND “BELOW” ETC

“Above” and “below”

This relates to the use of “above” and “below” to indicate that, for example, a section referred to is a section of the Act in which the reference occurs.

- Do not use “above” and “below” in this way unless it is appropriate to do so for the purpose of achieving certainty or internal consistency.
- The convention that amendments should follow the style of the Act amended does not need to be followed in connection with the use of “above” and “below”, particularly in the case of substantial insertions of new text.

“to this Act”

This relates to the use of references to Schedule X “to this Act”.

- The recommendations relating to the use of “above” and “below” apply equally to the use of “to this Act”.

“of this Act”, “of this section”, “of this Schedule” etc

This relates to the use of “of this Act”, “of this section” and “of this Schedule” etc. in connection with references to sections, subsections and paragraphs of a Schedule etc.

- As a general rule, use of these expressions should be avoided.
- But they may serve a useful purpose:
 - (a) in contexts where “above” or “below” might otherwise be used (see above): there may be reasons of symmetry or emphasis that mean that, for example, “of this Act” is to be preferred to “above” or “below”;
 - (b) where there is a reference in a Schedule to “this Part” or “Part 2” and both the Schedule and the Act containing it are divided into Parts: it may be desirable to add “of this Act” or “of this Schedule” to make clear which Part of what is being referred to;
 - (c) where there is a reference to a Chapter of the Part in which the reference occurs and another Part of the Act is also divided into Chapters: it may be desirable to add “of this Part” to the reference in the interests of clarity.

BODIES CORPORATE: PLURAL OR SINGULAR

This relates to the issue whether local authorities and other bodies corporate should be treated as plural or singular nouns.

- In general a local authority or other body corporate should be treated as a singular noun.
- But when textually amending an Act that uses the plural, it may be necessary to follow suit in order to avoid confusion.

CHANNEL ISLANDS ETC

This relates to the agreed formulations to be used in provisions providing for an Act to extend to the Channel Islands or the Isle of Man.

- In the case of a power to extend the Act to the Islands, the agreed formulation is –
“Her Majesty may by Order in Council provide for any of the provisions of this Act to extend, with or without modifications, to any of the Channel Islands or to the Isle of Man.”
- In the more unusual case where the Act is to extend to the Islands but is to be capable of being modified so far as it so extends, the agreed formulation is –
“This Act extends to [the Channel Islands], subject to such modifications as Her Majesty may by Order in Council provide.”

CITATION OF ACTS AND OTHER INSTRUMENTS

This relates to whether and how Acts and other instruments should be cited.

- References in a Bill to a public general or local Act of Parliament should not normally be accompanied by the chapter number of the Act unless there is a particular need for it.
- Chapter numbers should be given in repeals Schedules and other Schedules where Acts are listed chronologically within a year.
- Chapter and other reference numbers should be given for enactments and instruments other than Westminster Acts.

COMMENCEMENT

Royal Assent commencement

This relates to Acts some or all of whose provisions are to come into force immediately.

- The provisions that are to come into force on Royal Assent should be identified expressly.
- The form of words used to bring such provisions into force should normally be designed to attract section 4(a) of the Interpretation Act 1978. For example: “Sections X and Y come into force *on the day on which this Act is passed.*”
- Very exceptionally the desired policy may involve specifying a particular time at which immediate commencement is to occur.

Postponement for fixed period

This relates to the wording to be used where commencement of an Act, or particular provisions of it, is to be postponed for a fixed period after Royal Assent.

- The recommended standard form of words is –
“[This Act] comes into force at the end of the period of [2 months] beginning with the day on which it is passed.”

Commencement by order

This relates to the wording of provisions allowing commencement by order

- In general “appointed day” provisions are to be preferred to provisions for commencement in accordance with provision made by order.
- An “appointed day” provision should take the form of a positive statement along the lines that provisions “are to come into force on such day as X may by order appoint” (rather than that they do *not* come into force *until* such day as X may by order appoint).

CONJUNCTIONS BETWEEN PARAGRAPHS

General

This relates to the use of conjunctions at the ends of paragraphs of a subsection, sub-paragraph etc.

- Ensure that it is clear whether the paragraphs are intended to operate cumulatively or instead as alternatives.
- Often it will be sufficient to put the appropriate conjunction at the end of the penultimate paragraph and rely on the implication (in the absence of a contrary indication) that each of the preceding paragraphs is separated by the same conjunction.
- If that approach would not provide sufficient certainty, consider dispensing with conjunctions and spelling out the intended effect in the words before the paragraphs (e.g. “each of the following” or “either or both of the following”).

- Also consider using this last approach where putting a single conjunction towards the end of a long list of paragraphs might cause difficulties for the reader.
- In contexts where normal English usage would dictate the inclusion of a conjunction in un-paragraphed text, and its inclusion would not disturb the intended meaning, the conjunction should be included.
- There should not be a mixture of conjunctions, i.e. different conjunctions at the ends of different paragraphs in the same provision.
- Definitions should not be separated by conjunctions.
- The practice is not to use conjunctions in lists such as those of specific heads of vires.
- See also “OR” below.

Repeals and amendments

This relates to the approach to be taken where a paragraph that is being repealed or amended is followed by a conjunction.

- The recommended starting point is that the conjunction does not form part of the paragraph.
- The key question in a case where the fate of the conjunction is relevant (e.g. is it being repealed by an entry in a repeal Schedule?) is whether its fate will be clear to the reader.
- In cases where its fate would not otherwise be sufficiently clear, the position should be clarified by adding to the reference to the paragraph being repealed words such as “(together with the “and” following it)” or “(but not the “or” following it)”. (In some cases it may be desirable to insert “immediately” before “following” in order to ensure that the relevant conjunction is clearly identified.)

DATES

This relates to the use of the endings st, rd and th in conjunction with figures for dates.

- These endings should not be used in the body of an Act (Royal Assent dates are inserted by the House of Lords Public Bill Office).
- The different requirements of the style adopted by e.g. the House of Commons will need to be borne in mind when preparing documents to be considered by that House.

EXTENT PROVISIONS

This relates to the wording of a provision specifying the extent of an Act or of provisions within it.

- In the case of an Act or a provision of an Act which is not intended to extend beyond the United Kingdom, the recommended approach is to state extent positively - that is, to spell out its extent – rather than to rely on what the courts would in any event presume to be the case.

- Where a provision is intended to extend to the separate jurisdictions of England and Wales, Scotland and Northern Ireland, it is probably better to say that than to refer to the United Kingdom as such.
- The relevant jurisdictions within the United Kingdom are “England and Wales”, “Scotland” and “Northern Ireland”.
- An extent provision should be as short and simple as possible. It should also allow the reader to find out easily what the extent of any given provision is. These two aims may sometimes conflict.
- Care should be taken with catch-all provisions to the effect that an amendment or repeal has the same extent as the enactment to which it relates. In the case of an insertion, it may not be obvious what that enactment is. And this kind of formulation is not necessarily helpful to the reader.

FINAL PROVISIONS

This relates to the running order of the final provisions of a Bill, i.e. the provisions of a general nature that appear towards the end of a Bill and deal with, for example, subordinate legislation, financial matters, commencement and extent.

- The following running order should be used as a starting point when it comes to deciding the running order for the final provisions of a Bill—
 - General provisions about offences (bodies corporate, unincorporated associations)
 - Orders and regulations (including parliamentary procedure)
 - Directions
 - Notices/service of documents
 - Interpretation
 - Amendments, transitional provisions and savings, repeals
 - Financial provisions
 - Crown application
 - Devolution
 - Application to Scillies/Isle of Man/Channel Islands
 - Extent
 - Commencement
 - [Index]
 - Short title
- Where there is to be a single clause introducing Schedules containing minor and consequential amendments, transitional provisions and savings, and repeals, the clause should deal with those topics in that order.
- Although the running order above deals with extent, commencement and short title separately, a Bill may be so short that it would be better to deal with all three topics in a single clause.
- Any index of abbreviations/defined terms should be contained in the last Schedule of the Bill.
- If a single cross-heading is used to cover all the final provisions of a general nature, “General” should be used (rather than, for example, “Supplementary”).

FINANCIAL PROVISIONS

This relates to the drafting of provisions of Bills dealing with effects on public expenditure and to the headings for the clauses in question. It also relates to the drafting of the corresponding provisions of money resolutions.

- It is recommended that the usual provision dealing with such effects should refer to the payment out of money provided by Parliament of –
 - (a) any expenditure incurred under or by virtue of the Act by [the Secretary of State], [a Minister of the Crown], [a person holding office under Her Majesty] [or by a government department], and
 - (b) any increase attributable to the Act in the sums payable under any other Act out of money so provided.

This wording can then be reflected in the associated money resolution.

- The heading for clauses dealing with effects on public expenditure should be “Financial provisions”, whatever the precise nature of these effects.

GENDER NEUTRAL DRAFTING

The OPC has the following policy as to gender-neutral drafting (applicable to Bills from the 2007-2008 Parliamentary session onwards).

- Government Bills are to take a form which achieves gender-neutral drafting so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility. It is recognised that in practice a flexible approach to this change will need to be adopted (for example, in at least some of the cases where existing legislation is being amended): see the statement of the Leader of the House of Commons on 8.3.07.
- See further “The implementation of a policy of gender-neutral drafting” (paper of 19.6.07 by First Parliamentary Counsel, available on secondary legislation site on LION).

HEREBY ETC.

This relates to the use of “hereby” and other “here-” words.

- “Hereby” should not be used unless there is a particular reason for concluding that the inclusion of the idea conveyed by “hereby” would or might serve a useful purpose.
- Even then, consider using words such as “by this subsection” instead.
- Other “here-” words should not be used.

LAYING DOCUMENTS BEFORE PARLIAMENT

This relates to references to the laying of subordinate legislation and other documents before Parliament.

- Section 1(1) of the Laying of Documents before Parliament (Interpretation) Act 1948 means that such references are to laying documents before each House of Parliament (unless the contrary intention appears). Section 1(1) should normally be relied on whenever it will produce the correct result. But see the suggested

wording in connection with affirmative instruments under STATUTORY INSTRUMENTS below.

NON-TEXTUAL MODIFICATIONS

This relates to the wording of non-textual modifications in a way that serves to distinguish them from textual amendments.

- Formulations commonly used for textual amendments should be avoided.
- For example, this should be *avoided* –
 - “(1) Section 3 applies to fine defaulters as to offenders but with the following modifications –
 - (a) in subsection (1) for “offence” substitute “default”; and
 - (b) in subsection (2) for “6 months” substitute “3 months”.”
- This wording can be used instead –
 - “(1) Section 3 applies to fine defaulters as to offenders but as if –
 - (a) in subsection (1) the reference to an offence were to a default; and
 - (b) in subsection (2) the reference to 6 months were to 3 months.”

NUMBERS

Cardinal numbers

This relates to the use of words or figures for cardinal numbers. What follows amounts to a set of guidelines only: considerations of clarity or style may require different approaches in different circumstances.

- Figures should normally be used for all numbers above ten.
- Figures should also normally be used for numbers up to and including ten that relate to sums of money, times or periods of time, ages, dates, units of measurement or in quasi-mathematical contexts.
- In other contexts, numbers up to and including ten should either be spelt out or be expressed as figures depending on what seems more natural or appropriate in the contexts concerned.
- A number that begins a sentence should normally be spelt out.
- Mixing words and figures referring, in a single context, to things of the same kind should be avoided.

Ordinal numbers

This relates to the use of words or figures for ordinal numbers other than dates. (Dates are dealt with above.) What follows amounts to a set of guidelines only: considerations of clarity or style may require different approaches in different circumstances.

- Numbers above ten should not be spelt out.
- The question of whether numbers below 11 should or should not be spelt out should be decided in the light of what seems more natural or appropriate in the contexts concerned.

ONLY

This relates to the placing of “only” in a legislative sentence.

- Care should be taken to avoid placing “only” where it will produce ambiguity or mislead the reader.

OR

This relates to the exclusive and inclusive uses of “or”.

- The recommended starting point is that “or” is normally read in an inclusive, rather than an exclusive, sense (so a power to impose conditions relating to cats, dogs or rabbits would normally allow conditions relating to one or more of these).
- Sometimes it will be desirable to spell out that both of two alternatives are a permissible option (e.g. in a penal provision allowing the imposition of a fine or imprisonment or both).

PARAGRAPHING

General

This relates to the drafting device of paragraphing material in a legislative sentence.

- Long un-paragraphed sentences should be avoided.
- Clause sandwiches (sentences consisting of introductory text, paragraphs and then more text) should be avoided if difficulties would be caused for the reader as a result of e.g. the separation of the introductory text from the final text or the separation of the subject of the sentence from the verb.
- Provisions involving one set of paragraphs, some full-out text, and then another set of paragraphs should be avoided.

Punctuation at the end of paragraphs

This relates to the use of punctuation at the end of paragraphs in legislative sentences (apart from paragraphs ending sentences).

- Semi-colons may be more appropriate than commas where paragraphs are in effect a list setting out matters that have no particular affinity with each other.
- Commas should be used at the end of every paragraph of a provision if the paragraphs are followed by full-out text that is effectively a continuation of the proposition contained in the text preceding it.

PERCENTAGES

This relates to whether a percentage should be indicated by “per cent” or “%”.

- “%” should be used rather than “per cent”.

SHALL

The OPC has a policy of seeking to minimise the use of the legislative “shall” (applicable to Bills from the 2008-2009 Parliamentary session onwards).

There are various alternatives to “shall” which can be used, depending on context, to implement this policy:

- “must” in the context of obligations (although “is to be” and “it is the duty of” may also be appropriate alternatives in certain contexts);
- “there is to be” in the context of the establishment of new statutory bodies etc.;
- use of the present tense in provisions about application, effect, extent or commencement;
- “is amended as follows” in provisions introducing a series of amendments;
- “is repealed” in the context of free-standing repeals;
- “is to be” in the context of provisions relating to statutory instruments (and, if appropriate, “may not” as an alternative to “shall not”).

A reason for not departing from “shall” might be that it would appear in text to be inserted near to existing provisions that use “shall” in the same sense, or that use of an alternative might raise a real doubt that a different meaning was intended in an existing provision.

SHORT TITLE CLAUSES

This relates to the wording used to confer a short title on an Act.

- The recommended form of words is –
“This Act may be cited as...”.

STATUTORY INSTRUMENTS

Attracting section 1 of the Statutory Instruments Act 1946

This relates to the wording used where orders etc. are to be made by statutory instrument.

- To attract section 1 of the 1946 Act it is sufficient to say: “Orders/regulations [made by the relevant Minister] under this Act are to be made by statutory instrument.”
- It may sometimes be neater to roll up the attraction of section 1 with the power itself, for example: “The Secretary of State may by order made by statutory instrument provide...”

Attracting the negative resolution procedure

This relates to the wording used where orders etc. are to be subject to the negative procedure.

- To be consistent with section 5 of the 1946 Act, the statutory instrument containing the order/regulations (rather than the order/regulations) should be expressed to be subject to annulment.
- For example: “A statutory instrument containing an order or regulations under this Act is subject to annulment in pursuance of a resolution of either House of Parliament.”

Attracting the affirmative resolution procedure

This relates to the wording used where orders etc. are to be subject to the affirmative procedure.

- To be consistent with the recommended approach for negative instruments (above) - and with the wording of section 6 of the 1946 Act - the required approval should relate to a draft of the statutory instrument containing the order/regulations (rather than a draft of the order/regulations).
- For example: “A statutory instrument containing an order under section X may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

“Combined instruments”

This relates to the wording used where it is to be possible for a statutory instrument to contain a mixture of provisions subject to the negative procedure and provisions subject to the affirmative procedure.

- If the intention is expressly to authorise the making of instruments containing both sorts of provisions, it may be helpful to use the formulation suggested above with the addition of “(whether alone or with other provision)”.
- For example: “A statutory instrument containing *(whether alone or with other provision)* provision made under section X may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

STATUTORY REFERENCES

Use of Arabic rather than Roman numbers when referring to Parts etc.

This relates to the switch in 2001 from using Arabic rather than Roman numbers for Parts and Chapters and Parts of Schedules.

- Use Arabic numbers when referring to Parts and Chapters of pre-2001 Acts and Parts of Schedules to such Acts.
- When inserting or substituting text in a pre-2001 Act use Arabic numbers even if that leads to a mixture of Arabic and Roman in the text of the Act.
- But, if Roman numbers currently appear in text which needs to be identified for the purposes of amendment, refer to the text as it stands.

TEXTUAL AMENDMENTS: NUMBERING CONVENTIONS

Re-using numbers

This relates to re-using for new provisions the numbering of provisions that are being replaced or have been repealed.

- When substituting a complete sub-division of text (e.g. a subsection), the numbering of the old provision should generally not be used for the new provision unless (as will frequently be the case) the subject matter of the new provision corresponds to that of the old provision.
- When inserting a complete sub-division of text (e.g. a subsection) in a place where a corresponding sub-division has been repealed, the numbering of the repealed provision should generally not be used for the new provision.
- Occasionally the drafter may decide that there is good reason to depart from the above approaches (e.g. where a repealed provision was repealed many years ago).

Adding provisions at the beginning of a series

This relates to inserting a provision at the beginning of an existing series of provisions (e.g. a subsection at the beginning of a section or a Schedule before the first Schedule).

- New sections inserted before the first section of an Act are preceded by a letter, starting with “A”.
- The same approach is taken in relation to all other divisions of text (other than lettered paragraphs).

Thus the Insolvency Act 2000 inserted a Schedule A1 before Schedule 1 to the Insolvency Act 1986, and the Enterprise Act 2002 inserted a new Schedule B1 after Schedule A1.
- A provision inserted before “A1” (or “ai”) is “ZA1” or (“zai”).
- In the case of lettered paragraphs, new paragraphs inserted before paragraph (a) are (za), (zb) etc.
- And paragraphs inserted before (za) are (zza), (zzb) etc.

Adding provisions at the end of a series

This relates to adding a provision at the end of an existing series of provisions of the same kind (e.g. a subsection at the end of a section or a Schedule at the end of the Schedules).

- The numbering should continue in sequence.

Inserting whole provisions between existing provisions

This relates to inserting whole provisions between existing provisions.

- New provisions inserted between 1 and 2 are 1A, 1B, 1C etc.
- New provisions inserted between 1A and 1B are 1AA, 1AB, 1AC etc.
- New provisions inserted between 1 and 1A are 1ZA, 1ZB, 1ZC etc. (and not 1AA etc.)
- New provisions inserted between 1A and 1AA are 1AZA, 1AZB, 1AZC etc.

Do not generate a lower level identifier unless you have to.

- A new provision between 1AA and 1B is 1AB not 1AAA.
- But a new provision between 1AA and 1AB is 1AAA.

The above recommendations apply equally to sub-paragraphs with roman numerals and lettered paragraphs.

- New sub-paragraphs between sub-paragraphs (i) and (ii) are (ia), (ib), (ic) etc.
- New paragraphs between paragraphs (a) and (b) are (aa), (ab), (ac) etc.
- New paragraphs between paragraphs (a) and (aa) are (aza), (azb), (azc) etc.

Insertions resulting in a series of more than 26 new sections into an Act

This relates to the rare occasions when the insertion of new sections into an Act would result in a series of more than 26 new sections.

- After Z use Z1, Z2, Z3 etc.
So in the Capital Allowances Act 2001 section 360Z is followed by sections 360Z1 to 360Z4.

Insertions resulting in series of more than 26 lettered paragraphs

This relates to the rare occasions when the insertion of new paragraphs into a section would result in a series of more than 26 lettered paragraphs.

- After paragraph (z) insert paragraphs (z1), (z2), (z3) etc.

THEREAFTER, THEREBY ETC

This relates to the use of “thereafter”, “thereby” and other “there-” words.

- “Therefrom” and “therewith” are archaic and should not be used.
- Other “there-” words should only be used where the advantages of doing so outweigh their old-fashioned ring, there is no obvious more modern alternative and the meaning of the reference back is clear.