

Principles of Legislative and Regulatory Drafting

Ian McLeod



•HART-
PUBLISHING

OXFORD AND PORTLAND, OREGON
2009

Contents

<i>Preface</i>	v
<i>Table of Cases</i>	xv
1 Drafting and Communication	1
Introduction	1
The Imprecision of Language	2
Oral and Written Uses of Language	2
Clarity in Written Language	3
Introduction	3
Does <i>Clarity</i> have a Single Meaning and can Drafters Make Everything <i>Clear</i> !	3
How Objective is Clarity?	4
Introduction	4
Identifying Potential Readerships	5
The Fallacy of Assuming a Co-operative Readership	8
2 Principles of Interpretation	11
Introduction	11
Matters of Fact and Matters of Law	12
Introduction	12
The Leading Cases	12
The Myth of Literal Meaning	14
The Contextual Approach	15
Introduction	15
Purpose as Part of the Context	16
Introduction	16
Purposivism in Action	17
Reading Provisions and Instruments as a Whole	20
Introduction	20
Preambles and Long Titles	23
Short titles	23
Fleadings and Marginal Notes	24
Schedules, Definition Sections and Commencement Sections	24
Extrinsic Materials as Part of the Context	25
Introduction	25
Legal textbook's	25

Dictionaries	26
Pre-parliamentary Materials	26
Parliamentary Materials: the Use of Hansard	27
Post-parliamentary Materials	27
Presumptions	28
Introduction	28
The Presumption against Injustice	28
The Presumption against Absurdity	29
Updating Construction	29
Introduction-	29
The Problem of Social Change	30
The Problem of Technological Change	32
3 Drafting Instructions	33
Introduction	33
The Nature of Drafting Instructions	34
The Content of Drafting Instructions	35
The Form of Drafting Instructions	38
The Ethical Dimension of Drafting	39
Introduction	39
Ethical Considerations	39
4 Constitutional Considerations and the Protection of Human Rights	43
Introduction	43
Interpreting Constitutions	44
Introduction	44
The Constitutional Context of Drafting	44
The Protection of Human Rights	46
Introduction	46
The Legal Protection of Human Rights before the Human Rights Act 1998	46
The Human Rights Act 1998	48
Introduction	48
The European Convention on Human Rights	48
Convention Rights under the Human Rights Act	49
How the Courts must approach Convention Rights	50
Interpretation and Validity of Legislation	50
Declarations of Incompatibility	52
The Duty imposed on Public Authorities	52
Statements of Compatibility	53
Is the HRA Retrospective as to Matters of Fact?	53

ECHR Concepts and their Interpretation	54
The Presumption of Compliance with International Law	57
Paving Legislation	58
The Reallocation of Executive Functions and Titles	60
5 General Principles of Drafting	61
Introduction	61
The Nature of The General Principles of Drafting	61
Introduction	61
The Mongoose Principle	61
Is Drafting an Art or a Science?	62
The Range of Drafting Techniques	63
Plain Language Drafting	63
Introduction	63
Plain Language Drafting in its Historical Context	64
An Inevitable Limitation on the Usefulness of Plain Language Drafting	64
Structuring an Instrument	65
Introduction	65
The Value of Uniformity	66
Thring's Five Rules	67
Introduction	67
The Text of the Rules	67
The Essence of the Rules	68
The Placing of Subordinate Provisions in Practice	69
Layout	71
Introduction	71
Sentence Length	72
Matters Requiring Particular Care and Attention	73
Using Words Consistently	73
Using the Active rather than the Passive	73
Drafting Positively	74
Constructing Legislative Sentences	75
Introduction	75
Following Conventional Sentence Structure	75
Gender-Neutral Drafting	76
Introduction	76
Some Drafting Techniques	76
Being Careful with Modifiers	78
Using Past, Present and Future Tenses	79

Using <i>And, Or</i> and <i>And/Or</i>	79.
Is a Body Corporate Singular or Plural?	80
Avoiding Nominalisations	80
Using Ordinary Words	81
Introduction	81
Using Plain Language Guides	83
Provisos	83
Ranges of Items	84
Punctuation	85
Introduction	85
Round Brackets (or Parentheses) and Square Brackets (or Brackets Properly So-called)	87
Apostrophes	88
Commas	88
Restrictive and Non-restrictive Phrases and Clauses	89
Enacting Formulas, Titles and Preambles	90
Introduction	90
Enacting Formulas	91
Titles and Preambles	91
Amending Provisions	92
Introduction	92
Textual Amendment	92
Non-textual Amendment	92
Amending by Repeal and Re-enactment	93
Amending Provisions and Gender-neutral Drafting	94
Numbering Newly-inserted Provisions	94
Commencement (<i>or</i> Coming into Force)	94
Application and Extent	96
Savings and Transitional Provisions	98
Introduction	98
Some Examples of Savings and Transitional Provisions	98
Consequential Amendments and Repeals	99
Definition Sections	100
Introduction	100
Matters of Fact and Matters of Law	100
' <i>Means</i> ' and ' <i>Includes</i> '	100
Typography	101
Disapplying Definitions	102
Interpretation Acts	102

6 Powers and Duties	103
Introduction	103
The Distinction Between Powers and Duties	103
Introduction	103
<i>May</i> and <i>Shall</i> in the Context of Powers and Duties	104
Introduction	104
Enforcing Duties by Judicial Review	107
Introduction	107
Damages for Breach of Statutory Duty	110
Introduction	110
Two Specific Problems	112
. Introduction	112
Does a Statute which imposes a Duty and also specifies a Penalty for Breach of that Duty, impliedly exclude all Other Remedies?	112
Does a Statute which creates a Right and Specifies a Remedy to Enforce that Right, impliedly exclude all other Remedies?	113
The Drafting Solution to Both Problems	113
Where Breach of Statutory Duty gives rise to a Claim in Damages, do the Normal Principles of Vicarious Liability apply?	113
Continuity of Powers and Duties	113
Anticipatory Exercise of Powers	114
7 Licensing and Registration	115
Introduction	115
Designing the Legislative Scheme	115
Application Procedures	116
Introduction	116
Standard Application Forms	116
Fees	117
Requirements as to Giving Notice of Applications	117
Requirements as to Consultation	118
First-time Applications, Renewals, Revocations and Appeals	120
Criteria for Granting or Withholding Licences	121
Conditional Licences	122
Duration of Licences	125
Enforcement	127
Transitional Provisions (Including Grandparenting)	130

The Status of Qualifications From Other Jurisdictions	130
8. Statutory Corporations	133
Introduction	133
The Nature of Statutory Corporations	133
Creating Statutory Corporations	134
Introduction	134
Common Provisions	134
Introduction	134
The Name	134
The Objects	135
Members	135
Meetings	136
Employees	137
Dissolution	137
Miscellaneous Matters	138
Paving Legislation	138
9. Penal Provisions	139
Introduction	139
The Nature of Criminal Liability	139
Introduction	139
Penalties and their Enforcement	140
Drafting Techniques for Creating Criminal Offences	143
Introduction	143
Techniques for Creating Criminal Offences	143
Continuing Offences	145
Introduction	145
Offences which continue before Conviction	146
Offences which continue after Conviction	146
Standards of Proof	147
Interpretation	147
Introduction	147
The Presumption that <i>Mens Rea</i> is a Necessary Element of Statutory Offences	148
Introduction	148
Expressions creating the Need for <i>Mens Rea</i>	149
Rebutting the Presumption of the Need for <i>Mens Rea</i> by Express Language	150
Rebutting the Presumption of the Need for <i>Mens Rea</i> by reference to the Subject Matter of the Offence	150

<i>Mens Rea</i> and Consent	154
<i>Mens Rea</i> and Offences Committed by Corporations	155
The Standard Scale of Fines	156
10 Subordinate Legislation	159
Introduction	159
The Doctrine of Ultra Vires	162
Introduction	162
The Drafters' Responsibilities	162
Classifying the Bases of Ultra Vires Action	167
Introduction	167
Jurisdictional Error	168
Wednesbury Irrelevance	168
Wednesbury Unreasonableness	169
Breach of Procedural Fairness at Common Law	170
Breach of Express Procedural Requirements under Statute	171
Excluding and Restricting Challenges to The Validity of Subordinate Legislation	171
Introduction	171
The Leading Cases	172
Introduction	172
Total Ouster Clauses	172
Time-limited Ouster Clauses	173
Finality Clauses	174
(p) Henry VIII Clauses	174
Provisions containing Subjective Tests	175
Appendix 1 Extracts from the Interpretation Act 1978	177
Appendix 2 Extracts from the European Convention for the Protection of Human Rights and Fundamental Freedoms	187
Appendix 3 The Better Regulation Executive's Code of Practice on Guidance on Regulation	193
<i>Index</i>	199