

Chapter 4

The Basic Elements of a Legislative Sentence

In the early part of the nineteenth century, George Coode formulated basic principles concerning the aim of legislation and the basic composition of a legislative sentence that are relevant today. He found that legislation aims to regulate relationships between persons by **securing a benefit** to a person or class of persons. It does this:

- **directly**, by conferring a right, privilege or power on a person or persons or
- **indirectly**, by imposing an obligation or liability on others.

It follows that a legislative sentence must therefore prescribe the limits of the right, privilege, power, obligation or liability, and designate the circumstances in which it arises. All grammatical sentences must have a subject (the person or thing to be affected by the sentence) and a predicate (what is said about the subject). Some refinement to this simple proposition is necessary in a legislative sentence and in practice such a sentence must have:

- a subject (Coode referred to the 'legal subject')
- a predicate (Coode called this the 'legal action') and
- (in most cases, and unless the sentence would be too long as a result) a context.

4.1 Legal subject

This is a convenient term by which to refer to the precise person or categories of person to be affected. As will be seen in Chapter 5, where the rule applies to persons generally, the convention used is to state 'a person'; although the kind of person affected may be stated directly, for example 'a police officer', 'an inspector', 'a licensee'. The legal subject should normally be placed in a prominent position in the sentence:

A person must not enter an infected area.

A police officer may arrest a person trading in a street without a licence.

A **person** (i.e. an individual or group of persons, or a juridical person such as a company, corporation or partnership) **should normally be made the**

grammatical subject, although occasionally it will be useful to make use of an inanimate subject.

A contract entered into in contravention of this Act is void.

This may be done so long as the actual person or persons affected by the rule are clear (obviously here they are the parties to a relevant contract). In this way, the drafting is made more concise, for to make a person the legal subject would involve restructuring the words into a much longer sentence:

A person who enters into a contract that is in contravention of this Act may not rely on its provisions, which are void.

However, there is always a danger, when making something other than a person the legal subject, that sight will be lost of the actual person or persons to whom the rule is intended to apply:

Cattle must be confined or tethered in an infected area.

Notice of transfer must be given to the licensing authority within 14 days.

On whom exactly is the duty to confine, or to give notice, placed? The problem lies in the use of the passive voice. While it is not suggested that this never be used (it is sometimes convenient), care needs to be taken to check that it is clear who the person being addressed is. See Chapter 6 for further details.

In practice, the legal subject is usually **modified** to confine the rule to particular persons or things or classes of persons or things (see also the second example above):

A person who is a passenger on a bus...

An advocate qualified under this Part...

A licensee who contravenes subsection (1)...

A certificate of a motor vehicle examiner...

A contract of hire purchase...

Occasionally, more than one legal subject may be contained in the same sentence:

A police officer may require the driver of a motor vehicle to stop where indicated, and the driver must then stop accordingly and switch off the engine of the vehicle.

4.2 Legal action

‘Legal action’ is Coode’s technical expression (for what is sometimes called the predicate of a sentence). Coode used it to indicate the way in which the legal

subject is to be affected. This is done by use of a verb auxiliary ('must' or 'may' as shown in the examples below – these and other auxiliaries are considered further in Chapter 5). Usually the legal action takes one of two forms:

(a) the precise terms of the act or omission required or permitted:

A person must not enter an infected area.

A police officer may arrest a person trading in a street without a licence

or

(b) the consequences for a person of things done or omitted to be done:

A person who contravenes subsection (1) commits an offence

A convicted person is disqualified from standing for election...

A contract of hire purchase entered into in contravention of this Act is void.

Note in particular that:

- the technical term 'legal action' should not be confused with 'activity'
- where an act or omission is required or permitted, the verb should contain the appropriate auxiliary to indicate the nature of the rule
- the present, not the future, tense is used when describing a state of affairs or legal consequence, so that in the above examples 'commits' is correct, not 'shall commit'; 'is disqualified', not 'shall be disqualified'; 'is void', not 'shall be void'
- more than one legal action may be contained in a sentence

A police officer may require a motor vehicle to stop and, if the officer suspects that the driver has consumed alcohol or drugs, require the driver to submit to a breath test.

A person who contravenes subsection (1) commits an offence and is liable to a fine of...

4.3 Context

This is a statement of the circumstances in which the rule is to operate. It is typically done by the use of a context clause:

When an area has been declared an infected area, a person must not enter or leave it.

If the accused is under 14 years of age, the court may direct that the proceedings are to be held in closed court.

A police officer may require a motor vehicle to stop and, if the officer suspects that the driver has consumed alcohol or drugs, require the driver to submit to a breath test.

Note (from the first two examples above) that the subject of the context clause need not be the same as the legal subject of the sentence. Words like ‘where’, ‘when’ and ‘if’ commonly introduce this kind of context.

Sometimes the context involves the setting out of special conditions or exemptions which are to apply:

When an area has been declared an infected area, a person must not enter or leave it, unless authorised to do so by the District Veterinary Officer.

A police officer who suspects that a driver has consumed alcohol or drugs may require the driver to submit to a breath test, unless it appears to the officer that the driver is by reason of injury or otherwise incapable of so doing.

The word ‘unless’ commonly introduces this kind of context. Where the context is complex and contains a large number of qualifications, it is often better to place it, or the detailed provisions of it, in a separate sentence:

- (1) The report of a medical practitioner may be adduced in evidence of the matters contained in it without the need to call the practitioner as a witness if the conditions specified in subsection (2) apply.
- (2) The conditions referred to in subsection (1) are that:
 - (a) the report relates to a person, substance or thing sent or submitted for examination and finding;
 - (b) it is signed by the practitioner making it;
 - (c) a copy of the report has been served on the defence at least seven days before the hearing; and
 - (d) it is produced to the court by the police officer in charge of the case.

4.4 Prominence for the legal subject

Modern Commonwealth drafting styles tend to give prominence in a legislative sentence to the legal subject, and this often leads to expressing the context as a modification of the legal subject (see above). Thus, instead of giving prominence to the context clause:

If an investigator has reason to suspect the commission of an offence against this Act, he or she may seize any relevant documents.

Today, this proposition would probably more commonly be drafted as:

An investigator who has reason to suspect the commission of an offence against this Act may seize any relevant documents.

It must be stressed, however, that both have the same meaning in the context and neither is necessarily correct or incorrect. The question for counsel is, as always, ‘how well have I communicated the policy?’

One of the most common examples of a legal action that expresses the consequences following an act or omission is in the drafting of offence provisions. In these cases, it is usually better to express the context as a modification of the subject:

A person who makes a false declaration under this section commits an offence.

as the more traditional way of drafting would create a clumsy sentence:

If a person makes a false declaration under this section, that person commits an offence.

4.5 Prominence for the legal action

If it facilitates better understanding, it is often desirable to give prominence to the legal action as well. In the above example this would lead to the following:

An investigator may seize any relevant documents where there is reason to suspect the commission of an offence against this Act.

A very common example of the desirability of this kind of prominence is in the drafting of multiple offence provisions. Instead of:

If a person:
 (a) ...;
 (b) ...;
 (c) ...; or
 (d) ...,
 that person commits an offence and is liable to...

or

A person who:
 (a) ...;
 (b) ...;
 (c) ...; or
 (d) ...,
 commits an offence and is liable to...

it would often be better drafting (because it communicates the meaning in the clearest possible way) to state:

A person commits an offence if [he or she] [that person]:
 (a) ...;
 (b) ...;
 (c) ...; or
 (d) ...,
 and is liable to...

