

## Chapter 5

# Modern Commonwealth Conventions in Legislative Drafting

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### 5.1 The need for consistency and conciseness

As has already been noted in Chapter 2 ('judicial approaches' in section 2.4), it is an important rule of drafting legislative rules that the same words and expressions are used to mean the same things, as there is a presumption that the use of a different word or expression within the same item of legislation is intentional and indicates a shift in meaning. As has already been noted (see section on 'consistency', Chapter 2.3) the potential for unthinking use of different words to indicate permission cannot be overemphasised:

"allow", "authorise", "permit", "license", "consent", "let", "sanction", "recognise".

But there are other important areas where there are a range of possible words meaning the same or similar things. These can most conveniently be examined by looking in turn at the most common elements of legislative sentences:

- **Who is affected by the rule?**
- **What are they required to do or refrain from doing, or permitted to do?**

There is also a third very common element ('what is the consequence of failing to comply with the rule?'), but this relates to the drafting of penal provisions and will be considered in Chapter 14.

### 5.2 Who is affected by the rule?

A legislative rule usually states that those to whom the rule applies are required to do, or refrain from doing, something or (particularly in the case of administrators or enforcers) have a power or discretion to do or not to do something. As has already been seen (Chapter 4.1), when drafting the requisite rules, the first thing legislative counsel needs to do is to refer to the persons affected.

Bearing in mind that legislation is conventionally drafted in the third person, there are in English a number of possible ways of doing this. If it is necessary to refer to persons generally, any of the following could be written:

"anyone...", "anybody...", "everybody...", "people...", "persons...",  
"any person...", "every person...", "a person..."

or even the old-fashioned forms 'whoever' or 'whosoever'.

Depending on the shape of the sentence to be drafted, most of these can easily be expressed as negatives: 'no-one...', 'no person...', etc. However, for the sake of consistency it is necessary to choose a particular form and stick to it, and because it best represents plain language and avoids unnecessary use of words of emphasis, modern drafting convention in the Commonwealth when referring to persons generally is to use the form 'a person'.

Note that the ordinary indefinite article 'a' is used, rather than a more emphatic word such as 'any'. As will be seen in Chapter 10, the use of emphatic words 'any', 'each', 'all' and 'every' needs to be reserved for where a contrast needs to be drawn.

For drafting convenience, the meaning of 'person' is normally extended in an Interpretation Act or equivalent to include not only a natural person but also a body of persons, whether incorporated or unincorporated. In addition, as discussed in Chapter 4, it is often convenient to refer directly to the kind of person affected (for example a police officer, a driver, an investigator).

### 5.3 What is required or permitted?

When referring to what is required, forbidden or permitted, there are also numerous possible drafting alternatives available:

#### **Imposing an obligation to do something**

A person has a responsibility to.../has a duty to.../is compelled to.../is required to.../is obliged/obligated to.../is bound to.../has to.../shall.../must...

#### **Imposing an obligation to refrain from doing something**

A person is not allowed to.../is required not to.../is not permitted to.../is compelled not to.../is forbidden from.../is constrained not to.../shall not.../must not.../may not.../cannot...

#### **Giving a discretion to do something**

A person is allowed to.../is permitted to.../is entitled to.../is authorised to.../is empowered to.../has a discretion to.../may.../is able to.../can...

This can also be done by using a slightly different form relating to permitted or forbidden conduct that was often favoured in the past and is still sometimes seen:

It shall be lawful/unlawful/shall not be lawful/for a person to...

It shall be an offence for a person to...

Again, the need for **consistency**, as well as **conciseness**, has led to conventional uses of the shortest of these forms to the exclusion of the others. Traditionally ‘shall’ (and ‘shall not’) have been used to indicate obligation and ‘may’ to indicate discretion. These are known as verb auxiliaries, or merely ‘auxiliaries’. However, for reasons stated below, the conventional uses in modern Commonwealth drafting are:

A person must/must not/may/may not...

### 5.3.1 Problems with ‘shall’, and suggested alternatives

#### Indicating an obligation

The first problem is that, even in formal writing, the use of the auxiliary ‘shall’ to indicate obligation is slightly archaic. A century or more ago it was common when doing so, either in speech or writing, to state:

You shall proceed as directed.

He shall do as he is told.

In modern English these statements sound slightly awkward. Today ‘will’ tends to be substituted in each case, and indeed in conversational usage the two words have become, to an extent, interchangeable:

You will proceed as directed

He will do as he is told.

In view of the interchangeability of these auxiliaries, there is in both pairs of statements a potential problem of understanding. Do they indicate obligations or are they merely explaining what is going to happen (i.e. the future tense<sup>1</sup>)? Often, particularly in spoken English, the intended meaning will be clear from the context. Nevertheless, if it is intended to indicate obligation, whether in spoken or written, formal or informal, English, the auxiliary ‘**must**’ is usually used. As is noted in Chapter 6, the language used in legislation needs to conform as far as possible to that in ordinary use. So in drafting a legislative rule roughly corresponding to the above statements the following would be modern conventional drafting:

A person involved in a road traffic accident must follow the instructions of a police officer called to the scene.

A driver of a heavy goods vehicle must proceed through a weighbridge as directed by...

<sup>1</sup> For an example of where the future tense is used to explain what is expected to happen, see the typical procedure for legislation set out in Appendix A.

### Indicating a consequence or explanation

Often when the auxiliary ‘shall’ has been used in the past, it has not in fact imposed an obligation:

If an application complies with section 3, subsection (1) of this section shall not apply.

A person who contravenes this section shall be guilty of an offence.

In relation to a citizen by naturalisation, section 5 shall have effect as if the reference...

Subsection (3) shall not apply where the court gives leave to make a further application, but such leave shall not be given unless...

Except in the words following ‘but’ in the last example, each of these rules is merely stating a consequence or giving an explanation, i.e., a state of affairs brought about by, or consequence flowing from, the rule.

In the last example, the negative auxiliary ‘shall not’ is clearly used in two different senses in the same sentence (something counsel should avoid in order to preserve **consistency**). The intention in the second part of the sentence is to state what the duties of the court are in the relevant circumstances.

### Use of the present tense to indicate states of affairs or consequences

The modern convention when expressing a state of affairs or consequence is to use the **present** tense. Besides being better style, this neatly gives effect to the maxim of construction ‘a statute is always speaking’. Thus, in modern drafting, the following would take the place of the above examples:

If the application complies with section 3, subsection (1) of this section does not apply.

A person who contravenes this section is guilty of [*or, probably better, commits*] an offence.

In relation to a citizen by naturalisation, section 5 has effect as if the reference...

Subsection (3) does not apply where the court gives leave to make a further application, but...

A simple test to determine the way in which ‘shall’ is used is to ask whether ‘must’ can meaningfully be inserted in its place. If so, then the modern convention is to do so; if not, then the present tense or some other mode of expression is needed.

### Setting out functions and duties

There are further potential problems with the overworked ‘shall’. In many cases, it is desired to set out what somebody, usually a Minister, a court or a

specified official or body, is required to do. More often than not, the thrust of the provision is not so much to create an obligation or series of obligations (for the operation of the legislation concerned is usually predicated on the doing of the relevant things), but simply to state or list the powers or duties of the person concerned:

The National Heritage Trust shall:

- (a) ...;
- (b) ...

The objects of the Law Society shall be:

- (a) to...;
- (b) to...

The Minister shall appoint the Chairman of the Board

or, referring back to one of the original examples noted under the previous heading:

Subsection (3) does not apply where the court gives leave to make a further application, but leave [to make a further application] shall not be given unless...

### Use of the present tense to indicate lists of functions or duties

In these kinds of cases, it usually better expresses the sense of the provision to use the present tense in the form 'is to', or 'are to':

The duties of the National Heritage Trust are:

- (a) to...;
- (b) to...

The objects of the Law Society are:

- (a) to...;
- (b) to...

The Minister is to appoint the Chairman of the Board

...but leave [to make a further application] is not to be given unless...

### Establishing an office, corporation or other thing

The overworked 'shall' has been used here too:

There shall be a Registrar of Antiquities.

The Harbours Authority shall be a body corporate with perpetual succession and a common seal...

A tax, to be known as "land transaction tax", shall be charged and collected...

In these cases, as with those examined in the paragraph above on use of the present tense, the troublesome auxiliary is better replaced by 'is to' or, in the second example, by replacing 'shall be' with 'is'.

### Explaining provisions

Recourse has also sometimes been made to ‘shall’ for an explanatory purpose:

An interim order shall not be deemed to be an adoption order within the meaning of this Act.

The Board shall be lawfully constituted if there are no less than 7 elected members present.

In fact ‘be deemed to be’ in the first example is a slightly archaic form hardly ever used even in formal language outside legislation (in modern writing, the equivalent would be ‘be treated as’, ‘be regarded as’ or ‘be taken to be’), and so applying the conventions already discussed, one would write:

An interim order is not to be regarded as an adoption order within the meaning of this Act.

although, applying principles of **conciseness**, use in this context of the words ‘deemed to be’ is arguably redundant, and the better draft would be:

An interim order is not an adoption order within the meaning of this Act.

In the second example, all that is needed is ‘...is lawfully constituted if...’

### 5.3.2 Potential problems with ‘may’

#### The use of ‘can’

As has been seen, from the variety of words and expressions that could be used to indicate discretion, ‘may’ is the one usually chosen. Of course in informal spoken language another verb auxiliary ‘can’ is often used in the same sense:

You can call me by my first name or my nickname.

He can do whatever he thinks is right in the circumstances.

In formal English, however, it is not correct to do this. ‘Can’ in its correct use is synonymous with ‘is able to’ and should be reserved for referring to physical or mental ability to do something, rather than having permission to do it. What is needed is a word indicating permission or discretion. Legislative equivalents of the above examples might be:

An Act may be referred to by its short title or chapter number.

The Authority may direct a course of action that it considers appropriate in the circumstances.

### The use of 'may not'

At first sight the negative form 'may not' seems to have the same meaning as the negative obligation form 'must not', and indeed in spoken language any of the following might be stated interchangeably:

You must not smoke in here.

You may not smoke in here.

or even:

You cannot smoke in here.

The third version has already been considered, but there is also a fine but important distinction between the first two. In legislative rules, 'must not' is used to create **an obligation not to do something**; 'may not', on the other hand, is reserved for cases in which it is required to emphasise **a lack of authority to do something** (without necessarily incurring a penalty for contravention):

A licensee may not apply to renew a licence more than 30 days before it is due to expire.

A court may not convict a person of an offence under this section if that person has paid the relevant fixed penalty.

In these cases, the sense is not so much to forbid a person from doing something as to indicate or explain the lack of a right or discretion. A licensee who failed to comply would presumably simply be told to reapply at the correct time and, in the unlikely event that a person were actually to be convicted of the specified offence in the circumstances mentioned, he or she would have an unanswerable appeal.

Contrast, however, the more usual type of case:

A person must not carry on the business of a hawker unless he or she holds a hawker's licence of the appropriate class.

This clearly creates an important negative obligation, and there would undoubtedly have to be a provision following it making anybody who failed to comply liable to penal sanctions.

### Other meanings of 'may'

Finally, there is sometimes inconsistent use of 'may' in the sense of 'is' (or 'are') and 'might':

In sections 3 to 9 of this Act a reference to adoption is to adoption of an infant wherever the infant may be habitually resident.

Although there would not in practice be any difficulty in understanding this provision, it would be better from the point of view of consistency to use 'is' instead of 'may be'.

Furthermore, an ambiguity could possibly arise with inconsistent use, particularly if the auxiliary is capable of meaning 'might':

The Minister may not make an order if the circumstances set out in subsection (3) apply.

The application of this Act may be subject to such modifications as are prescribed.

The first could be construed either as a lack of power in the specified circumstances or (if 'may' is understood in the sense of 'might') as an explanation of the way in which that power could be expected to be exercised in a particular case. In addition, the question arises with regard to the second example as to whether the sentence confers a power to make modifications or (as in the first example) is an explanation of what might happen. Although legislation is construed as creating rules rather than giving explanations, it would nevertheless be better to redraft the above provisions:

The Minister [is not to] [must not] make an order if the circumstances set out in subsection (3) apply.

The application of this Act is subject to such modifications as are prescribed.