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Bennion on Statutory Interpretation

Seventh Edition

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Citation

1.8 Code ss **2.15** and **2.16** consider how Acts may be cited. Code s **2.15** considers the method of citing an individual Act. Code s **2.16** considers citation by collective titles.

Proof and challenges to validity

1.9 Code s **2.17** states that in general an Act is admissible in proceedings without being proved.

Code s **2.18** states that the only ground for challenging the validity of an Act is that it is not an Act (ie does not comply with the requirements stated in Code s **2.1**). The courts will not examine other alleged irregularities, or the motives of a Bill's promoters or of legislators. It is noted that an enactment, though not formally invalid, may be ineffective, eg because it conflicts with European Union law (this issue is considered in CHAPTER 28).

CHAPTER 3: DELEGATED LEGISLATION AND PREROGATIVE INSTRUMENTS

Nature, type and form of delegated legislation

1.10 CHAPTER 3 is principally concerned with delegated legislation, that is law made by a person or body (the delegate) under legislative powers (enabling powers) conferred by an Act (the enabling Act): see Code s **3.1**. A valid provision of delegated legislation has the same effect as if it were contained in an Act (Code s **3.1**). Other names for delegated legislation include subordinate legislation and secondary legislation.

Code s **3.2** describes the types of delegated legislation, the most common of which are regulations, orders, Orders in Council and rules. Code s **3.3** describes the types of delegate, the most common of which are ministers of the Crown.

Code s **3.4** describes the form and components of delegated legislation. This includes consideration of the recital of enabling powers, and the effect of mistakes in the citation of such powers. Most UK delegated legislation is made by statutory instrument – Code s **3.5** deals with this topic.

Parliamentary control of delegated legislation

Code s **3.6** is concerned with Parliamentary control of delegated legislation.

Scope and exercise of enabling powers

1.11 Code s **3.7** deals with the scope of enabling powers, that is with the question of what delegated legislation may be made under an enabling power. Subsequent sections deal with particular aspects of this topic. Code s **3.8** considers powers to amend or modify Acts (sometimes called 'Henry VIII powers'). Code s **3.9** considers express or implied ancillary powers – examples of express ancillary powers include the power to make supple-

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1 Ch 842, 70 LJ Ch 489.

Chapter 3

DELEGATED LEGISLATION AND PREROGATIVE INSTRUMENTS

Overview	*Section*
Nature, type and form of delegated legislation	3.1–3.5
Parliamentary control of delegated legislation	3.6
Scope and exercise of enabling powers	3.7–3.12
Interpretation and operation of delegated legislation	3.13–3.15
Proof of delegated legislation	3.16
Prerogative instruments	3.17–3.18

NATURE, TYPE AND FORM OF DELEGATED LEGISLATION

Section 3.1: Nature of delegated legislation

3.1

(1) Delegated legislation is law made by a person or body (the delegate) under legislative powers conferred by Act (the enabling Act).

(2) A valid provision of delegated legislation has the same effect as if it were contained in an Act.

Comment

Acts frequently confer powers on persons or bodies to make legislation about specified matters. Legislation made under those powers is known as delegated legislation (or subordinate legislation).[1]

Erskine May, Parliamentary Practice, notes:

> ' . . . it has been recognised that the greater the number of details of an essentially subsidiary or procedural character which can be withdrawn from the floors of both Houses, the more time will be available for the discussion of major matters of public concern. Consequently, legislative power is often conferred upon the executive by statute, and various arrangements are made for parliamentary scrutiny of its exercise.'[2]

The power is usually conferred on a minister, but others may be delegates (see Code s 3.3).

Reasons for delegation

There are many reasons why Parliament finds it necessary to delegate legislative power. These include:

(a) Modern legislation requires far more detail than Parliament itself has time or inclination for. For example, Parliament may not wish to concern itself with minor procedural matters.

(b) To bring a complex legislative scheme into full working operation, consultation with affected interests is required. This can best be done after Parliament has passed the outline legislation, since it is then known that the new law is indeed to take effect and what its main features are.[3]

(c) Some details of the overall legislative scheme may need to be tentative or experimental. Delegated legislation provides an easy way of adjusting the scheme without the need for further recourse to Parliament.

(d) Within the field of a regulatory Act new developments will from time to time arise. By the use of delegated legislation the scheme can be easily altered to allow for these.

(e) If a sudden emergency arises it may be essential to give the executive wide and flexible legislative powers to deal with it whether or not Parliament is sitting.

Effect of valid delegated legislation

A valid provision of delegated legislation has statutory force. Its effect is the same as if it were contained in an Act.[4] Formerly this would usually be spelt out in the enabling Act.[5]

EXAMPLE

The Representation of the People Act 1832 (the great Reform Act of 1832), giving power to make legislative instruments laying down altered dates and times, said that these 'shall be deemed to be of the same force and effect as if they had in every instance been mentioned in this Act'.[6]

A few twentieth-century Acts contain a similar provision.[7] The effect is the same, whether or not the enabling Act spells it out.[8] This applies even where the person entrusted with the delegated legislative power is not an emanation of the state.[9]

Although *valid* delegated legislation has statutory effect, words saying that it is to 'have effect as if enacted in this Act' will not avail to achieve this if the instrument is ultra vires.[10]

Terminology

The Interpretation Act 1978 uses the term 'subordinate legislation', defined in s 21(1) of that Act as 'Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act'. It has been held that an ad hoc authorisation given under an Act was within this definition and that therefore, applying the Interpretation Act 1978, s 11, terms used in the authorisation had the same meaning as in the Act.[11]

The term 'delegated legislation' is perhaps more helpful because the central concept of the delegation of legislative power by Parliament is a crucial one,

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Effect of Acts that change constitutional arrangements for making primary legislation

Where an Act remodels the primary legislative procedure of the state, as the Parliament Act 1911 did in reducing the power of the House of Lords to reject or delay public Bills,[12] the product of the remodelled process is primary rather than delegated legislation: see *R (on the application of Jackson) v A-G*.[13] In that case the House of Lords upheld the decision of the Divisional Court in *R (on the application of Jackson) v A-G*, where Maurice Kay LJ said: ' . . . the language of "redefinition" or "remodelling" (the latter being the word used by Francis Bennion in his helpful article 'Is the New Hunting Act Valid?' *Justice of the Peace*, 27 November 2004, 928) is more appropriate than that of "delegation"'.[14]

Similarly, where an Act of the Westminster Parliament sets up a legislature for a territory outside the United Kingdom with the powers of a primary legislature for that territory,[15] its legislation falls to be treated qua that territory as primary rather than delegated legislation.

A somewhat different analysis has been applied in relation to primary law making powers of the devolved UK legislatures.[16] In *Axa General Insurance Ltd v Lord Advocate*,[17] Lord Hope analysed primary legislation from the Scottish Parliament as a form of delegated legislation, amenable to judicial review on common law grounds.[18] Lord Hope went on to say that the common law grounds for review would be limited, and that Acts of the Scottish Parliament would not be subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness.[19] Lord Reed approached the issue in the following way:

> 'Classification is, at best, an indirect way of approaching what seems to me to be the underlying question, which is the extent to which judicial review, having regard to its nature and purpose, can apply to the law-making functions of a devolved legislature. I prefer to approach that question directly.'[20]

His conclusion was that Acts of the Scottish Parliament would be subject to review if they abrogated fundamental rights or violated the rule of law, but not otherwise.[21] It is suggested that Lord Reed's approach is preferable, as it gives proper weight to the constitutional arrangements reflected in the devolution settlements, and does not treat devolved primary legislation as different in nature to primary legislation of the Westminster Parliament.

Immigration rules

The Immigration Act 1971, s 3(2) provides as follows:

> 'The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . . '

Despite the wording of this provision (which describes the rules as statements of practice), it has been said (by Sedley LJ in *Pankina v Secretary of State for the Home Department*[22]), that the rules are different from and more than policy and 'have acquired a status akin to that of law' for

particular purposes.[23]

1 As to delegated legislation generally see: Report of the Committee on Ministers' Powers (Donoughmore Committee, 1932) Cmd 4060; Carr *Delegated Legislation* (1921); Carr *Administrative Law in England* (1941); Allen *Law in the Making* (7th edn, 1966); Allen *Law and Orders* (3rd edn, 1965); Harrison *Notes on the Delegation by Parliament of Legislative Powers* (1931); Report of the Select Committee on Delegated Legislation (1952–53) HC 301; Reports of the Joint Committee on Delegated Legislation (1971–72) HL 184, HC 475 (1972–73) HL 188 and 204, HC 407 and 468; Reports of the Joint Committee on Statutory Instruments, the Commons Select Committee on Statutory Instruments, and the House of Lords Delegated Powers and Regulatory Reform Committee.

2 May *Parliamentary Practice* (24th edn, 2011) p 667.

3 For a useful discussion of this process of consultation, see Thornton *Legislative Drafting* (4th edn, 1996) pp 332–336.

4 *Dale's Case* (1881) 6 QBD 376 at 398; *Re Langlois and Biden* [1891] 1 QB 349 at 355, 60 LJQB 123; *Kruse v Johnson* [1898] 2 QB 91 at 96, 62 JP 469; *Re Macartney, Brookhouse v Barman* (1920) 36 TLR 394; *Swain v Law Society* [1983] 1 AC 598, [1982] 2 All ER 827; *Ex p Austintel Ltd* (1996) Times, 11 November; *Hughes v Kingston upon Hull City Council* [1999] QB 1193, [1999] 2 All ER 49.

5 The practice has been traced back to the Statute of the Staple 1385: Harrison *Notes on the Delegation by Parliament of Legislative Powers* (1931) p 66.

6 Representation of the People Act 1832, s 80

7 See eg Emergency Powers Act 1920, s 2(4); Emergency Laws (Re-Enactments and Repeals) Act 1964, s 7(7).

8 *Institute of Patent Agents v Lockwood* [1894] AC 347 at 361, 63 LJPC 75.

9 *Swain v Law Society* [1983] 1 AC 598; *Mohamed v Alaga & Co (a firm)* [1998] 2 All ER 720, [1998] 17 LS Gaz R 29 (rules made by Law Society under Solicitors Act 1974); *Garbutt v Edwards* [2005] EWCA Civ 1206, [2006] 1 All ER 553, [2006] 1 WLR 2907 at [31].

10 *Minister of Health v R ex p Yaffé* [1931] AC 494, 100 LJKB 306. This sentence was cited by Laws J in *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, [1998] 4 All ER 764 at 777 (affd [1999] 4 All ER 583). As to the doctrine of ultra vires see Code s **3.12**.

11 *R v HM Inspectorate of Pollution ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329, 341, [1994] 2 CMLR 548.

12 See Code s **2.11**.

13 [2005] UKHL 56, [2006] 1 AC 262, [2005] 4 All ER 1253. The Parliament Act 1911, ss 1(1) and 2(1) provides that – in the circumstances mentioned there – the Bill 'shall become . . . an Act of Parliament'. Given this, it is hard to see how such an Act could be characterised as anything other than an Act of Parliament (which by definition cannot, of course, be delegated legislation).

14 [2005] EWHC 94 (Admin), [23].

15 See for example the Barbados Independence Act 1966.

16 That is, the Scottish Parliament established by the Scotland Act 1998, the Northern Ireland Assembly established by the Northern Ireland Act 1998, and the National Assembly for Wales established by the Government of Wales Act 2006.

17 [2011] UKSC 46, [2012] 1 AC 868, [2011] 3 WLR 871.

18 At [46]–[47].

19 At [48]–[52].

20 At [141].

21 At [153].

22 [2010] EWCA Civ 719, [2011] QB 376, [2011] 1 All ER 1043 at [17].

23 For a detailed consideration of the nature of immigration rules, see *Pankina v Secretary of State for the Home Department* [2010] EWCA Civ 719; *R (on the application of Sayaniya) v Upper Tribunal* [2016] EWCA Civ 85, [2016] 4 WLR 58, [2016] All ER (D) 124 (Feb). As to the construction of immigration rules, see *Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16, [2010] 2 All ER 535, [2010] 1 WLR 48 at [10] (they should not be construed with the strictness appropriate for a statute or a statutory instrument, but rather should be construed 'sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy'); *Pokhriyal v Secretary of State for the Home Department; Hussain v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [2014] PTSR D4, [2013] All ER (D) 52 (Dec).

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Section 3.2: Types of delegated legislation

3.2

(1) The most common forms of delegated legislation are regulations, orders, Orders in Council and rules, but there is no restriction on the name that an enabling Act may use to describe the delegated legislation to be made under it.

(2) Regulations, Orders in Council and rules usually have a continuous regulating effect, and so, like Acts, are 'always speaking'. They have traditionally been used to flesh out the details of an Act.

(3) The term 'order' has traditionally been used for an instrument that makes a one-off change to the law. Recent Westminster Acts have tended to provide for provisions of this kind to be made by regulations.

(4) Orders in Council are orders made by the Sovereign by and with the advice of the Privy Council.

(5) The term 'rules' is mainly reserved for instruments, such as rules of court, which regulate judicial or other procedure.[1]

(6) The term 'byelaw' is mainly used for delegated legislation made by local authorities, public utilities and similar bodies (whether public or private). Byelaws usually operate in a small geographical area, or apply only to the operations of a particular body.

(7) Other terms used include proclamation, warrant, declaration, scheme, general notice, direction, ordinance, legislative instrument.

Comment

This section describes the different types of delegated legislation. Delegated legislation is often made by 'statutory instrument' – this topic is considered at Code s 3.5.

Regulations and orders

As mentioned above, orders have traditionally been used to make one-off changes to the law; for example, orders have traditionally been used to bring Acts or provisions of Acts into force.

Most recent Westminster Acts do not contain order-making powers – where a power might formerly have been conferred to do things by order, the power is now usually conferred to do the same thing by regulations.[2]

Rules

Rules have the same nature as regulations, except that the term rule is usually reserved for procedural matters, for example instruments dealing with the procedure of a court, tribunal, corporation or other statutory body.

Byelaws

The power to make byelaws is usually conferred in respect of a particular locality. A power to make byelaws usually states that they require confirmation by a minister or other authority.

EXAMPLE

The Local Government Act 1972, s 235(1) gives local authorities power to make byelaws 'for the good rule and government of the whole or any

part of . . . [their area] and for the suppression of nuisances therein'. Sections 235 and 236 of that Act provide that these byelaws do not have effect until confirmed by the Secretary of State (unless an alternative procedure prescribed by regulations under s 236A of that Act applies).

Non-legislative byelaws

The term 'byelaw' is sometimes used for the regulations applying to members of corporations or other bodies.[3] Byelaws of this kind do not constitute delegated legislation, since their character is contractual rather than legislative. Corporations established by royal charter are deemed to have power to make similar byelaws.[4]

Other instruments

As mentioned above, there is no restriction on the name that an enabling Act may use to describe the delegated legislation to be made under it.

In 1932 the Donoughmore Committee complained about the confused nomenclature in this field. They said it was 'not only due to the use of many different words for the same thing' but was 'aggravated by the use of the same word for different things'.[5] Since then consistency has improved in UK legislation.

Here are some examples of other terms used to describe delegated legislation:

- *Proclamation*: This term is reserved for announcements made by or under the authority of the Crown.[6]
- *Warrant*: This term is used for royal directions or those made by HM Treasury.[7]
- *Declaration*: As to declarations see the comment to Code s 3.3, under the heading 'The Sovereign'.
- *Scheme*: This term is used where power is given to make detailed arrangements for some matter considered to be in need of general statutory supervision or administration.[8]
- *General notice*: This term is used for minor administrative announcements (which may have legislative effect) of which wide notice needs to be given. Usually they are issued under regulatory Acts.[9]
- *Direction*: In some cases an enabling Act uses the term direction for what amounts to an instruction from the executive, while in other cases it is used to indicate that general directions, of a legislative character, may be made.[10]
- *Ordinance*: This term is used for delegated legislation made by the governor or other administering authority in a colony or other dependent territory. The ordinance is the primary form of legislation in the territory, and often gives power to make regulations and other sub-delegated instruments.[11]
- *Legislative instrument*: The term legislative instrument, an all-embracing term to describe delegated legislation and distinguish it from executive instruments, is little used in the United Kingdom.[12]

Combining different forms of subordinate legislation

The Deregulation Act 2015, s 105 provides:

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'Any provision that may be made by order, regulations or rules made by statutory instrument may be made by any other of those forms of legislation made by statutory instrument.'[13]

This deals with the position where it is necessary to make a number of different orders, regulations or rules to give effect to a single policy. It allows several powers to be exercised together to make a single instrument.

1 This part of the Code has been judicially approved: see *Law Society of Upper Canada v Ontario (Attorney-General)* (1995) 21 OR (3d) 666, [19].

2 This change in practice arose from a desire to reduce the number of different kinds of delegated legislation that were being used. The change in practice was announced in a Written Ministerial Statement in both Houses of Parliament on 20 March 2014: Col 63 WS (Commons); Col WS 15 (Lords). See also Part 9.1 of Office of Parliamentary Counsel *Drafting Guidance* (June 2017), available at: www.gov.uk/government/collections/the-office-of-the-parliamentary-counsel-guidance.

3 See eg *Tobacco Pipe Makers' Co v Loder* (1851) 16 QB 765.

4 *Piper v Chappell* (1845) 14 M & W 624. As to the case where such byelaws are ultra vires or otherwise void see *R v Coopers' Co, Newcastle* (1798) 7 Term Rep 543; *R v Cutbush* (1768) 4 Burr 2204; *Carter v Sanderson* (1828) 5 Bing 79.

5 Report of the Committee on Ministers' Powers (1932) Cmd 4060 p 18.

6 See Code s 3.3.

7 Thus the National Savings Bank Act 1971, s 11 empowered the Treasury by warrant to fix the amount of certain fees incurred under the Act. See also s 26 of that Act.

8 See eg Agricultural Marketing Act 1958, Part I in relation to milk and potatoes (agricultural marketing schemes); and Job Release Act 1977, s 1 (job release schemes). For an example of a case concerning a statutory scheme see *Minister of Health v R, ex p Yaffé* [1931] AC 494 (scheme under the Housing Act 1925, s 40).

9 See eg the definition of the term in the Consumer Credit Act 1974 s 189(1) and its use in ss 2(4), 6(2), 22(8), 30(5), 31(3)(a) and 31(6) of the Act. See also Estate Agents Act 1979, s 33(1).

10 See eg the powers conferred on the Treasury by the Exchange Control Act 1947, ss 24(2), 25(3)–(5), 26, 27, 32 and 34(2); the power conferred on the appropriate minister by the Road Traffic Regulation Act 1967, s 75(1)(a) to give 'general or other directions' regarding the erection of traffic signs; and the power conferred on the Secretary of State by the Fair Trading Act 1973, s 12 to give directions to the Director General of Fair Trading.

11 See eg Bennion *Constitutional Law of Ghana* (1962) pp 284–291): www.francisbennion.com/1962/002/284.htm. See also Legislative Instruments Act 2003 (Australia) and *Harbour Radio Pty Ltd and Australian Communications and Media Authority* [2012] FCA 614 at [127]–[140].

12 For a detailed account of its use in Ghana see Bennion *Constitutional Law of Ghana* (1962) pp 262–269.

13 This does not apply to statutory instruments made by the Welsh Ministers: see s 105(4).

Section 3.3: Types of delegate

3.3

(1) In the case of most delegated legislation, the delegate is a minister of the Crown.

(2) An Act may authorise the Sovereign to make instruments having the force of law. These usually take the form of Orders in Council but other forms (such as proclamations or declarations) may be used.

(3) Some Acts confer delegated legislative power on the Privy Council alone.

(4) In recognition of the exclusive power of the House of Commons over the raising and expenditure of public money, Parliament has by Act endowed certain orders of that House with legislative effect.

(5) There is no restriction on the type of person or body to whom Parliament may delegate legislative power. The delegate need not be one established by Act. Nor need the delegate be in the public domain, though this is usually the case.

Comment

Ministers

A government department is usually responsible for administering an Act, and responsibility for government policy on the subject matter will fall on a particular minister, so in most cases the appointed delegate is a minister. For Westminster Acts, that minister will usually be the Secretary of State. For the meaning of that expression, see Code s **19.6**.

The Sovereign

Whenever in early times it was doubtful whether the royal prerogative extended to a matter with regard to which the King desired legislative power, or the exercise of the prerogative might be disputed, Parliament was asked to grant the necessary power. The outstanding example of this was the Statute of Proclamations 1539. Earlier, the statute 11 Edw 3 c 1 (1337) prohibited the exporting of wool unless otherwise ordained by the King in council. Later, the Mutiny Act 1717 gave the King power to legislate for the army.

In modern times, powers of delegated legislation bestowed on the Queen are most usually to be exercised by Order in Council. It is the modern constitutional convention that in exercising her powers of delegated legislation the Queen acts only on the advice of ministers.

Orders in Council

An Order in Council is an order made by the Queen by and with the advice of the Privy Council. The full name of the latter is 'the Lords and others of Her Majesty's Most Honourable Privy Council'.[1]

An Order in Council is usually drafted in the Department concerned with administering the enabling Act, though a particularly important Order may be drafted by Parliamentary Counsel. Its ratification by the Queen and Privy Council is a formality.

Proclamations

The Emergency Powers Act 1920, s 1 formerly empowered the Queen, where it appeared to her that events threatening the nation's essentials of life had occurred, or were about to occur, to issue a proclamation of emergency.[2] By implication, such powers are taken to be exercisable only on the advice of ministers.

Declarations

It is rare for an Act to provide for royal declarations.[3]

The Privy Council

Delegated legislative powers conferred on the Privy Council alone usually concern its supervisory functions in relation to bodies incorporated by royal charter and regulated by Act.

The instruments made under these powers are styled Orders of Council.[4]

The House of Commons

The Crown, as the executive power, is charged by the constitution with responsibility for the management of the public revenue of the state, and with the making of payments for the public service. Acting on the advice of ministers, the Crown makes known to the House of Commons the financial requirements of the government, and that House in return grants such aids or supplies as it accepts are needed. It provides by taxation, and by the appropriation of other sources of public income, the ways and means to meet the supplies it has granted. The Crown demands money, the Commons grant it, and the Lords assent to the grant.[5]

An example of a delegated legislative power conferred on the House of Commons is provided by the Provisional Collection of Taxes Act 1968, s 1. This enables the House to pass resolutions which, for a limited period only, have statutory effect as if contained in an Act.

Other delegates

As Parliament has unfettered legislative power, it may delegate a portion of this power to anyone.

EXAMPLE

The Civil Procedure Act 1997, s 2 confers powers on a Committee known as the Civil Procedure Rules Committee, for the purpose of making Civil Procedure Rules.

1 Interpretation Act 1978, s 5 and Sch 1.
2 Replaced by the Civil Contingencies Act 2004, which gives power to make emergency regulations instead. For another example of a former royal power to legislate by proclamation see the Coinage Act 1870, s 11.
3 The Coroners (Amendment) Act 1926, s 4(4) provided for the abolition of the office of Admiralty Coroner 'if His Majesty is pleased to declare in Council that it is his will' to relinquish the right of making appointments to the office. Under this provision the Admiralty Coronership (Abolition) Declaration 1927 (S R & O 1927 No 675) was made.
4 For an example, see the Veterinary Surgeons Act 1966, ss 3 and 25.
5 May *Parliamentary Practice* (24th edn, 2011) ch 32.

Section 3.4: Form and components of delegated legislation

3.4

(1) It is usual for delegated legislation to recite the powers under which it is made, but this is not necessary to its validity.
(2) Statutory instruments take a standard form.

Comment

Recital of enabling powers

It is usual to recite the powers under which delegated legislation is made, but this is not necessary to its validity. Nor is it material if the enabling powers are mistakenly cited.[1]

The recital of enabling powers may, by way of precaution in case any relevant power is missed out, end with the ancient sweeping-up formula

in this area. The process by which amendments are tabled and made or not made needs to be viewed in the context of the wider political process, particularly when it comes to opposition amendments that have little prospect of success without government support. Amendments may be proposed by a member for a variety of reasons and are not always intended to result in a change to the legislative text. For example, an amendment may be tabled simply to engineer a debate on an issue of particular interest to a member or to elicit a government undertaking on some unrelated matter or for some other political reason.

Notes on amendments

For the use of notes on amendments, see Code s **24.14**.

1 For an early case where the court considered amendments made to a Bill see *Millar v Taylor* (1769) 4 Burr 2303.

2 Lord Diplock's suggestion in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 280 that the drafter's advice is available on the wording of amendments is something of an understatement. Government amendments are drafted by Parliamentary Counsel.

3 [1993] AC 593 at 642.

4 [2015] EWCA Civ 282, [2016] 1 WLR 275, [2015] HLR 593.

5 [1922] 2 AC 339.

6 CJ (1919) 330; LJ (1919) 431.

7 Lord Birkenhead LC however said that since the case was not being considered by the House of Lords in its judicial capacity the parliamentary history of the Act might have been admissible.

Section 24.14: Explanatory notes, etc

24.14

(1) Explanatory notes to an Act may be used to understand the background to and context of the Act and the mischief at which it is aimed.

(2) Other explanatory material provided by the promoter of a Bill or amendment for the use of members of Parliament is likely to be treated in the same way if it is also made available to the public at large.

(3) But it is not appropriate to have regard to explanatory material as an aid to construction if it is not publicly available. On the importance of public availability, see also Code s **24.2**.

Comment

Explanatory notes (Acts since 1999)

Status and purpose Since 1999 most public general Acts have been accompanied by explanatory notes prepared by the government. The notes are published when a Bill is first introduced in each House and again when it receives Royal Assent. Their status and purpose is recorded at the beginning of the notes:

> 'These Explanatory Notes have been prepared by [the Government] in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

> [They] explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.'[1]

The fact that the notes do not form part of the legislative text ' . . . means that there is freedom to use techniques which cannot generally be used in Bills . . . The notes can explain the background to a measure; they can summarise its principal provisions; they can give worked examples; they can explain difficult concepts by setting them out in different ways; and they can set out the full wording of provisions that are being textually amended by the Bill.'[2]

Use in interpretation As Lord Steyn said in *R (Westminster City Council) v National Asylum Support Service*[3] explanatory notes may be a useful aid to construction:

> 'In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible . . . '

A more comprehensive description of the current position may be found in Brooke LJ's judgment in *Flora v Wakom (Heathrow) Ltd*:[4]

> '15. The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service*[5] at [2]–[6]; see also *R (S) v Chief Constable of South Yorkshire Police*[6] at [4]. As Lord Steyn says in the *NASS* case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.
>
> 16. The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the Act is set (*NASS*, para [5]). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of Explanatory Notes as an aid to construction by saying (at para [6]):
>
> > "What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."
>
> The value of . . . Explanatory Notes as an aid to construction . . . is that it [*sic*] identifies the contextual scene . . . That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of

> Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them.'

Although explanatory notes may therefore be useful as an aid construction, the courts will resist attempts to elevate the notes to a status where they supplant the language of the legislation itself.[7] There is also always a risk that the notes will be wrong or misleading.[8]

Notes on amendments

In recent years notes on amendments have been prepared at certain stages during the passage of a Bill through Parliament.

- At Committee and Report stage in the Commons an amendment may be accompanied by a brief explanatory statement of around 50 words describing the intended effect of the amendment.[9] The note is prepared by or on behalf of the member tabling the amendment.
- Amendments made to a Bill in the second House of Parliament are accompanied by a set of explanatory notes when they are returned to the first House. These are prepared by the government.

The value of these notes as an aid to construction ought to be the same as explanatory notes to a Bill. Being more specific, however, they are perhaps more likely to shed light on a particular issue.

Financial and Explanatory Memoranda and notes on clauses (pre-1999 Acts)

Before the introduction of explanatory notes in 1999, Bills were published with Financial and Explanatory memoranda at the front. These were a précis and did not provide background information, although they were occasionally considered by the courts.[10] They may continue to be referred to in relation to older legislation in much the same way as explanatory notes.

In addition, before 1999 'notes on clauses' were frequently produced by the government and made available to members with an interest in a Bill. These explained the intended effect of each clause and were originally for the use of ministers only, but in the early 1990s the practice developed of making them available also to backbench and opposition members.

There are some examples of notes on clauses being relied upon but without any consideration of whether it is appropriate to do so.[11]

More recently in *R (on the application of Public and Commercial Services Union) v Minister for the Civil Service*[12] it was held that notes on clauses are not appropriate aids to construction, since they are private documents not available to the public at large and all admissible external aids to construction should be publicly available. Sales J said:[13]

> 'In my judgment, notes on clauses (as distinct from published explanatory notes) are not a proper aid to the interpretation of an Act of Parliament, whether they are circulated to MPs (as happened in relation to the 1990 Act) or not (as in relation to the 1972 Act). Although in the former case, unlike the latter case, it might be argued that there are some grounds for saying that the notes on clauses form part of the contextual background against which the Bill was passed by Parliament as a collective body, so that they should be taken to have an interpretive role and status analogous to that of statements in a White Paper proposing legislation, or in clear statements by a promoter of a Bill in Parliament

or in modern form explanatory notes, I think that there is an important difference from all these cases. Notes on clauses when not cited in debate are private documents not available to the public at large, unlike White Papers, statements reported in Hansard and published explanatory notes. An Act of Parliament creates law applicable to all citizens. In my judgment, it is fundamental that all materials which are relevant to the proper interpretation of such an instrument should be available to any person who wishes to inform himself about the meaning of that law. That is not the position in relation to notes on clauses and for that reason I do not consider they are a legitimate aid to construction of an Act of Parliament.'

Other unpublished explanatory material prepared during passage of a Bill

As a matter of principle other briefing documents, correspondence or material generated during the passage of a Bill through Parliament should not be available as an aid to construction unless it has been cited in debate or otherwise made available to the public.[14]

Impact assessments

Proposed legislation will now usually be accompanied by an impact assessment evaluating the benefits of the legislation and the costs imposed by the legislation on business, charities and others. The courts have shown a preparedness to refer to impact assessments, at least as an indication of the mischief at which the legislation is aimed.[15]

Silence

It is doubtful whether any support can be derived for an argument from what is not said in explanatory material, as opposed to what is said.[16] Explanatory material may fail to address a point for any number of political, practical or other reasons that have nothing to do with the meaning or intended meaning of the legislation.

1 See, for example, the explanatory notes for the Housing and Planning Act 2016. Following a consultation carried out by the Office of the Parliamentary Counsel in 2014 the format of the notes has changed in recent years but their basic purpose has not. There are also slight differences between the introductory wording of explanatory notes for Bills and those for Acts: the purpose of the former includes helping to 'inform debate'.

2 Christopher Jenkins (then First Parliamentary Counsel) 'Helping the reader of Bills and Acts' (1999) 149 NLJ 798.

3 [2002] UKHL 38, [2002] 4 All ER 654 at [5].

4 [2006] EWCA Civ 1103, [2006] 4 All ER 982, [2007] 1 WLR 482.

5 [2002] UKHL 38, [2002] 4 All ER 654.

6 [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196.

7 See for example *Aspinalls Club Ltd v Revenue and Customs* [2013] EWCA Civ 1464, [2015] Ch 79 *per* Moses LJ at [22] ('I am called upon to construe the statute and not the explanatory note'). See also *R (D) v Secretary of State for Justice* [2010] EWCA Civ 18, [2010] 1 WLR 1782 *per* Carnwath LJ at [45] ('I would treat with caution, respectfully, Brooke LJ's observation [in *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2006] 4 All ER 982, [2007] 1 WLR 482] that the legislative text need not be "ambiguous" before explanatory notes are to be taken into account. This cannot be taken as meaning that, even if the statutory language is *unambiguous*, the court is free to rewrite it by reference to the explanatory notes').

8 See, for example, *Chief Constable of Greater Manchester Police v Wright (Trustee in Bankruptcy of Mohammed Osman Tahir)* [2015] EWHC 3824 (Ch) at [25] (notes 'potentially misleading').

9 See Fourth Report of the Procedure Committee of the House of Commons, Session 2012–13, 'Explanatory statements on amendments' HC 979; and HC Deb 6 November 2013 cc 358–383. On 6 November 2013, the Deputy Leader announced 'I expect the Government to table explanatory statements on amendments for Bills introduced to this House after 1 January 2014.': HC Deb 6 November 2013 c 381.

[10] See, for example, *Chief Adjudication Officer and Secretary of State for Social Security v Clarke* [1995] ELR 259, (1995) Times, 22 February at 264.

[11] See, for example, *R v St Helens Justices, ex p Jones* [1999] 2 All ER 73; *Davidson v Scottish Ministers* [2005] UKHL 74 at [50].

[12] [2010] EWHC 1027, [2011] 3 All ER 54, [2010] ICR 1198.

[13] At [55].

[14] This seems to follow from the reasoning of Sales J in *R (on the application of Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin), [2011] 3 All ER 54, [2010] ICR 1198 at [55].

[15] See, for example, *Islington London Borough v Unite Group plc* [2013] EWHC 508 (Admin), [2013] PTSR 1078, [2013] HLR 449. For further discussion of the extent to which and the manner in which judges employ impact assessments, as well as the risks of doing so, see Munday 'In the Wake of "Good Governance": Impact Assessments and the Politicisation of Statutory Interpretation' (2008) 71 MLR 385.

[16] See, for example, *DMWSHNZ Ltd (In Members' Voluntary Liquidation) v Revenue and Customs Commissioners* [2015] EWCA Civ 1036 at [25].

Section 24.15: Press releases and other contemporaneous statements

24.15 Press releases and other contemporaneous statements made during the passage of a Bill through Parliament but outside of the parliamentary process will seldom if ever be of assistance in construing the resulting Act.

Comment

When a government Bill is first introduced, and at other key moments during its passage through Parliament, it is often the subject of a government press release. Press releases typically fulfil a political purpose and are couched in general terms meaning that they are generally of little or no use as interpretative aids. Attempts to rely on press releases have been deprecated by the courts.[1]

EXAMPLE

In *Bogdanic v Secretary of State for the Home Department*[2] Sales J rejected the use of government press releases in these terms:

> '[55] As is usual with press releases, they are presented in relatively broad-brush terms and are not couched in formal or precise language. They included quotations from the Secretary of State at the time explaining the main thrust of the 2002 Act (of which amendment of the 1999 Act was but one aspect) in tendentious terms, for political effect. The press releases were Government statements which were not even made to Parliament for its consideration in the course of promulgating legislation. Had they been Government statements made to Parliament in the course of promulgation of legislation, they would only have been admissible as an aid to interpretation under the rule in *Pepper v Hart*[3] if, among other things, they were clear and unequivocal: see, eg, *Spath Holme*,[4] per Lord Nicholls. It is difficult to see how a Government statement in a press release could potentially qualify as an aid to interpretation of legislation if it did not meet a similar standard of clarity. The press releases referred to in this case do not satisfy that standard.
>
> [56] At p 399G-H in his speech in *Spath Holme*, Lord Nicholls said "In considering whether a ministerial statement is clear and unequivocal, regard must be had to the circumstances in which it was made. Extempore answers given in the course of vigorous debate in the House or in committee cannot be expected to be as comprehensive and precise as more formal statements." Similarly, in my view, it may be said that broad-brush statements in Government press releases cannot usually be regarded as clear and unequivocal in the requisite sense.