

For discussion
on 23 May 2011

**Legislative Council Panel on
Administration of Justice and Legal Services**

Drafting of Legislation

**Use of “Examples” and “Notes” in legislation
Numbering System for Bill clauses**

INTRODUCTION

In an information paper prepared for the meeting of the Panel on 15 December 2009 (LC Paper No. CB(2)512/09-10(04)) the Law Drafting Division, in listing the plain language drafting techniques it was proposing to adopt in order to improve readability and facilitate the clearer understanding of legislation, referred to reader aids. Paragraph 20 of that paper stated:

“20. **Reader aids** – The use, where appropriate, of reader aids such as notes and examples will be encouraged.”

Examples

2. The Motor Vehicle Idling (Fixed Penalty) Bill, introduced on 16 April 2010, set out 5 examples under proposed section 7 of Schedule 1 in order to illustrate the meaning and hence facilitate a clearer understanding of that section. For the purpose of clarifying the status of those examples clause 2(2) of the Bill provided that they were non-exhaustive and that the provision of which they were an example would prevail if the example was inconsistent with the provision. Relevant
----- extracts from the Bill are set out at **Annex A**.

3. The Bills Committee expressed concern about the drafting of clause 2(2) and the inclusion of examples in section 7 of Schedule 1 to the Bill. Para. 93 of the Report of the Bills Committee on its deliberations on the Bill (LC Paper No. CB(1)1304/10-11) states:

“93. Bills Committee members have expressed concern about the appropriateness of using examples in legislation and the Bill since inclusion of examples in a legislative provision is a relatively new approach in law drafting in Hong Kong. Some members consider that by including an example of the operation of a provision of the Bill, the Administration should ensure that the example falls squarely within that provision and the example fulfils all the conditions/requirements of that provision. However, the effect of clause 2(2) seems to be that where an example is included in the Bill, it is neither exhaustive nor conclusive. Some members consider that it is not desirable to include examples in a legislative provision.”

4. To address members’ concern the Administration agreed to delete clause 2(2) and the examples from the Bill. The Bills Committee agreed to refer the use of examples in legislation to the Panel for follow-up discussion.

Notes

5. The Companies Bill, introduced on 14 January 2011, contains a number of notes. Clause 2(6) of the Bill states that a “note located in the text of this Ordinance is provided for information only and has no legislative effect”. Annexed to a paper submitted to the Bills Committee on 7 March 2011¹ is a note on Modernisation of Drafting which covers, among other matters, the use of notes in the Bill. On 6 May 2011 the Law Drafting Division submitted a further paper to the Bills Committee on Use of Notes in the Companies Bill². The Bills Committee has agreed to refer the use of notes to the Panel for follow-up discussion.

Numbering system

6. The Minutes of the meeting of the House Committee of the Legislative Council held on 7 January 2011 (LC Paper No. CB(2)777/10-11) refer to a new numbering system the use of which had been

¹ LC Paper No. CB(1)1522/10-11(02) Overall Policies of the Companies Ordinance Rewrite

² LC Paper No. CB(1)2133/10-11(01)

contemplated for the Companies Bill which was then about to be introduced. The Secretariat was requested to prepare a paper setting out the consultation procedure to be followed if any new numbering system for the clauses of a Bill is proposed by the Administration. A paper dated 22 February 2011 has been circulated to Members (LC Paper No. CB(2)1131/10-11). Paragraph 9 of that paper advised that it would be appropriate for any proposal for a new numbering system to be first discussed by the Panel as it involves changes to the format and drafting style of legislation.

7. These three issues are dealt with in this paper.

USE OF “EXAMPLES” IN LEGISLATION

The use of examples is not new in legislation

8. There are many incidents of the use of examples in Hong Kong legislation. See section 35(1) of the Bills of Exchange Ordinance (Cap. 19), section 30(2) of the Limitation Ordinance (Cap. 347), section 106(2) of the Copyright Ordinance (Cap. 528) and the Schedule to the Widows and Orphans Pension Ordinance (Cap. 94). The latter Schedule contains many examples of the operation of its provisions.

9. In including examples in legislation Hong Kong was not acting in a novel way. The use of examples can be found in the Indian Evidence Act (I. of 1872). A provision in similar terms to one contained in that Act was made by section 32 of the Straits Settlements Evidence Ordinance, 1893. Illustrations of the operation of that section were appended to it. In Mahomed Syedol Ariffin v Yeoh Ooi Gark [1916] 2AC 575 at 581 Lord Shaw of Dunfermline giving the judgment of the Privy Council in a case involving the application of that section stated:

“... in the construction of the Evidence Ordinance it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text ... it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves The great usefulness of the illustrations, which have, although not part of

the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired.”.

10. It is fair to say that examples were not employed to any significant extent in overseas legislation up to the last few decades of the 20th century. The advent of the plain language movement in the 1970s caused attention to once again be paid to them.

11. Schedule 2 to the Consumer Credit Act 1974 (UK) contains 24 examples illustrating the use of new terminology introduced by that Act. Section 188 provides that the examples are not exhaustive and that in the case of a conflict between Schedule 2 and any other provision of the Act, that other provision would prevail.

12. In the United Kingdom the Report of the Renton Committee on The Preparation of Legislation (1975, Cmnd. 6053) at para. 20.2(9) recommended making more use of examples showing how a Bill is intended to work in particular situations.

13. Section 29(2) of the Sex Discrimination Act 1975 (UK) sets out examples of facilities and services covered by section 29(1). In Amin v Entry Clearance Officer, Bombay [1983] 2AC 818 at 834 Lord Fraser of Tullybelton stated:

“... the examples in s. 29(2) are not exhaustive, but they are, in my opinion, useful pointers to aid in the construction of sub-s (1). Section 29 as a whole seems to me to apply to the direct provision of facilities or services, and not to the mere grant of the permission to use facilities. That is in accordance with the words of sub-s (1), and is reinforced by some of the examples in sub-s (2).”.

14. In recent years examples have been frequently included in Australian legislation and to an increasingly marked extent in United Kingdom legislation. See the Income Tax Assessment Act 1997 (Aus); Local Government Act 1993 (NSW) ss.67(1), 107A(2), 495(2); Mental Health Act 2000 (Qld); Civil Procedure Act 2010 (Vic) ss.22, 44(1);

Adoption and Children Act 2002 (UK) s.69(3) and 70(2); Flood and Water Management Act 2010 (UK) s.3(3).

Status of examples

15. At the federal level in Australia section 15AD of the Acts Interpretation Act 1901, similarly to clause 2(2) of the Motor Vehicle Idling (Fixed Penalty) Bill, provides that examples are non-exhaustive and if inconsistent with the provision of which they are an example, the provision prevails. In Fair Trading Administration Corporation v Owners Corporation [2002] NSWSC 624 the NSW Supreme Court referred to section 15AD and commented that it “appears merely to confirm the approach the ordinary principles of construction would generally require a court to take”.

16. In Victoria, Australia section 36A of the Interpretation of Legislation Act 1984 provides that examples are not exhaustive but may extend, but not limit, the meaning of the provision. Similar provision is made by section 14D of the Acts Interpretation Act 1954 (Qld) and by section 132 of the Legislation Act 2001 (ACT) but the Queensland provision goes on to state that “the example and the provision are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails.”.

17. In drafting an example of the operation of a provision care must be taken to ensure that it is within the intended scope of that provision. An example of a provision enacted as part of the law forms part of the context in which the provision must be interpreted. This may result in the ordinary meaning of the provision being enlarged to accommodate the example, but it must be an enlargement that its wording is capable of bearing.

18. The approach taken to examples is consistent with the ordinary meaning of “example”. That term is defined in the Concise Oxford English Dictionary as “a thing characteristic of its kind or illustrating a general rule”. An illustration of a rule cannot take priority

over a rule. The interpretative provision included in the Motor Vehicle Idling (Fixed Penalty) Bill was consistent with this approach.

Why use examples?

19. Much legislation is complex or uses “broad terms” requiring the exercise of judgement as to their meaning³ or technical terms the meaning of which is not known by many readers. Examples assist communication by supplying concrete illustrations that help the reader grasp the underlying concept.

20. In a comprehensive survey on drafting innovations conducted by the Australian Government’s Office of Parliamentary Counsel in 2010⁴, respondents were asked to comment on the use of examples in legislation. Overall 81% of respondents were satisfied with the usefulness of examples. The satisfaction rate ranged from 94% for public servants to 56% for judges and magistrates. 85% of respondents agreed that examples assist in explaining the operation of complex provisions and 81% agreed that examples make legislation easier to understand.

21. It is submitted that a legislative drafter should be free to employ an example whenever he or she considers that it will genuinely assist in getting meaning across to the audience. This does not mean that the drafter is relieved of the task of writing the ‘rule’ in clear and simple terms. It simply recognises the reality that giving the reader a concrete instance will help him or her in understanding the ‘rule’.

22. When advocating the use of examples in legislation the Law Reform Commission of Victoria stated that tests “at the Communications Design Centre in Pittsburgh have shown that readers construct stories or episodes to help them understand abstract rules or complex procedures.”⁵

³ See Bennion on Statutory Interpretation, 5th ed. at pp. 1167-1170.

⁴ The results of the survey are available at <http://www.opc.gov.au>

⁵ See Plain English and the Law, Report No. 9 of the Law Reform Commission of Victoria, June 1987.

23. A powerful testimony to this practice was provided by Lord Denning in *Escoigne Properties Ltd v Inland Revenue Commissioners* [1958] A.C. 549 when he stated at 566-7:

“... one of the best ways, I find, of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it. This is especially the case with a Finance Act. I often cannot understand it by simply reading it through. But when an instance is given, it becomes plain. I can say at once: ‘Yes, that is the sort of thing Parliament intended to cover.’ The reason is not far to seek. When the draftsman is drawing the Act, he has in mind particular instances which he wishes to cover. He frames a formula which he hopes will embrace them all with precision. But the formula is an unintelligible as a mathematical formula to anyone except the experts: and even they have to know what the symbols mean. To make it intelligible, you must know the sort of thing Parliament had in mind. So you have to resort to particular instances to gather the meaning ...

Section 50 of the Finance Act, 1938 ... is a section which I would not be able to understand unless I was first given an instance of what it was intended to cover.”⁶

24. Why leave the reader to construct their own examples? Would it not assist him or her to supply ready-made examples which the legislature asserts are indeed instances which it wishes to cover.

25. The Office of Parliamentary Counsel of the Australian Government has published a *Plain English Manual* which covers the use of examples. It states:

“159. Examples are an excellent way of illustrating the meaning of complex provisions. With the picture of the example in mind, the reader can return to the text and better understand the details and how they hang together. Examples can take many forms.

Example for a graphic type of example – Schedule 2 to the *Australian Capital Territory (Electoral) Act 1988*

⁶ See also *Mayne Nickless Ltd. v Mackintosh* [1989] V.R. 878 at 885 para Murphy J.

for a case-history type of example – section 1165 of the *Social Security Act 1991* or Appendix A to the *Sales Tax Assessment Act 1992*.

160. It's not practicable to make rules on the cases when you should or shouldn't use examples: use your discretion. However, remember that they're not a substitute for clear text. Even if you use them, try to make the text as simple and clear as if there were no examples. Examples don't define the rule, they merely illustrate it. Using examples to define the rule would result in a "wilderness of single instances".

161. Examples must have the same effect as the text they illustrate."⁷

26. However, it is important that examples are not overused as an excess of examples will only impede the communication of the main message by the substantive provisions of the legislation.

What form should examples take?

27. An example may be located at the end of a paragraph or of a subsection or of a section or in a note to a paragraph, subsection or section. They could be collated and included in a Schedule of Examples. They should be capable of being inserted wherever is likely to be most convenient to the reader. The use that may be made of them depends not on their location but on the status that they are accorded in the particular item of legislation.

28. An example may give an illustration in general terms or may take the form of a narrative. **Annex B** contains an example of a narrative format being used to illustrate the abstract term "place where the liquor provided was appropriated to the person's order".

⁷ See <http://www.opc.au/about/docs/pem.pdf>.

29. An example must however, whatever form it takes, be drafted with the same care as any other part of an item of legislation and using no lesser standard of language.

USE OF NOTES IN LEGISLATION

30. Paragraph 5 refers to the use of notes in the Companies Bill and the papers submitted to the Bills Committee on that issue. The notes in that Bill have been classified into 3 broad categories, namely –

- (a) to draw readers’ attention to other relevant provisions of the Bill;
- (b) to provide readers with factual information which is available elsewhere;
- (c) to provide examples of the situations in which the relevant clause applies or illustrate how it will work in practice (paragraph 27 of this paper refers to the location of examples in notes).

31. The papers submitted to the Bills Committee have also made it clear that clause 2(6) of the Bill in providing for the notes to have “no legislative effect” clarifies that in that Bill they are not intended to have a legal effect in the same way as a clause of the Bill. In that Bill the notes are provided for information only and play no interpretative role.

32. The Australian survey referred to in paragraph 20 also covered the use of notes in legislation. Overall 87% of respondents were satisfied with the usefulness of notes. The satisfaction rate ranged from 98% for public servants to 78% for judges and magistrates. At p. 41 the survey concludes that notes were seen to provide most value when providing navigational and contextual information (“signposts to a related provision”) and that they helped to “improve navigability” and “add clarity”.

33. The use of notes in legislation is another hallmark of plain language drafting. In providing signpost or other factual information they

assist readers to more quickly understand the scheme of the legislation and gain a complete picture of it. Like other reader aids their use should be encouraged.

NUMBERING SYSTEM FOR BILL CLAUSES

34. The Companies Bill comprises 909 clauses and 10 Schedules. It is divided into 21 Parts. As stated in the Secretariat's paper referred to in paragraph 6 the adoption for the Bill of a new numbering system had been proposed "under which each clause would be numbered by the part number of the Bill, followed by a dividing decimal and then the number representing its numerical order within that part".

35. For example, in the Companies Bill as introduced, clause 456 deals with directors' duty to exercise reasonable care, skill and diligence. It is located in Division 2 of Part 10 which has a Part heading of "Directors and Company Secretaries". Under the proposed alternate system it would have been numbered as clause 10.13. It was felt that such a numbering system would be more user-friendly as using the Part number as a component of the clause number would help users of companies legislation quickly associate the clause number with directors. A bald reference to clause 456 conveys nothing to a user other than one with particularly detailed knowledge of that clause.

36. The document design now adopted in Hong Kong legislation under which a solid line appears at the end of each Part and each new Part begins on a new page makes it clear which section is the last section of a Part. Thus in the numbering system that had been proposed for the Companies Bill the fact that section numbers started at 1 for each new Part would not have given rise to any concern based on readers not knowing what was the last section of a Part.

37. Modified decimal numbering systems of varying kinds are used in Australian legislation for large Bills. For example Victoria divides large Bills into Chapters which in turn are divided into Parts. Clauses are numbered by the Chapter number of the Bill followed by a

dividing decimal, and then the Part number of that Chapter, followed by another dividing decimal and then the number representing its numerical order within that Part. Thus the first clause in Part 2 of Chapter 2 is clause 2.2.1.⁸

38. Some federal legislation in Australia uses a Division-Section numbering system. Under it an Act is divided into Chapters which are numbered 1, 2, 3 etc but the Parts are numbered 1-1, 1-2 etc to show which Chapter they are in. Divisions are numbered sequentially 1, 2, 3 etc from the beginning to the end of the Act without restarting at each new Part. Section numbers are then a combination of the Division number and a number starting at 1 for each new Division e.g. section 1-1, 1-2, 1-3, 2-1, 2-2, 2-3.

39. Another advantage of these modified numbering systems is that you can avoid ending up with section numbers like section 168BAD of the Companies Ordinance (Cap. 32) or section 59ZBA of the Mental Health Ordinance (Cap. 136). Indeed in Australia the Income Tax Assessment Act 1997 as originally enacted left gaps in the Division-Section numbering system to allow for the insertion of new Divisions and sections.

40. Rule 50(6) of the Rules of Procedure of the Legislative Council provides that a “bill shall be divided into clauses numbered consecutively”. This is interpreted as ruling out any departure from the current numbering system whereby sections are numbered consecutively throughout the Bill beginning with 1.

41. The Law Drafting Division seeks the views of Panel Members on Bill numbering systems and whether they see any advantage in adopting a modified numbering system for large Bills.

⁸ See, for example, the Gambling Regulation Act 2003 and the Legal Profession Act 2004.

CONCLUSION

42. The three issues dealt with in this paper each have their origin in a desire to make Hong Kong legislation more accessible to users. This is an aim to which the Law Drafting Division is fully committed.

Law Drafting Division
Department of Justice
May 2011

**Extracts from
Motor Vehicle Idling (Fixed Penalty) Bill**

Clause 2(2)

(2) Where this Ordinance includes an example of the operation of a provision –

- (a) the example is not exhaustive; and
- (b) if the example is inconsistent with the provision, the provision prevails.

Schedule 1, section 7

Vehicles necessarily idling for certain purposes

Section 5 does not apply to a driver of a motor vehicle if –

- (a) the vehicle is lawfully designed primarily for a purpose other than the carriage of the driver, any passengers and their personal effects; and
- (b) idling the vehicle is necessary for a purpose for which the vehicle is primarily designed.

Examples:

1. A refrigerator truck carrying perishable freight that is required to be kept at a low temperature.
2. A tipper lorry that is required to idle to operate a tipping system for loading and unloading refuse.
3. A recovery vehicle that is required to idle to provide vehicle recovery and towing services.
4. A refuse collection vehicle that is required to idle to provide refuse collection services.
5. A street washing vehicle that is required to idle to provide street washing services.

Liquor Control Reform Act 1998 (Victoria)

3B Where supply occurs if off-premises request made

For the purposes of this Act, if liquor is provided to a person who was not on licensed premises at the time the person ordered the liquor, the supply of the liquor to the person occurs at the place where the liquor provided was appropriated to the person's order.

Examples

1. A customer sits down at a kerb-side table of premises operated by the holder of a general licence. She orders a glass of wine. The waiter takes the order to the bar, where a glass is filled. The waiter then takes the glass to the customer. In this scenario the wine in the glass is supplied to the customer at the bar because that is where it was appropriated to the customer's order.
2. A customer orders the home delivery of a carton of beer by phone from the manager of premises licensed to supply liquor for consumption off the premises. The customer pays for the beer by providing his credit card details over the phone. The manager selects the beer from the fridge, and a staff member delivers the beer to the customer's house. In this scenario the beer is supplied to the customer at the fridge because that is where it was appropriated to the customer's order.