

Statutory Instrument Practice

Circular No.4 (05)

Date of Issue: 19 September 2005

MODERNISING SI DRAFTING

1. This Circular provides guidance regarding the use of modern language within the text of Statutory Instruments. It follows from work which the LION Secondary Legislation Practice Editorial Group were asked to undertake following correspondence between the Joint Committee on Statutory Instruments and the Minister for the Cabinet Office in which the need to modernise the style of drafting in SIs was accepted. The new styles should be brought into use for all new Statutory Instruments which are made after the Parliamentary Summer Recess.

2. Drafters are expected to consider the entire text critically with a view to making it as easy as is reasonably possible to read. At times complexity is unavoidable because sufficient precision to give effect to the intended policy cannot be achieved otherwise. But that does not justify excessively long or complex sentences or use of surplus material, archaisms or unnecessarily formal terminology purely to follow precedent.

3. The following guidance, which has been approved by advisers to the Joint Committee, is intended to help drafters avoid particular pitfalls. The bulk records points already made by the Committee, but the material on breaking up preambles is new.

Preambles

4. There is no need for the indication (used in paragraph 2.4.1 of SIP) that the maker of the SI 'hereby' makes it. 'The Secretary of State makes the following [Order/Regulations/Rules/Scheme]' is sufficient.

5. As indicated in paragraph 2.4.2 of the SIP, the full powers exercised when an instrument is made should be quoted specifically in the preamble; consequently, the use of the phrase 'and in exercise of all other powers enabling [her/him/them] in that behalf' within the recital of powers ought to be unnecessary. Where the enabling power and prerogative action are clearly inter-dependent then the phrase remains appropriate to cover the prerogative action, but that is very rare and, if something is needed, "in that behalf" should be replaced by more contemporary words such as "to do so".

6. Reducing length and complexity of sentences - encouraged by the Committee in relation to operative parts of statutory instruments - is equally applicable to preambles. The hypothetical examples below are aimed at establishing a general approach rather than a standard format.

7. In relation to a negative instrument:

The Secretary of State [for ...] in exercise of the powers conferred by sections ... and ... of the ... Act [YEAR], [and now vested in him/ her]^(A), after taking into account, in accordance with section ... of that Act, any views of the ... Agency on the proposal to make the following Regulations, and after consultation, in accordance with section ... of that Act, with representatives of those whom (s)he considers to be likely to be affected by the following Regulations, hereby makes the following Regulations:

would be more accessible if opened up in the following manner:

The Secretary of State [for ...] makes the following Regulations in exercise of the powers conferred by sections ... and ... of the ... Act [YEAR] [and now vested in him/her]^(A).
In accordance with section ... of that Act (s)he has taken into account any views of the ... Agency^(B) on the proposal to make the Regulations.
In accordance with section ... of that Act (s)he has consulted with representatives of those whom (s)he considers to be likely to be affected by the Regulations.

8. In relation to a straightforward affirmative instrument:

The Secretary of State [for A], in exercise of the powers conferred by section [B] of the [C] Act [YEAR] and by Article [D] of the [E] (Northern Ireland) Order [YEAR], [and now vested in him/her]^(A), hereby makes the following Regulations, a draft of which was, in accordance with section [F] of that Act and Article [G] of that Order, laid before Parliament and approved by a resolution of each House of Parliament:

would be more accessible if opened up in the following manner:

The Secretary of State [for A] makes the following Regulations in exercise of the powers conferred by section [B] of the [C] Act [YEAR] and Article [D] of the [E] (Northern Ireland) Order [YEAR] [and now vested in him/her]^(A);
In accordance with section [F] of that Act and Article [G] of that Order, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

9. This approach is also a means of avoiding the antiquated sounding “whereas ... now therefore” formulation in more complex affirmative instruments, as shown in the examples below.

10. The first example covers a case where the enabling power is complicated by the need to specify a partial purpose and the need to obtain agreement of a type from a particular committee. Here:

^(A) Note that this is only needed where there has been a transfer of functions, in which case the relevant orders should be footnoted.

^(B) It should also be possible to use “the views of the ... Agency” rather than “any views of the ... Agency” where the Agency’s views have been given and taken into account, or a suitably expressed indication that the Agency’s views have been invited but have not been given, where that is the case.

Whereas a draft of this instrument was laid before Parliament in accordance with section [A] of the [B] Act [YEAR] and approved by a resolution of each House of Parliament.

Whereas these Regulations, so far as section [C] of the [B] Act [YEAR] applies to them, are made with a view to [SPECIFY PURPOSE].

Now, therefore, the Secretary of State for [X], in exercise of the powers conferred upon [him/her] by sections [D, E and F] of the [B] Act [YEAR], and all other powers enabling [him/her] in that behalf, and after agreement by the [G] Committee that proposals in respect of these Regulations should not be referred to it, hereby makes the following Regulations:

would be more accessible if recast as follows:

These Regulations are made in exercise of the powers conferred by sections [D, E and F] of the [B] Act [YEAR].

These Regulations, so far as section [C] of that Act applies to them, are made with a view to [SPECIFY PURPOSE].

The [G] Committee has agreed that proposals in respect of these Regulations should not be referred to it.

A draft of this instrument has been laid before Parliament in accordance with section [A] of that Act and approved by a resolution of each House of Parliament.

[Accordingly] the Secretary of State for [X] makes the following Regulations:

11. The second example covers a case where the enabling power is complicated by consultation requirement and the need to take particular factors into account. Here:

Whereas a draft of this Order has been approved by a resolution of each House of Parliament pursuant to section [A] of the [B] Act [YEAR].

Now therefore, the Secretary of State for [X], having consulted [SPECIFY STATUTORY CONSULTEE], such persons as appear to [him/her] to be representative of persons likely to be materially affected by the following Order and such other persons as (s)he thinks fit, and having regard to [SPECIFY FACTORS] in exercise of the powers conferred upon him/her by paragraph [C] of Schedule [D] to the [B] Act [YEAR], and of all other powers enabling [him/her] in that behalf, hereby makes the following Order:

would be more accessible if recast as follows:

This Order is made in exercise of the powers conferred by paragraph [C] of Schedule [D] to the [B] Act [YEAR].

This Order is made having regard to [SPECIFY FACTORS].

The Secretary of State [for X] has consulted [SPECIFY STATUTORY CONSULTEE], such persons as appears to [him/her] to be representative of the persons likely to be materially affected by the Order and such other persons as (s)he thinks fit.

A draft of this instrument has been approved by a resolution of each House of Parliament pursuant to section [A] of that Act..

[Accordingly] the Secretary of State [for X] makes the following Order:

Operative provisions

12. Do not use indications in references to provisions of a statutory instrument such as ‘above’, ‘below’ or ‘of this Order’ except for specific references to avoid ambiguity; similarly avoid using general provisions such as ‘any reference in this Order to a numbered Schedule shall be taken to be a reference to the Schedule so numbered in this Order’. However if a new provision is inserted by amendment into an instrument that contains those types of expression it is desirable to follow the usage already in the instrument.

13. Expressions such as ‘the said’, ‘hereafter’, ‘herein’, ‘therein’ and ‘therewith’ sound antiquated. Drafters should aim to avoid them unless there is no alternative to achieve precision. Similarly Latin expressions should be avoided unless they are the only means of describing a recognised technical term such as *bona vacantia*^(c). For example, the use of “mutatis mutandis” to apply a rule to different circumstances is better avoided. In such a case an expression such as “with any necessary modifications” should be used or, if that gives rise to uncertainty, the application of the rule to those circumstances should be set out expressly.

14. Long sentences should be avoided where possible. So should sub-clauses beginning “provided that” or “save that”: sentences containing numerous propositions qualified by a saving or proviso are particularly to be avoided, as it will often be unclear whether the qualification covers one, some or all of them.

15. Finally, on the desirability of avoiding unnecessary complexity, it should be stressed that if too many propositions are crammed together, unintended effects may arise. As an example, attention is drawn to a sentence regarded as excessive in the Committee’s 14th Report for 2003-4; in contrast, the alternative suggested by the relevant Department in their memorandum was regarded by the Committee as acceptable.

16. The offending provision (which related to an obligation in a Community Regulation which called for designation of a controller to be present when fish landed were weighed) read as follows:

(2) If, in the circumstances to which point 20 of Annex V applies, cod is first landed from a fishing boat in a port within England designated as specified in paragraph ([X]), it is required that a representative sample, as called for by that point, shall be weighed in the presence of a British sea-fishery officer prior to being offered for first sale, unless the following conditions are met -

^(c) It is generally possible to translate “ex parte” by “without giving notice to the [other party]”.

- (a) the fishing boat is party to an arrangement made among fishing boats using the port with a person or organisation to act as their controller for the purposes of that point; and*
- (b) details of the arrangement, and the fishing boats which are party to it, have been notified to the Secretary of State for Environment, Food and Rural Affairs;*

and the person in charge of a fishing boat from which cod is offered for first sale during the Annex V year in contravention of that requirement is guilty of an offence.

The primary point of concern to the Committee here was that the original crammed together too many propositions in a somewhat obscure single sentence; furthermore the identification of the offence was not straightforward where a controller had been covered by an arrangement as indented but fish had not been weighed in his presence.

17. The acceptable alternative read as follows:

(2) If -

- (a) cod is first landed from a fishing boat in a port within England designated as specified in paragraph ([X]),*
- (b) the requirement to weigh a representative sample, as specified in point 20 of Annex V, applies to that landing, and*
- (c) paragraph (3) does not apply to the landing,*

the controller for the purposes of that point is a British sea fishery officer.

(3) If -

- (a) cod is first landed from a fishing boat in a port within England designated as specified in paragraph ([X]),*
- (b) the requirement to weigh a representative sample, as specified in point 20 of Annex V, applies to that landing,*
- (c) the fishing boat is party to an arrangement made among fishing boats using the port with a person or organisation to act as their controller for the purposes of that point, and*
- (d) details of the arrangement, and the fishing boats which are party to it, have been notified to the Secretary of State for Environment, Food and Rural Affairs,*

the controller for the purposes of that point is that person or organisation.

(4) The person in charge of a fishing boat from which cod is offered for first sale during the Annex V year in contravention of the second sentence of point 20 of the Annex as read with paragraphs (2) and (3) is guilty of an offence.

The alternative was longer, but was acceptable because the propositions were opened out, and it also had the advantage of giving effect to the policy without ambiguity, by making it clear what the offence would be when the controller was not a British Sea-Fishery Officer.

18. Consequential changes to Statutory Instrument Practice will be included within a new edition which is due to be released by the end of October. The SI Template will also be revised to take account of these changes but until this occurs drafters can overwrite some of the automatic text which the template provides.

Enquiries

19. Any enquiries regarding this Circular should be addressed in the first instance to Alan Pawsey , Head of Publishing Services, Her Majesty's Stationery Office. (email: alan.pawsey@cabinet-office.x.gsi.gov.uk or Tel: 01603 723014)