



# WESTLAW UK ANNOTATED STATUTES

## THE CHALLENGES OF UNDERSTANDING MODERN LEGISLATION

Daniel Greenberg<sup>1</sup>

### INTRODUCTION

Legislation increases in volume and complexity every year. There is no way that citizens can possibly know more than a tiny fraction of the law that applies to them; but one of the few things we all know about the law is that ignorance of it is no excuse. The idea that this is a presumption of actual knowledge was dismissed years ago<sup>2</sup>, but the effect is much the same – wherever we are and whatever we are doing we are constantly affected by thousands of laws, of which we have no actual knowledge but as a result of which we are vulnerable to various kinds of liability and penalty.

Finding access to a text of legislation is only the beginning of the story – the text is generally complex, technical and often obscure. It is generally accepted that the fairness and effectiveness of the rule of law depend on finding effective solutions to these problems.<sup>3</sup>

### ACCESSIBILITY AS A CONDITION OF LAWFULNESS

Effective access to legislation may now be more than a question of the fairness of the rule of law. Lawyers in the United Kingdom used to think little about the lawfulness of legislation, because of the courts' traditional reluctance to entertain challenges to it<sup>4</sup>, but now even primary legislation is increasingly scrutinised for lawfulness, principally because Parliament has created justiciable presumptions that legislation is intended to comply with principles of European Law<sup>5</sup> and human rights law<sup>6</sup>. In *ZL & VL v Home Secretary*<sup>7</sup> the Court of Appeal considered the effectiveness of an Act that had not been published. Although the Court found the Act effective, it dwelt on the idea that in cases with a human rights or European component effective access for citizens to the text of the law might already be an essential component of anything required to be "prescribed by law"<sup>8</sup>.

### PROBLEM 1 - COMPLEXITY

The principal source of complexity in legislation is the mass of express and implied references. A section of an Act frequently refers to or implicitly relies on other provisions of the same Act, or provisions of other Acts. The result is that it is generally impossible to get a clear and complete picture of the effect of a section without being aware of, and looking at, a considerable number of other provisions as well.

One of the functions of the Westlaw UK technical annotations is to provide the reader of a section with links to all related provisions – including provisions which define terms in the section and provisions which gloss its effect for particular purposes<sup>9</sup>; and also where appropriate to summarise the effect of a reference to other legislation so that the reader can quickly form a judgment as to whether he or she needs to see it in detail.

<sup>1</sup> Daniel Greenberg is the General Editor of Annotated Statutes, Westlaw UK; he is also Editor of *Craies on Legislation*, *Stroud's Judicial Dictionary* and *Jowitt's Dictionary of English Law*. He was Parliamentary Counsel (UK) full-time 1991-2008 and continues to serve part-time. This article is based on a presentation to the London launch of Annotated Statutes on 16th September 2009.

<sup>2</sup> *Bowmaker v Tabor* [1941] 2 KB 1, 5 per Goddard LJ.

<sup>3</sup> See, for example, "The Lord Chancellor recognises that he has a responsibility, on behalf of the Government, to ensure that satisfactory arrangements are made for the publication of the statute book, in order that the citizen may know by what laws he is bound." – Commons Hansard, 13th June 1991 WA 613-614. See also Toulson LJ's comments on the "problem of substantial constitutional importance" relating to access to legislation, in *R v William Chambers* [2008] EWCA Crim 2467.

<sup>4</sup> "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution, ... For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them." *British Railways Board v Pickin* [1974] A.C. 765 per Lord Reid.

<sup>5</sup> European Communities Act 1972, s.2(1).

<sup>6</sup> Human Rights Act 1998, ss.3, 4.

<sup>7</sup> [2003] EWCA Civ 25.

<sup>8</sup> The Court of Appeal drew in particular on *Sunday Times v United Kingdom* (1979-80 2 EHRR 245): "First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case."

<sup>9</sup> This could include referring the reader to the provision which sets out the penalties for or other consequences of failure to comply with a duty; or it might involve alerting the reader of, say, a provision about banks that by virtue of a later section it applies to building societies also, but with certain modifications.

## PROBLEM 2 - TECHNICALITY

Even when it is written in apparently clear and natural English, legislation is really using language in a special way, the meaning and effect of which depends on a maze of technical rules of which the reader needs to be aware in order to have a clear and complete understanding of the provision. A good example is the word “person”. Some readers will assume that it means a natural person, while a lawyer may assume that it means anything with legal personality – and both will be wrong<sup>10</sup>. Similarly, a reference to the use of post for service assumes and requires knowledge of a number of technicalities provided elsewhere<sup>11</sup>. And the same is true for references to oaths, parents, children, months, roads, and hundreds of other terms that people might read in legislation and mistakenly think that they more or less understood. And that is before one comes to consider the “pure” technicalities of extent, Crown application, extraterritoriality, sunset clauses, purpose clauses, sink clauses and so on.

The General Notes library in the Westlaw UK technical annotations is designed to alert the reader to technicalities of expressions or concepts used, and to help readers find the information that they need to be sure that they have discovered and understood all the potential technicalities that underpin legislation. Wherever a provision depends on or can best be understood by reference to a technical concept, the reader is referred to a General Note that expounds the concept.

## PROBLEM 3 - OBSCURITY

There are many reasons why legislation may appear obscure: the constraints or technicalities of the Parliamentary process, political reality, the need to reflect the language of related older legislation or European obligations. All these factors and others can combine to make it difficult to be sure of the legislative intention. Although the “battle” between literal and purposive approaches to construction is largely mythical<sup>12</sup>, it is certainly true that the courts have become increasingly willing to look at a wide range of material in order to determine the context of legislation, by reference to which it must be understood and construed. The use of Hansard in accordance with *Pepper v Hart*<sup>13</sup> is a well-known landmark along the way, but all kinds of other documents are now routinely used by the courts (in particular, Explanatory Notes<sup>14</sup> and departmental documents of various kinds<sup>15</sup>).

But even for forms of explanatory material that the courts have traditionally been prepared to look at, there is an increasing tendency for judges to insist on not being bombarded with vast volumes of debatably relevant material, but to be taken with precision to the most precisely relevant passages<sup>16</sup>.

One of the functions of the Westlaw UK technical annotations is to bring the reader precise quotes from Hansard, Explanatory Notes and other relevant material, and to provide references to other documents that may help to establish the context of legislation.

In addition, where points of ambiguity or difficulty have already been addressed by the courts, the Annotations alert the reader to the existence and effect of the decision.

## CONCLUSION

Modern technology may have made possible the deluge of legislation with which we are confronted, but it also makes possible new methods of navigating around it, understanding it and putting it into context. Westlaw UK’s Annotated Statutes are not a substitute for the thorough research that professional legal advisers carry out for their clients; but they aim to be a powerful tool to make that research quicker, more efficient and more effective.

<sup>10</sup>By virtue of Sched.1 to the Interpretation Act 1978 “person” includes unincorporated associations despite their lack of legal personality, unless the contrary is expressly provided or implied.

<sup>11</sup>See the Postal Services Act 2000, Sched.8, the Interpretation Act 1978, s.7 and the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999, art.4.

<sup>12</sup>See *All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting*, D Greenberg, European Journal of Law Reform, Vol. VII, no.1/2, pp.31-46.

<sup>13</sup>[1993] AC 593 HL; see also *Hansard, the Whole Hansard and Nothing but the Hansard*, D Greenberg, (2008) 124 LQR 181-185.

<sup>14</sup>See *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38.

<sup>15</sup>For example, Regulatory Impact Assessments: see (2003) 71(3) Modern Law Review 385-412; but note *Evans v Amicus Healthcare* [2004] EWCA Civ 727.

<sup>16</sup>See, for example, “Only a bull’s-eye counts. Nothing less will do.” – *Effort Shipping v Linden Management* [1998] AC 605, 623E-F per Lord Steyn.

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