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A brief overview of purpose and overview clauses

A INTRODUCTION

The Northern Ireland Protocol Bill¹ was introduced on 13 June 2022. This note will not consider the detail of the bill. This is discussed elsewhere.² Instead focus is on the nature and role of the “admirably clear”³ section 1 of the bill as introduced,⁴ titled “Overview of main provisions” which summarises the contents of the bill:

“This Act—

“(a) provides that certain specified provision of the Northern Ireland Protocol does not have effect in the United Kingdom;

“(b) gives Ministers of the Crown powers to provide that other provision of the Northern Ireland Protocol does not have effect in the United Kingdom;

“(c) provides that enactments, including the Union with Ireland Act 1800 and the Act of Union (Ireland) 1800, are not to be affected by provision of the Northern Ireland Protocol that does not have effect in the United Kingdom;

“(d) gives Ministers of the Crown powers to make new law in connection with the Northern Ireland Protocol (including where provision of the Protocol does not have effect in the United Kingdom).”

It has been suggested that such a clause has no legal consequence and is unnecessary and “political propaganda”.⁵

This note will show that contrary to that position such overview clauses are not unusual in legislation, and have a role in determining the purpose of legislation which can assist in the interpretation of legislation given the prevailing use of purposive interpretation in the United Kingdom today.⁶

¹ Bill 12 of 2022-23.

² See, e.g., Sir Jonathan Jones QC, “The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen” Politics Home, The House, 15 June 2022

<https://www.politicshome.com/thehouse/article/northern-ireland-protocol-bill-one-of-the-most-extraordinary-i-have-ever-seen>, Professor Mark Elliott, “Northern Ireland Protocol Bill” 13 June 2022

<https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/>, and Dr Ronan Cormacain, “Northern Ireland Protocol Bill: A Rule of Law Analysis of its Compliance with International Law” (Bingham Centre for the Rule of Law, 17 June 2022)

https://binghamcentre.biicl.org/documents/146_northern_ireland_protocol_bill_report.pdf.

³ Cormacain, *op. cit.* n. 2 at p. 5.

⁴ <https://publications.parliament.uk/pa/bills/cbill/58-03/0012/220012.pdf>

⁵ David Allen Green, “The curious clause one of the Northern Ireland Protocol Bill” (14 June 2022)

<https://davidallengreen.com/2022/06/the-curious-clause-one-of-the-northern-irish-protocol-bill/>

⁶ Authorities are numerous. Let *R v Secretary of State for Health ex. p. Quintavalle* [2003] UKHL 13 at [7] speak for the others. See Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Tedn., 2020) chs 11 and 12.

B OVERVIEW AND PURPOSE CLAUSES

1. The Renton Report

In 1973 the government set up a committee chaired by Sir David Renton QC MP⁷ tasked with considering the preparation of legislation (with the exception of policy formulation – an omission which given the nature of legislation and the legislative process was unfortunate).⁸ The committee considered ways in which legislation could be prepared with greater simplicity and clarity.

The Renton Report was published in May 1975.⁹ It made various recommendations and there are a number of interesting ideas throughout the report, but the committee report was, as Renton bemoaned in 1979,¹⁰ largely ignored. But while some of the wider scale changes Renton recommended did not come in the recommendations led to incremental changes into drafting practice. Two are relevant here.

In Chapter X the Renton Report stressed that legislation should be prepared with the ultimate user prioritised. And Renton stressed this user was not just to include lawyers and advisers but the “ordinary citizen”¹¹ as there could be multiple users with differing needs and interests.¹² This focus on accessibility of legislation to users informed other recommendations aimed at simplifying legislation and its language and improving understanding.

One mechanism to achieve this was the introduction of statements of purpose, clauses of a bill which would set out the purpose of the bill as a whole, or of parts of a bill.¹³ The evidence submitted to Renton indicated judges and users of legislation thought purpose clauses would be helpful, drafters were less fond – particularly given concerns about amendments during the passage of a bill.¹⁴

Renton was wary of purpose clauses becoming manifestos and expressed concerns about lengthy preambles. Instead Renton felt that statements of purpose could be valuable when used to illuminate the legal effects of legislation, thereby serving a role in resolving any uncertainties in other provisions (in essence fulfilling a role of providing provision within legislation which could aid its interpretation and assist the reader in determining the meaning of provisions).

Renton recommended,

“(a) that statements of purpose should be used when they are the most convenient method of delimiting or otherwise clarifying the scope and effect of legislation;

⁷ Renton had a fascinating life chronicled in John Biffen, “Lord Renton: obituary” *Guardian* 25 May 2007.

⁸ Committee on the Preparation of Legislation, *The preparation of legislation : report of a committee appointed by the Lord President of the Council* (Cmd. 6053, 1975) (hereafter “Renton Report”) at para 1.2.

⁹ A century after the last parliamentary committee consideration – Renton Report para 2.13. That followed the establishment of Office of the Parliamentary Counsel in 1869 and separate Scottish parliamentary counsel in 1871.

¹⁰ Statute Law Society, *Statute Law: Renton and the need for Reform* (1979) pp. 2 – 8.

¹¹ Renton Report, para 10.1.

¹² Renton Report, para 10.1. See also Ian McLeod, *Principles of Legislative and regulatory Drafting* (2009) pp. 5 – 8.

¹³ Renton Report, paras 11.6 – 11.8.

¹⁴ Renton Report, para 11.7.

“(b) That when a statement of purpose is so used, it should be contained in a clause that is in the Bill and not a preamble.”¹⁵

The second recommendation was important to Renton. It was felt that putting the provision in a clause, rather than in a preamble, gave parliament the opportunity to amend the provision like any other clause of a bill, whereas preambles would be subject to rules that may make amendment more difficult.¹⁶

2. Statements of purpose clauses

Statements of purpose were not a new thing conjured out of the ether by Renton though. They, or variants of them, had been used in some legislation for many years.

Sometimes statements of purpose appeared as or in preambles. The Riotous Assemblies (Scotland) Act 1822¹⁷ had a lengthy preamble to s. 1 as to the rationale behind the legislation which imposed strict liability on councils to compensate for damage caused by riots within their council area. Preambles have had a well-established role in legislative interpretation in determining the purpose of legislation from the internal content and context of the Act, thereby assisting the courts in purposive interpretation of legislation.¹⁸ And while a preamble will not trump the clear wording of legislation a reading which is contrary to the purpose set out in the preamble will be questionable.¹⁹

Sometimes statements of purpose appeared in individual sections setting out the objective of the provision before providing further detail. For example, s 73 (1) of the Road Traffic Act 1960 began

“With a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue, it is hereby enacted that it shall not be lawful”

before detailing the relevant offences.²⁰

In recent years though purpose clauses have started being used in the way envisaged by Renton. This accords with a trend in anglo-american legislation.²¹ For example, in Victoria each Act since 1985 has a statement of purpose.²² The Office of the Parliamentary Counsel drafting guidance, a regularly updated document which explains approaches to drafting, includes section 3.2 which explicitly references purpose clauses.²³

¹⁵ Renton Report, para 11.8.

¹⁶ Renton Report, para 11.8. It should be noted that amendment of preambles is possible but restricted during parliamentary consideration. See *Director of Public Prosecutions v Schieldkamp* [1971] AC 1, at p. 17 (per Viscount Dilhorne).

¹⁷ Discussed in *Cora Foundation v East Dunbartonshire Council* [2014] CSIH 46.

¹⁸ For example, see *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436 and *Cora Foundation v East Dunbartonshire Council* [2014] CSIH 46.

¹⁹ *Matthew v Trinidad and Tobago* [2004] UKPC 33 at para [46] (per Lord Bingham).

²⁰ The example is given by Bennion, *Statute Law* (3rd edn., 1990) at p. 165.

²¹ See, e.g., Antonin Scalia and Bryan A. Garner, *Reading law: the interpretation of legal texts* (2012) p. 230, Dennis C. Pearce, *Statutory interpretation in Australia* (9th edn., 2019) paras. 2.21 and 4.63, and Duncan Berry, “Purpose sections: Why they are a good idea for drafters and users” (May 2011) *The Loophole* (Issue 2 of 2011) p. 49 (which details examples of their use from jurisdictions including Barbados, Canada, Australia, New Zealand, and other).

²² Pearce, *Statutory interpretation in Australia* (9th edn., 2019) para 2.21.

²³ Office of the Parliamentary Counsel, *Drafting Guidance* (June 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf

Purpose clauses explicitly identify the objective of legislation and will be influential, although not determinative, in the interpretation of the legislation.²⁴ Internal assistance in determining the purpose of legislation to further purposive interpretation is often dependent on close contextual reading.²⁵ Explicit provision in a clause setting out the objects of legislation makes that easier, albeit the clause is only one facet of the content of the Act which, when read as a whole, determines purpose in aiding interpretation.²⁶

Statement of purpose clauses are used, occasionally, in the UK. For example s. 2 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 sets out the purpose of the legislation in preserving EU law in Scotland. An earlier version of the legislation, passed by the Scottish Parliament but then challenged at the instance of the Attorney General and the Advocate General for Scotland, was considered by the Supreme court in 2018.²⁷ Section 1 of the bill as originally enacted contained a differently worded purpose clause, which “accurately summarised” the object of the legislation and was used by the Supreme Court in its consideration of the legislative competence of the bill.²⁸

3. Overview clauses

Section 3.2 of the Office of the Parliamentary Counsel drafting guidance distinguishes between purpose clauses and overview clauses. The latter are used for navigational purposes and are more common in the UK than statement of purpose clauses.²⁹ They can identify what a bill contains, draw out common themes within legislation, can provide signposts to other parts of the legislation, or can give a contextual background to the legislation – including identifying other legislation against which the relevant legislation is enacted.

A couple of examples demonstrate the use of these clauses. Section 1 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 is an overview provision for the 110 section, two schedule, and seven part act. It tells the reader of the legislation what each part of the Act does, summarising the key elements of each part, and identifying the functions of the legislation. This is more helpful to the reader than the general list of contents, because it gives context, not just a list of section titles but identifying common threads and elements – giving the reader the wider context of the bill aiding readers in orienting themselves around legislation. Overviews of this type are not uncommon.³⁰

²⁴ Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory interpretation* (8th edn., 2020) section 17.2.

²⁵ Such as described in *Kostal (UK) Ltd v Dunkley* [2021] UKSC 47 at para [30] per Lords Leggatt, Briggs and Kitchin.

²⁶ Australian material gives the best illustration of this. See, for example, Acts Interpretation Act 1901, s. 15AA and *Russo v Aiello* (2003) 215 CLR 643, and see *IW v City of Perth* (1997) 191 CLR 1, at p. 12 (per Brennan, C.J. and McHugh, J.) and *Victims Compensation Found Corporation v Brown* (2003) 77 ALJR 1797. The latter case is discussed in some detail in this context by R.S. Geddes, “Purpose and context in statutory interpretation” in Judicial Commission of New South Wales, *Statutory interpretation, principles and pragmatism for a new age* (Educational Monograph 4, 2007) p. 127 at pp. 153 – 4 <https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-4.pdf>

²⁷ *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

²⁸ *Ibid* at para. [28] (per Lord Reed).

²⁹ Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory interpretation* (8th edn., 2020) section 17.3.

³⁰ See, e.g., Insolvency Act 1986, s. A1 (inserted by Corporate Insolvency and Governance Act 2020, s. 1) Data Protection Act 2018, s. 1, Subsidy Control Act 2022, s. 1, and Building Safety Act 2022, s. 1 and s. 61 (the latter providing an overview of a part of the Act).

Overview clauses need not just be summaries of legislative content. The Corporation Tax Act 2010 contains a number of overview clauses³¹ but some, such as s. 35, give legislative context.³² This provision not only sets out the approach in the relevant part but provides a signpost to other legislation relevant to the operation of the provisions (here, the Corporation Tax Act 2009). Identifying that background legislative context explicitly aids the user (in this case to identify where rules regarding the calculation of losses relevant to the part can be found) and context is generally relevant in interpretation,³³

Overview clauses, although framed as orientational aids, can also help identify the purpose of legislation even where this is not the main objective of the provision. This can be done negatively, e.g., the Commercial Rent (Coronavirus) Act 2022, s. 1 (3) provides that the Act is not to supplant agreements dealing with the subject of the legislation – thereby indicating the legislation is not intended to be prescriptive in all circumstances. Purpose can be indicated positively through the language used. One illustration is the *Local Government Byelaws (Wales) Bill* case³⁴ where Lord Neuberger set out the overview clause³⁵ and then used it to assist determining purpose in assessing legislative competence.³⁶

4. The Northern Ireland Protocol Bill, cl. 1

Clause 1 of the Northern Ireland Protocol bill is then not unusual as a legislative device. It is an overview clause setting out the structure of the legislation, and explicitly references the legislative context underpinning the bill.

In addition given the wording of subclauses (1) and (2) in explicitly stating that the Northern Ireland protocol³⁷ does not apply in the United Kingdom the purpose of the bill is made clear. The bill has the purpose not only of disappling the protocol (seemingly contrary to the EU withdrawal agreement) but also delegating powers to ministers to do so. This serves to comply with the requirement that it is presumed that parliament does not intend to legislate in a way contrary to the rule of law unless it does so expressly,³⁸ the “principle of legality”,³⁹ and also the requirement from *AXA General Insurance Ltd v Lord Advocate*⁴⁰ that delegation of powers to act contrary to the rule of law needs to be express and unambiguous.

How a domestic court will respond to such an explicit provision is yet to be seen.

³¹ Corporation Tax Act 2010, ss. 1, 2, 55, 97, 98, 111, 129, etc

³² Office of the Parliamentary Counsel, *Drafting Guidance* (2020), at para. 3.2.5.

³³ On contextual interpretation see Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn., 2020) at section 11.2, and chs. 7, 8, and 21 Interpretation of one Act may inform interpretation of another where the legislation is on similar areas (*in pari materia*). Bailey and Norbury, *op. cit.*, section 21.5 and David Lowe and Charlie Potter, *Understanding legislation* (2018) at paras. 5.31ff discuss in detail.

³⁴ [2012] UKSC 53.

³⁵ *Ibid* at para [21].

³⁶ *Ibid* at para [48].

³⁷ The Protocol on Ireland/Northern Ireland in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01.

³⁸ *R v Secretary of State for the Home Department ex. p. Simms* [2000] 2 AC 115, at p. 131 (per Lord Hoffmann)

³⁹ Discussed in Bailey and Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) ch. 27, Andrew Burrows, *Thinking about statutes: interpretation, interaction, improvement* (2018) pp. 68 - 74

⁴⁰ [2011] UKSC 46, at para. [152] (per Lord Reed).

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