

# Shall

## Introduction and summary

1 “Shall” can be controversial. Few other words have the potential to evoke such strong feelings among writers on legal drafting. It has been said that ““shall” is the hallmark of traditional legal writing. Whenever lawyers want to express themselves in formal style, “shall” intrudes.”<sup>1</sup> But its supporters can be forthright in its defence. Thus Craies on Legislation<sup>2</sup> argues that “shall” “is simply too precious a commodity to discard in the absence of an obvious modern equivalent, however archaic it appears”.<sup>3</sup>

2 This difference of opinion is reflected in the practice of the Office. Some recent Acts use “shall” freely<sup>4</sup> whilst others avoid it altogether, or perhaps reserve it for textual amendments to Acts in which it already appears.<sup>5</sup>

3 This paper looks first at the grammatical use of “shall”. It then considers the legal use of “shall” in the following contexts –

- provisions imposing obligations;
- provisions creating a statutory body, office, tribunal etc;
- provisions about application or effect;
- amendments;
- repeals;
- provisions introducing Schedules;
- financial provisions;
- provisions about orders and regulations;
- provisions about extent;
- provisions about commencement.

4 In relation to each of these, it identifies some alternatives that are available, looks at current practice in the Office, discusses the arguments for retaining “shall” and for using the alternatives, and examines approaches taken in other jurisdictions.

5 The consideration of the uses of “shall” by this paper is not and cannot be exhaustive: it has been said that “the categories of shall are not closed”.<sup>6</sup> On the other hand, it is possible to detect a decreasing use of “shall” in many contexts, in the practice of some members of the Office at least. It is the Group’s view that this should be encouraged, as the resulting propositions have a clearer and more modern feel.

1. Butt and Castle: *Modern Legal Drafting* (2nd edition), page 99.

2. 8th edition, page 310.

3. The example under discussion is “without prejudice to the generality of”, but the passage in question goes on: “Similar questions arise in relation to the use of the legislative “shall”” (see further below).

4. See e.g. the Equality Act 2006.

5. See e.g. the Natural Environment and Rural Communities Act 2006.

6. Butt and Castle: *Modern Legal Drafting* (2nd edition), page 100.

6 In summary, the Group believes that a suitable alternative to “shall” exists in each of the contexts mentioned above. Generally, and on the basis of the discussion in this paper, it recommends that in these contexts the starting point should be that the use of the alternative concerned is to be preferred. That is what this paper is to be taken as meaning when in any particular context it recommends a presumption in favour of a particular alternative to “shall”. In the case of the last three contexts mentioned above, this paper recommends the use of the alternative concerned, and this reflects a corresponding recommendation (or provisional recommendation) in an existing Group paper.

7 This paper also looks at the issue of whether, in textually amending an Act that already uses “shall”, we should follow the usage of the Act.

8 The Group’s conclusion is that, similarly, there should be a presumption in favour of alternatives which do not use “shall” in textual amendments unless (a) they involve inserting text near existing provisions that use “shall” in the same sense or (b) the use of an alternative would raise a real doubt that a different meaning was intended in an existing provision.

### The grammatical use of “shall”

9 In non-legal contexts, the convention is that “shall” should be used for the simple future in the first person and “will” should be used for the simple future in the second and third persons. Contrast “On Saturday I shall go to the cinema” with “On Saturday John will go to the cinema.” But “will” may be used in the first person to show determination or insistence (“I *will* have another piece of cake”). And “shall” may be used in the second and third persons for intention or determination on the part of the speaker or someone other than the subject of the verb, especially to express a promise made by the speaker to or about the subject (e.g. “You shall go to the ball”).<sup>7</sup>

10 For Scottish, Irish or American speakers the rule is often reversed.<sup>8</sup> Even outside those contexts, “will” is used increasingly in the first person. Constructions like “I’ll”, “you’ll” and “she’ll” mask the distinction anyway, and “Tomorrow I am going to buy a new coat” is a popular alternative. But the first person “shall” lingers on in questions like “Shall I make a cup of tea?”<sup>9</sup>

11 Originally, however, “shall” was only used for obligations. As English lacked a proper future tense, it came to be used for that purpose too. But by the 17th century the use of “shall” to express the future had displaced its use for obligations, except in legal writing.<sup>10</sup> So, while both Fowler and Gowers recognise the use of “shall” in the third person to impose duties or requirements, both works characterise this as a specialised use that applies in legal or quasi-legal contexts.

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7. Note the emphases in “I will not cease from Mental Fight/Nor shall my Sword sleep in my hand”.

8. E.g. the drowning Scotsman who was left to his fate because he cried “I will drown and no one shall save me!”

9. The summary in this and the preceding paragraph is based on Fowler: *Modern English Usage* (3rd edition) and Gowers: *The Complete Plain Words* (revised edition), pages 141-142.

10. Eagleson: *Drafting Tips: Recasting a Document*, *Clarity* 56 (November 2006), page 58.

## Imposing obligations

### *Current usage by the Office*

12 Recent Acts continue to use “shall” to impose an obligation on someone to do something (or to refrain from doing something). These duties may be expressed either in the form “X shall do Y” or “it shall be the duty of X to do Y”.<sup>11</sup>

13 A JUSTIS search of recent references to “the Secretary of State shall” and “the Secretary of State must” suggests an increasing use of “must” for obligations. Here is a breakdown of results since 1997 –

- **1997:** “the SoS shall”: 19 Acts; “the SoS must”: 3 Acts;
- **1998:** “the SoS shall”: 28 Acts; “the SoS must”: 6 Acts;
- **1999:** “the SoS shall”: 15 Acts; “the SoS must”: 6 Acts;
- **2000:** “the SoS shall”: 22 Acts; “the SoS must”: 10 Acts;
- **2001:** “the SoS shall”: 8 Acts; “the SoS must”: 4 Acts;
- **2002:** “the SoS shall”: 11 Acts; “the SoS must” 13 Acts;
- **2003:** “the SoS shall”: 13 Acts; “the SoS must”: 17 Acts;
- **2004:** “the SoS shall”: 12 Acts; “the SoS must”: 17 Acts”;
- **2005:** “the SoS shall”: 5 Acts; “the SoS must”: 8 Acts;
- **2006:** “the SoS shall”: 17 Acts; “the SoS must”: 25 Acts;
- **2007:** “the SoS shall”: 9 Acts; “the SoS must”: 14 Acts.

14 This is subject to the caveat that many of these Acts contain textual amendments to other Acts, so that drafters may have felt constrained to reflect the language of the amended Acts. For that reason, some of the Acts mentioned above contain both kinds of proposition.<sup>12</sup>

15 As to the practice at the Tax Law Rewrite Project, in its original statement of general principles,<sup>13</sup> the Project said it had no objection to the use of “shall” for obligations. But this has not been reflected in the legislation it has produced, especially in its more recent Acts. The Income Tax Act 2007 only uses “shall” for textual amendments, and the Income Tax (Trading and Other Income) Act 2005 took the same approach. In the main text of the Income Tax (Earnings and Pensions) Act 2003 and the Capital Allowances Act 2001 “shall” appears two and four times respectively.

### *Alternatives to “shall”*

16 “Must” is the obvious alternative to “shall” when imposing obligations.

11.For the latter approach see e.g. section 1(1) of the Identity Cards Act 2006: “It shall be the duty of the Secretary of State to establish and maintain a register of individuals (to be known as “the National Identity Register”).”

12.For example, the Childcare Act 2006 contains various uses of “the Secretary of State must” (e.g. section 12(3)), but by paragraph 2(3) of Schedule 1 inserts section 23(2ZB) into the Education Act 1997, which uses “the Secretary of State shall”. Some Acts contain both kinds of proposition in substantive provisions (compare e.g. sections 43(1) and 67(4) of the Health Act 2006). Such differences in wording may simply reflect different hands at work on different parts of a Bill.

13.The Way Forward (1996), Annex 1, paragraph 20 ([www.hmrc.gov.uk/rewrite/wayforward/menu.htm](http://www.hmrc.gov.uk/rewrite/wayforward/menu.htm)).

17 “X is to...” is another, but it does not appear to be much used. A JUSTIS search suggests that there are eight examples of “the Secretary of State is to” on the statute book.<sup>14</sup>

18 “It is the duty of” is also sometimes used.<sup>15</sup> This may be a useful technique for imposing duties on more than one person or category of person.<sup>16</sup> There is also a case for using it for important, “headline” duties. But arguably it is too cumbersome for everyday use, and to use five words where one will do breaches a basic rule of plain English (whether that word is “shall” or “must”).

19 Rule 3.9(1) in the Civil Procedure Rules states “On an application for relief from any sanction imposed for a failure to comply with any rules, practice direction or court order the court *will* consider all the circumstances, including...” (emphasis added). The rule then goes on to list a number of factors. But “will” does not recommend itself as an alternative to “shall”. It is not clear whether the statement “the Secretary of State will do X” imposes a duty on the Secretary of State. In any case it appears that in a provision like CPR 3.9(1) “will” is not used as an imperative - that rule merely describes the kinds of things the court may find material in coming to a decision.<sup>17</sup>

20 “May” has been held to impose an obligation,<sup>18</sup> but it would be perverse to use “may” for this purpose. Clearly when drafters in this Office say that “the Secretary of State may do X” they mean to confer a discretion on the Secretary of State.

21 Hence the discussion below focuses on the alternatives of “shall” and “must”.

*Discussion: arguments for “shall”*

22 This section sets out some arguments for using “shall” to impose obligations in preference to its alternatives, especially “must”.

23 The use of “shall” as the conventional means of imposing obligations by statute has a long pedigree. It is recommended by writers on legislative drafting from Coode (in 1852)<sup>19</sup> and Thring (in 1902)<sup>20</sup> to Driedger (in 1957)<sup>21</sup> and Reed Dickerson (in 1981).<sup>22</sup>

14. An example is section 28(2) of the Health and Social Care (Community Health and Standards) Act 2003: “Where such an authorisation is given, the Secretary of State is to make an order...”.

15. For example, section 8(1) of the Health Act 2006: “It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.”

16. For example, section 11(1) of the Wireless Telegraphy Act 2006: “Where a wireless telegraphy licence has expired or has been revoked, it is the duty of— (a) the person to whom the licence was granted, and (b) any other person in whose possession or under whose control the licence may be, to cause it to be surrendered to OFCOM if required by them to do so.”

17. *Woodhouse v. Consignia* [2002] EWCA Civ 275 (mentioned in Clarity 48 (December 2002), page 37).

18. See Thornton: Legislative Drafting (4th edition), pages 104 and 218.

19. Legislative Expression: “If an obligation is imposed to render any duty, the appropriate *copula* is *shall*; if the obligation is to abstain, the appropriate *copula* is *shall not*” (set out in Driedger: The Composition of Legislation, page 180).

20. Practical Legislation, page 62: “If the law is imperative the proper auxiliary verb of the predicate is “shall” or “shall not”, if permissive “may”.”

21. The Composition of Legislation, page 87: “The imperative “shall” should be used only where a person is commanded to do something.”

24 More recently some commentators have claimed that the use of “shall” for duties is confusing because it could just mean the simple future.<sup>23</sup> But it seems unlikely that anyone would read a provision in an Act that said “The Secretary of State shall make regulations” as a prediction about the Secretary of State’s future activities. As David Hall<sup>24</sup> has written, “For most people “thou shall not kill”, in context, is a statement that is well understood.” As noted above, the imperative use of “shall” is recognised in grammar textbooks, albeit as a specialised legal use.

25 It has been said that, whilst the use of “shall” to impose obligations does not reflect everyday language, neither does the use of “must” for this purpose. So, it is argued, it is as rare to hear anyone say “You must tidy your room” as to hear them say “You shall tidy your room.” A command like that might instead be expressed as a request (“Please can you tidy your room?”) or be softened (“I need you to tidy your room”) or expressed in more forthright terms (“Tidy your room now!”).<sup>25</sup>

26 Some writers favour the use of “shall” in legislation precisely because that is a specialised legal use which signals the word is to be given a particular interpretation. So in Craies on Legislation it is argued that this use of “shall” is clearly and increasingly archaic, but “its meaning is still clearly understood and its very archaism helpfully indicates that it is a requirement imposed by a process that differs in character and effect from other non-legislative processes”.<sup>26</sup> It has also been suggested that the continued use of “shall” by some drafters in the Office is an argument that it is not archaic.

27 There are various arguments that “must” has a different meaning from “shall”.

28 For example, there is the feeling that to say “you must do X” implies that the obligation has its origin elsewhere, whereas an obligation expressed using “shall” clearly indicates that it is meant to be the source of the obligation.<sup>27</sup>

29 The former First Parliamentary Counsel Sir Henry de Waal is quoted in Butt and Castle: Modern Legal Drafting<sup>28</sup> as arguing that “shall” is mandatory and “must” is directory. (The distinction is between a case where a failure to comply with a statutory requirement invalidates the thing done under the enactment and a case where a failure does not have that effect.)<sup>29</sup>

30 Some drafters like to use “must” for conditions to be met in doing something that is otherwise optional (e.g. “an application must be made in the prescribed form”), reserving “shall” for “true” duties.

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22. Materials on Legal Drafting, page 182: “To create a duty, say “shall”.” See also Reed Dickerson: The Fundamentals of Legal Drafting, page 130.

23. Thornton: Legislative Drafting (4th edition), page 104; Butt and Castle: Modern Legal Drafting (2nd edition), page 151.

24. Drafters’ Devils: The Loophole, June 2000, page 23.

25. Jack Stark: The Legislative Lawyer, November 2003 (US), page 6. (Stark is a critic of plain language drafting generally.)

26. 8th edition, page 310.

27. This view is expressed by Nick Horn of the Australian Capital Territory in Clarity 48 (December 2002), page 35 (though that jurisdiction has replaced “shall” with “must”).

28. (2nd edition), page 150. The same view is expressed in Driedger: The Composition of Legislation, page 87.

29. See e.g. Bennion: Statutory Interpretation (4th edition), page 32 forward.

31 It is also possible to make a case that “shall” is a stronger obligation. This may either be a legal argument or an argument that “shall” is more appropriate to certain kinds of duty or document. For example, writing on the drafting of the new South African constitution, Frans Viljoen<sup>30</sup> reports that politicians felt that “shall” represented a more forceful obligation than “must”, and so was more appropriate to a document of that importance. In the event, the constitution uses “must” rather than “shall” e.g. “The President must uphold, defend and respect the constitution.” Similarly, some have felt that it is impertinent to say that a public official or a court “must” do something.

32 Finally there is the concern that a change to “must” might make the courts think that a different meaning was intended. In the *Statute Law Review*<sup>31</sup> Ruth Sullivan mentions the case of *Lovick v. Brough* in the Canadian province of British Columbia. Drafters in that jurisdiction had amended certain of their Acts merely to update the language, and in a particular provision “shall” had been replaced with “must”. The court held that a change in the law was intended and that “must” was actually supposed to be stronger than “shall”. In fact section 29 of the British Columbian Interpretation Act 1996 says that both “shall” and “must” are to be construed as imperative.

*Discussion: arguments for “must”*

33 This section sets out some arguments for using “must” to impose obligations in preference to “shall”.

34 The use of “must” for this purpose may be a more modern phenomenon, but its use in Westminster Acts seems to have increased to the extent that it is more common than the use of “shall” (see above on the instances of “The Secretary of State shall.../”The Secretary of State must...”). So (in this context at least) it does not seem possible any longer to say that “shall” is the conventional word for imposing legislative obligations.<sup>32</sup>

35 “Must” is an unambiguous term which plainly denotes an obligation. Unlike “shall” it lacks the alternative meaning of expressing the simple future.

36 The question of whether “must” or “shall” is more modern or more closely reflects every day speech is clearly one of impression. But arguably the current authors of *The Complete Plain Words* are right to say that the use of “shall” for obligations is “old-fashioned”.<sup>33</sup> As noted above, some have argued that spoken commands do not use “must” any more than “shall”. Even if this is true, the same cannot be said of written English outside the legal context. For example, one would expect a sign to say “Children must be supervised at all times” rather than “Children shall be supervised at all times”,<sup>34</sup> and the former statement does sound more up-to-date.

37 An argument that applies generally to the use of alternatives to “shall” is that the desirability of replacing it is something of a touchstone of Plain English. So, for example,

30. Baring the Nation’s Soul Through Plain Language: *Clarity* 46 (July 2001), page 15.

31. (2001) *Statute Law Review* Volume 22 No.3. See also *Clarity* 48 (December 2002), page 36.

32. In the article advocating “shall” mentioned above (*The Legislative Lawyer*, November 2003) Stark still says that “must” is conventional in GB, Canada and Australia “and drafters in those countries ought to follow that convention” (page 6).

33. Gowers: *The Complete Plain Words* (3rd edition), page 142. See also Thornton: *Legislative Drafting* (4th edition), page 104 (““must” is more in line with ordinary speech”) and Piesse: *The Elements of Drafting* (8th edition), page 73 (““must” is more common in everyday usage”).

34. Cf Sir Geoffrey Bowman’s favourite notice: “Dogs must be carried on the Underground.”

writing in Clarity Joseph Kimble<sup>35</sup> includes the following as one of his basic rules of legal drafting: “Give *shall* the boot: use *must* instead.” Indeed it has been said of “shall” that “no word ever so clearly marked off a document as “legal””.<sup>36</sup>

38 As to the argument in Craies on Legislation referred to above, it is not clear why it should be necessary to signal that an obligation in an Act is imposed by an Act. There may be a link here to the argument that the use of “must” implies that the source of the duty is to be found elsewhere. But, again, where an Act says “The Secretary of State must...” in unqualified terms (i.e. without any indication that the source of the duty lies elsewhere) the natural reading seems to be that the Act itself is imposing the obligation, otherwise why say it?

39 One response to the view that the use by some drafters in this Office of “shall” shows that the word is not archaic might be that this does not recognise the difference between modern legalese and modern everyday English. Although in some contexts we may be driven to use legal language, arguably we should be making every effort to use everyday words instead where available.

40 On the argument that “shall” is mandatory and “must” directory, the entry for “shall” in the current (7th) edition of Stroud’s Judicial Dictionary shows that that term can be mandatory or directory. But this issue can be avoided whichever word is used if the consequences of breaching the requirement in question are clear. Thus Bennion says:<sup>37</sup> “...the first step is truly to decide whether or not the consequences of breach are spelt out in the statute. If they are, there is usually no need to ask whether the duty is mandatory or directory because the question does not arise.” This is reflected in the judgment of Lord Woolf MR in *R v. Immigration Appeal Tribunal ex p. Jeyantham* [1999] All ER 231, which casts doubt on the usefulness of the mandatory/directory description. Lord Woolf says –

*“Frequently the investigation [into whether an obligation is mandatory or directory] involves doing no more than deciding the sense in which the word “shall” has been used as part of a particular procedural requirement. As the word “shall” is normally inserted to show something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance.”*<sup>38</sup>

41 The distinction between the use of “must” for requirements to be met in doing something that is otherwise optional and the use of “shall” for “true” duties is not one that would be recognised by many drafters in the Office. Nor, it is submitted, would it be clear to many users of legislation. That argument in favour of “shall” also fails to make any kind of case *against* the use of “must” for the so-called “true” duties.

42 It was said above that “shall” has sometimes been seen as conferring a stronger duty, but there is also a view that “must” is more forceful. Butt and Castle argue that there is less risk that “must” may be construed as conferring a discretion.<sup>39</sup>

35.The Elements of Plain Language: Clarity 50 (November 2003), page 23.

36.Burrows: Plain English and New Zealand Statutes: Clarity 52 (November 2004), page 4. See also Butt and Castle: Modern Legal Drafting (2nd edition), page 99, quoted at the beginning of this paper.

37.Statutory Interpretation (4th edition), page 33.

38.Pages 236-237. See also Millett J in *Petch v Gurney* [1994] 3 All ER 731 at 736: “The difficulty arises from the common practice of the legislature of stating that something “shall” be done (which means that it “must” be done) without stating what are to be the consequences if it is not done.”

43 There does not seem much to be said for the view that, as a matter of style, “shall” is more impressive, or less impertinent, than “must”.

44 The more general difficulty with the view that “shall” should be used in some contexts and “must” in others is that there is no consensus in the Office about this or about where the distinction lies. This approach almost seems to require the reader to know who has drafted a particular Act and to be aware of that drafter’s practice in order to understand it.

45 Similarly the concern that a change from “shall” to “must” might make the courts think that a different meaning was intended would carry more weight if the use of “shall” were universal. Given that both words are now widely used for this purpose, it is too late to worry about that risk. There is no evidence that the courts have seen the issue in this light anyway. And if this argument were valid, it could equally be used to justify the universal adoption of “must” instead.

46 A potential difficulty with replacing “shall” with “must” is that on closer inspection the provision in question might not turn out to impose a duty at all. It is submitted that, rather than being a reason for retaining “shall”, this potential for ambiguity is a further argument against the use of “shall”. But it does point up the importance of being clear what the provision in question is trying to achieve and choosing a suitable alternative on that basis.<sup>40</sup>

#### *Practice elsewhere*

47 The current edition of Statutory Instrument Practice<sup>41</sup> does not contain guidance on the use of “shall” in secondary legislation. The current GLS Statutory Instrument Drafting Guidance suggests considering the use of “must” in place of “shall” whilst making it clear that consistency is important.<sup>42</sup> This advice was echoed by a speaker at a recent SI drafting course who argued that “must” scores higher on the plain English rating, and unambiguously connotes obligation to lawyer and layman. He also said that “must” came of age when the then First Parliamentary Counsel (Sir Edward Caldwell) used it 809 times in the Bill for the Financial Services and Markets Act 2000.<sup>43</sup>

48 A recent publication on plain language drafting by the Scottish Parliamentary Counsel Office<sup>44</sup> commented that preference for “must” is gaining momentum, and that “shall” may be ambiguous because of its use to mean the future. It suggests other options like “it is for [X] to”, “[X] is to”. Writing in *Statute Law Review*<sup>45</sup> Keith Bush, then of the Welsh Assembly

39. Modern Legal Drafting (2nd edition), page 151. See also Kilpatrick: The Power of Language: Clarity 52 (November 2004), page 17: “Students of English will tell you that when *shall* is used to express an obligation, it expresses an obligation only weakly.” See also the British Columbian case of *Lovick v. Brough* mentioned above.

40. For example, this point arises in connection with provisions about the authentication by a member of a body corporate of the application of the body’s seal: compare paragraph 19 of Schedule 5 to the Railways Act 2005 (“shall be authenticated”) with paragraph 11 of Schedule 2 to the Clean Neighbourhoods and Environment Act 2005 (“must be authenticated”) and paragraph 15 of Schedule 13 to the Education Act 2005 (“is authenticated”).

41. 4th edition, November 2006.

42. Para. 4.4.7.

43. James Cooper: Issues in S.I. Drafting (6th January 2006), page 8.

44. Plain Language and Legislation (March 2006), page 35 ([www.scotland.gov.uk/Publications/2006/02/17093804/0](http://www.scotland.gov.uk/Publications/2006/02/17093804/0))

45. “Approaches to UK Legislative Drafting: The Welsh Perspective” (2004) *Statute Law Review* Vol. 25 No. 2.

Government, said that Assembly lawyers drafting Welsh SIs were avoiding “shall” for obligations. Some colleagues have reported that Welsh Assembly Government lawyers prefer Bills applying to Wales not to use “shall” because of the difficulty of translating the word into Welsh (others would say that translators ought to be capable of determining the meaning of a word from its context and giving effect to that meaning).

49 Some other English-speaking jurisdictions permit the use of “shall” for obligations, but not in other contexts. So the Irish Revenue Guide to the Legislative Process says that “shall” may be used for duties, but not in a non-mandatory sense (e.g. “is guilty of an offence” not “shall be guilty of an offence”).<sup>46</sup> The legislation section of the Canadian Department of Justice has published two drafting manuals. The Legislation Deskbook indicates that “shall” should not generally be used, but that its use as an imperative is an exception to that rule.<sup>47</sup> A separate publication called “Legistics” permits “shall” for the creation of requirements and prohibitions. It notes that section 11 of the Canadian Interpretation Act 1985 states that “shall” is to be construed as imperative. But it advises against using “shall” and its alternatives interchangeably in the same Act or regulation.<sup>48</sup> The same publication also discusses the question of whether “must” can be used to create obligations as opposed to reporting the fact that they have been created, and concludes that there is no doubt it can be so used.<sup>49</sup>

50 Against this, the Plain English Manual of the Australian Parliamentary Counsel Office prescribes “must” or “must not” for obligations, or “is to” or “is not to” if a gentler form is needed (acknowledging that these latter forms are less direct and use more words).<sup>50</sup> Similarly the Drafting Manual for the New Zealand Parliamentary Counsel Office requires “must” to be used where a duty is imposed. It comments that because “shall” is also the simple future, its use can lead to confusion, and that “shall” is less and less in common usage, and rarely used in New Zealand legislation. “Must” is said to be clear and definite and commonly understood.<sup>51</sup>

### *Conclusion*

51 The Group considers that “must” in this context means the same as “shall” but is clearer, more modern and more consistent with Plain English drafting. There is no real argument that “must” is weaker (or stronger) than “shall”, or that it should be used for directory as opposed to mandatory obligations. Its use to impose duties is increasing, and there is no real danger that, if this became more widespread, the courts would think a different meaning was intended. This development would align practice in this Office more closely with practice elsewhere in the UK and in other jurisdictions.

**52 The Group recommends that there should be a presumption in favour of alternatives to “shall” to impose obligations. It considers that “must” is the clearest and most concise current alternative.**

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46.(2004, revised 2007), page 44 ([www.revenue.ie/leaflets/legislative-process.pdf](http://www.revenue.ie/leaflets/legislative-process.pdf)).

47.(2002), pages 174 to 175 (available on the intranet under PCO Groups etc/Drafting techniques group/External reference material).

48.(2002), pages 54 to 55 (available on the intranet as mentioned above, see also [www.justice.gc.ca/en/dept/pub/legis/index.html](http://www.justice.gc.ca/en/dept/pub/legis/index.html)).

49.Pages 46 to 48.

50.(2003), pages 19 to 20 (available on the intranet as mentioned above, see also [www.opc.gov.au/about/docs/pem.pdf](http://www.opc.gov.au/about/docs/pem.pdf)).

51.(2007, version 5.2), Chapter 3, pages 28 and 29 (available on the intranet as mentioned above).

## Creating a statutory body, office, tribunal etc

### *Current usage by the Office*

53 Practice in the Office differs over whether to use “shall” or “is to be” in the following contexts –

- when establishing a statutory body (e.g. “There shall be a body corporate, to be known as the Health Protection Agency”: section 1(1) of the Health Protection Agency Act 2004; “There is to be a body corporate, to be known as the Commission for Architecture and the Built Environment”: section 87(1) of the Clean Neighbourhoods and Environment Act 2005);
- when establishing a statutory office (e.g. “There shall be a chief executive of OFCOM”: paragraph 5(1) of the Schedule to the Office of Communications Act 2002; “There is to be a Commissioner for Older People in Wales”: section 1(1) of the Commissioner for Older People (Wales) Act 2006);
- to establish a court or tribunal (e.g. “There shall be a tribunal, to be known as the Pensions Regulator Tribunal”: section 102(1) of the Pensions Act 2004; “There is to be a superior court of record, known as the Court of Protection”: section 45(1) of the Mental Capacity Act 2004).

54 Similar choices have been made when creating (for example) a fund (compare section 64(1) of the Scotland Act 1998: “There shall be a Scottish Consolidated Fund” and section 117(1) of the Government of Wales Act 2006: “There is to be a Welsh Consolidated Fund”) or even when providing for an object with a special status (section 116(1) of the Government of Wales Act 2006: “There is to be a Welsh Seal”).

55 Until very recently provisions using “is to be” were out-numbered by provisions using “shall”, but still constituted a substantial minority. A JUSTIS search shows that since 2000 there have been 95 provisions of the kind mentioned above using the formulation “There shall be a...”, whereas there have been 60 provisions using the formulation “There is to be a...”.

56 Justis does however reveal some evidence of an increasing preference for “is to be” over “shall” in the last couple of years. An analysis of the number of Acts since 2000 using one or other formulation shows the following: –

- **2000:** “There shall be a”: 14 Acts; “There is to be a”: 4 Acts;
- **2001:** “There shall be a”: 4 Acts; “There is to be a”: 0 Acts;
- **2002:** “There shall be a”: 5 Acts; “There is to be a”: 3 Acts;
- **2003:** “There shall be a”: 7 Acts; “There is to be a”: 3 Acts;
- **2004:** “There shall be a”: 8 Acts; “There is to be a”: 4 Acts;
- **2005:** “There shall be a”: 5 Acts; “There is to be a”: 4 Acts;
- **2006:** “There shall be a”: 7 Acts; “There is to be a”: 6 Acts;
- **2007:** “There shall be a”: 3 Acts; “There is to be a”: 5 Acts.

### *Alternatives to “shall”*

57 “There is to be a body corporate, to be known as the Drafting Techniques Authority” is the obvious alternative. Some drafters might just say “There is to be a Drafting Techniques Authority”, and deal separately with legal personality. If it is necessary to continue a body in existence (e.g. on a consolidation), “There continues to be” may be used in place of “There

shall continue to be”.<sup>52</sup>

58 The use of the present tense, as in “There is a body corporate, to be known as the Drafting Techniques Authority” or “There is a Drafting Techniques Authority” arguably does not make it clear that the Act itself is creating the body. This does seem to be a context in which some kind of a command is appropriate. A Lexis search reveals no examples in Acts of “There is a body corporate”. “There will be a body corporate...” suffers from the same defect and in addition suggests that the body will come into existence at some unspecified future date. Again Lexis reveals no examples of “There will be a...”.

59 What about “The Drafting Techniques Authority is established”? This is the practice of the Australian Parliamentary Counsel Office and the legislation section of the Canadian Department of Justice.<sup>53</sup> The formulation does not seem to be generally used by this Office to establish a body, as opposed to refer to the fact of its establishment,<sup>54</sup> though there is now at least one example in a Bill.<sup>55</sup> There might be a temptation to say “is hereby established”, which would reflect the language sometimes used in international treaties.<sup>56</sup> That temptation would have to be resisted: see the Group’s final paper no.9 on “here” words.<sup>57</sup> But it perhaps reflects the feeling that the proposition “is established” does not make it sufficiently clear that the Act itself creates the body, which points back to “is to be”.

60 So the discussion below focuses on the alternatives of “shall” and “is to be”.

*Discussion: arguments for “shall”*

61 There is no doubt as to the meaning of “shall” in this context. It is perhaps not so much used as an imperative, as it is not clear to whom the duty would apply - unless it is meant to be a general requirement to give legal effect to the provision in question. Rather “shall” is here used in the sense of willing a certain outcome, of bringing something about (the “you shall go to the ball” meaning). Its use emphasises that the Act itself brings about the result. So it might be said that “there shall be” is no more specialised or ‘legal’ than “there is to be”, and it uses fewer words (though more letters).

62 There is also a case that “shall” sounds more impressive in this context, so that it is more appropriate to the creation of a statutory body. The guide to plain language prepared by the Scottish Parliamentary Counsel Office mentioned above says that ““shall” can add resonance”<sup>58</sup>, quoting section 1 of the Scotland Act 1998: “There shall be a Scottish Parliament”. Indeed those words have taken on something of a life of their own, appearing on the Mace of the Scottish Parliament and Glasgow’s statue of Donald Dewar,<sup>59</sup> as well as in numerous adverts for recruitment to this Office.

52. See e.g. section 31(1) of the National Health Service Act 2006.

53. Plain English Manual (2003) pages 19 to 20; Legistics (2002), page 55.

54. For example, in paragraph 12(10) of Schedule 10 to the Energy Act 2004, there is a definition of the Civil Nuclear Police Authority’s first accounting year: “(a) where the Police Authority is established at the beginning of a financial year, that financial year”.

55. Clause 1(1) of the Regulatory Enforcement and Sanctions Bill (“The Local Better Regulation Office is established as a body corporate”).

56. See for example Article 13.1 of the Convention on Carriage of Hazardous and Noxious Substances set out in Schedule 5A to the Merchant Shipping Act 1995: “The International Hazardous and Noxious Substances Fund is hereby established.”

57. And see also the discussion on “hereby” in Clarity 50 (Nov 2003), pages 37 to 38.

58. Plain Language and Legislation (March 2006), page 35.

63 Finally, provisions creating a statutory body usually require supplementary provisions about the status of the body, its constitution and so on. If the body is created by a proposition using “shall”, those provisions can also be drafted using “shall”. But if “is to be” is used in the opening proposition, that may be felt to entail its use for all of these supplementary provisions as well.<sup>60</sup> Some drafters feel that this is inelegant.

*Discussion: arguments for “is to be”*

64 There is no doubt as to the meaning of “There is to be a body corporate”, and nor could it be thought that that statement has a different legal effect from “There shall be a body corporate”. The use of “is to be” in this context is as correct grammatically as “shall be”. Though it does not reflect everyday speech, it is no more specialised than “shall”. On the other hand, in everyday speech the use of “shall” is becoming rarer and rarer. This ties in with the point mentioned above, that “shall” just sounds “legal” and archaic, and that its replacement is a touchstone of Plain English drafting.

65 As to whether “shall” sounds more impressive, plainly that is a subjective judgment. The Government of Wales Act 2006 (“There is to be a National Assembly for Wales”) takes a different approach from the Government of Wales Act 1998 (“There shall be a National Assembly for Wales”), but it is debatable whether the former statement is any less impressive than the latter.

66 As to the point on supplementary provisions, it might be said that if “There is to be a Drafting Techniques Authority” is acceptable, then “The Authority is to consist of six members” should be too.

*Practice elsewhere*

67 This issue has less prominence in the drafting guidance of other jurisdictions than the “shall”/“must” issue. But again the Scottish Parliamentary Counsel Office has suggested “shall” might be appropriate where resonance is required. The recommendations of the Australian Parliamentary Counsel Office and the legislation section of the Canadian Department of Justice that “is established” should be used have already been mentioned.

*Conclusion*

68 The arguments on this issue are perhaps more finely balanced than on the “shall”/“must” issue. But on balance the Group believes that “is to be” is preferable to “shall”. One further point is that, if “shall” is thought to be old-fashioned in some contexts (e.g. to impose duties), that suggests we should aim to reduce its use in others.

**69 The Group therefore recommends that there should be a presumption in favour of “there is to be” instead of “there shall be” in the creation of new statutory bodies and offices and courts and tribunals.**

59. Dewar was particularly attached to this phrase, mentioned in his speech at the opening of the Scottish Parliament on 1 July 1999: “Through long years, those words were once a hope, then a belief, then a promise. Now they are a reality.”

60. Compare, for example Schedule 1A to the Charities Act 1993 inserted by Schedule 1 to the Charities Act 2006 (e.g. paragraph 1(1): “The Commission *shall* consist of...”) and Schedule 1 to the Natural Environment and Rural Communities Act 2000 (e.g. paragraph 3(1): “Natural England *is to consist of*...”).

## Application or effect

### *Current usage by the Office*

70 This category covers propositions about the application or non-application of particular provisions. Here are some examples from recent Acts –

- “Subsection (3) *shall apply* in relation to a revised draft plan as it applies in relation to a first draft plan”: section 22(4) of the Equality Act 2006;
- “In relation to the purchase of land by a Regional Development Agency for the purpose of preparing for the London Olympics...section 285 of the Housing Act 1985 *shall apply* (with any necessary modifications) as it applies to a purchase by a local housing authority”: section 36(3) of the London Olympic Games and Paralympic Games Act 2006;
- “Subsection (1) *shall have effect* in respect of chargeable periods beginning on or after 22nd March 2006”: section 56(1) of the Finance Act 2006;
- “The powers of a Minister of the Crown under subsection (5)–(a) so far as exercisable in relation to a matter the exercise of functions in relation to which is within devolved competence *shall also be exercisable* by the Scottish Ministers...”: section 27(6) of the Legislative and Regulatory Reform Act 2006;
- “In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection *shall not apply* – (a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis...”: section 3(4) of the Compensation Act 2006;
- “If the Commissioners for Her Majesty’s Revenue and Customs give a company to which this Part applies a notice in writing under this subsection, this Part *shall cease to apply* to the company”: section 129(1) of the Finance Act 2006.

71 It also covers deeming provisions and presumptions, for example –

- “If the land would not otherwise be subject to that right, *it shall be deemed* to have become subject to that right...on its registration”: section 18(2) of the Commons Act 2006;
- “...a person *shall be treated as* responsible for any animal for which a person under the age of 16 years for which he has actual care and control is responsible”: section 3(4) of the Animal Welfare Act 2006;
- “If an agreement includes a declaration made by the debtor or hirer to the effect that the agreement is entered into by him wholly or predominantly for the purpose of a business carried on, or intended to be carried on, by him, the agreement *shall be presumed to have been* entered into by him wholly or predominantly for such purposes”: section 16B(2) of the Consumer Credit Act 1974, inserted by section 4 of the Consumer Credit Act 2006.

72 Finally, this category also covers propositions about the legal status or consequences of particular actions or states of affairs. Here are some examples from recent Acts –

- “Where – [transfer scheme prevents enforcement by third party of entitlement to interest or right] the third party *shall be entitled to* compensation in respect of the

extinguishment of his entitlement”: paragraph 10(1) of Schedule 2 to the Railways Act 2006;

- “A person guilty of an offence under subsection (1) or (3) *shall be liable, on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine, or to both*”: section 25(6) of the Identity Cards Act 2006;
- “...a certificate signed by or behalf of the prosecutor and stating the date on which such evidence came to his knowledge *shall be conclusive evidence of that fact...*”: section 31(2) of the Animal Welfare Act 2006;
- “An apology, an offer of treatment or other redress, *shall not of itself amount to an admission of negligence or breach of statutory duty*”: section 2 of the Compensation Act 2006;
- “A warrant *shall authorise* an entry on one occasion only”: paragraph 2(5) of Schedule 2 to the Animal Welfare Act 2006.

73 The Group is nevertheless under the impression that these kinds of proposition are giving way to propositions expressed in the present tense. It is difficult to carry out searches using JUSTIS or Lexis to verify this, because there are so many permutations. But see for example—

- “Paragraph 5 of Schedule 3 to SSFA 1998 *applies* in relation to the new school as it applies in relation to an existing voluntary aided school”: paragraph 29(2) of Schedule 2 to the Education and Inspections Act 2006;
- “This section *has effect* in relation to accounting periods beginning on or after 1st April 2006”: section 10(2) of the Finance Act 2006;
- “Where the regulator refuses to give an authorisation to a public benefit corporation— (a) the powers conferred by this section *are also exercisable*”; section 54(9) of the National Health Service Act 2006;
- “Nothing in this Act *applies* in relation to anything which occurs in the normal course of fishing”: section 59 of the Animal Welfare Act 2006;
- “Where the offender was aged 18 or over at the time of his conviction of the offence in question and is subsequently dealt with under section 186 for that offence, subsection (1) *ceases to apply* to the conviction”: section 187(2) of the Armed Forces Act 2006;
- “An NHS trust’s originating capital *is deemed* to have been issued out of moneys paid out of the Welsh Consolidated Fund and is an asset of the Welsh

Consolidated Fund”: paragraph 1(4) of Schedule 4 to the National Health Service (Wales) Act 2006;

- “For this purpose a shadow director *is treated* as an officer of the company”: section 275(6) of the Companies Act 2006;
- “For the purposes of subsection (1)(b), a document *is presumed* to be delivered on its being executed, unless a contrary intention is proved”: section 46(2) of the Companies Act 2006;
- “The Secretary of State for Wales *is entitled to* participate in proceedings of the Assembly but not to vote”: section 32(1) of the Government of Wales Act 2006;
- “A person guilty of an offence under this paragraph *is liable on summary conviction to a fine not exceeding level 5 on the standard scale*”: paragraph 1(3) of Schedule 6 to the Safeguarding Vulnerable Groups Act 2006;
- “The certificate *is* conclusive evidence that the requirements of this Act as to registration have been complied with and that the company is duly registered under this Act”: section 15(4) of the Companies Act 2006;
- “A failure to observe any provision of a code or revised code issued under this section *does not of itself make* a person liable to any civil or criminal proceedings”: section 49(6) of the Health Act 2006;
- “Nothing in this section *authorises* a constable to enter a dwelling”: section 24B(9) of the Aviation Security Act 1982, inserted by section 12 of the Police and Justice Act 2006.

74 The Tax Law Rewrite Project said in its original statement of general principles<sup>61</sup> that it would use the present tense for provisions about application and effect.

#### *Alternatives to “shall”*

75 As is clear from the final list above, in the examples of “shall” propositions given above, it is possible to replace “shall” with the present tense.

76 Some drafters feel uncomfortable with the idea that provisions like “shall be deemed”, “shall be treated” and “shall be presumed” can be rendered as “is treated”, “is deemed” and “is presumed”.<sup>62</sup> This may be because it is not clear in that case who or what is doing the treating, deeming or presuming (the answer may be the Act itself). Alternatively this may be because it is felt that propositions of this kind should be expressed as a command to make a mental leap of the required kind (especially if the leap is a big one). Consider also the following provision: “If any of the images in a film are generated by computer, references in this Chapter to principal photography *shall be read as* references to, or as including, the generation of those images.”<sup>63</sup> In that proposition it does not sound right to say the relevant references “are” read in a particular way.

77 The Group considers that where a simple translation into the present tense is not possible, or is felt to be undesirable, provisions of this kind can be recast so that they use “is

61. The Way Forward (1996), Annex 1, paragraphs 21 to 25.

62. In the materials on S.I. drafting mentioned above in the context of “shall”/“must”, the alternative “In these Regulations, a person has special needs if—” is suggested (James Cooper: Issues in S.I. Drafting (6th January 2006), page 8). But that might suggest that the only circumstances in which a person has special needs are those set out in the provision. To use “is treated as” makes it easier to assert the contrary.

63. Section 33(2) of the Finance Act 2006.

[or are] to be”. Another approach may be to state the same proposition in a slightly different and possibly more direct way. The example given in the previous paragraph might be rewritten as: “Where any of the images in a film are generated by computer, references in this Chapter to principal photography *are*, or include, references to the generation of those images”.

78 However some drafters may feel that there is a subtle difference between (for example) the proposition “Nothing in this section shall/is to be read as limiting the factors that the Secretary of State must take into account in reaching a decision” and the proposition “Nothing in this section limits the factors that the Secretary of State must take into account in reaching a decision.” The former suggests that, without that proposition, the section might be read as limiting the relevant factors, whereas the latter suggests that, without that proposition, the section would limit those factors. Similar arguments might point to “shall/is to be construed/read *accordingly*” which implies that the conclusion indicated is the case anyway. Others may feel it is unnecessary to worry about what a proposition implies about its hypothetical absence, so long as it produces the right legal result.

#### *Discussion*

79 As with the use of “shall” described in the previous section, in this context it is perhaps not so much intended as an imperative, but rather in the sense of willing a certain outcome, of bringing something about (the “you shall go to the ball” meaning, again). It emphasises that the Act itself brings about the legal result. There may be an anxiety that a statement like “X is entitled to compensation” implies that the source of the entitlement lies elsewhere, whereas “X shall be entitled to compensation” shows that the Act itself creates the right.

80 But this view is undermined by the increasing use of the present tense in legislation, which (as noted above) is arguably more consistent with the idea that an Act is a statement of the law and is always speaking. For so long as an Act is in force, a person to whom a provision *applies is entitled* to the rights it confers and *is liable* to the penalties it imposes.

81 Advice to avoid “shall” in these contexts goes back a long way. For example, in 1957 Driedger<sup>64</sup> counselled the use of the present tense and said that “The word “shall” in a statute almost invariably is pure imperative, and where it is not it is usually meaningless.”<sup>65</sup> Similarly, Reed Dickerson<sup>66</sup> said in 1965 that: “Draftsmen often use [shall and shall not] merely to declare a legal result, rather than to prescribe a rule of conduct...this...is not only unnecessary but involves a circumlocution in thought because the purpose of the provision is achieved in the very act of declaring the legal result.” Some might say this view is reinforced by the fact that the examples given in the final list above sound crisper and more modern than those in the other lists.

82 The Tax Law Rewrite Project has commented that this use of “shall” draws unnecessary attention and excessive emphasis to a simple statement.<sup>67</sup>

83 If it is thought that “is to be” is objectionable in propositions creating statutory bodies, then the same will apply to propositions which say “is to be treated” or “is to be read”. But, again, it is likely that “is to be” can be avoided in this context by the use of the present tense.

64. The Composition of Legislation, page 87.

65. The Composition of Legislation, page 144.

66. The Fundamentals of Legal Drafting, page 93.

67. The Way Forward (1996), Annex 1, paragraph 22.

## *Practice elsewhere*

84 As noted in paragraph 49 above, the Irish Revenue Guide to the Legislative Process advises against the use of “shall” in a non-mandatory sense (suggesting “is guilty of an offence” instead of “shall be guilty of an offence”). Further afield, the Drafting Manual for the New Zealand Parliamentary Counsel Office comments that “shall” is often used unnecessarily in declarative expressions in an attempt to capture a sense of authority and obligation. In this situation the present tense is often more appropriate (e.g. shall be entitled, shall be lawful etc.).<sup>68</sup> The Legislation Deskbook of the legislation section of the Canadian Department of Justice requires verbs to appear in the present tense and the indicative mood unless the context requires an exception (the imperative is an exception).<sup>69</sup> Legistics, published by the same department, states “shall” should not be used other than to create requirements and prohibitions.<sup>70</sup> This, it is said, applies particularly to provisions that express rules of law as opposed to rules of conduct, e.g. deeming, application, interpretation and commencement provisions.

## *Conclusion*

**85 The Group recommends that there should be a presumption in favour of using the present tense instead of “shall” in provisions about application or effect of the kind discussed in this section.**

## **Amendments**

### *Current usage by the Office*

86 “Shall” is sometimes used in a provision introducing a number of amendments to the same Act e.g. section 45(1) of the Criminal Justice and Police Act 2001: “The Companies Act 1985 shall be amended as follows.”<sup>71</sup> Another permutation can be found in paragraph 1 of Schedule 1 to the Disability Discrimination Act 2005: “The 1995 Act shall have effect with the following amendments.”

87 These provisions may or may not then go on to use “shall” for the amendments themselves. Compare section 45(2) of the Criminal Justice and Police Act 2001: “After section 723A there shall be inserted...” and Schedule 4 to the Commissioners for Revenue and Customs Act 2005. In the latter, paragraph 11 says “The Taxes Management Act 1970 shall be amended as follows”, but paragraph 12 continues “For section 1...substitute...”.

88 Use of “shall be amended as follows” now seems much less common than “is amended as follows”. So “shall be amended as follows” appears in 39 Acts from 2000 to 2006, whereas “is amended as follows” appears in 132 Acts in the same period.

68.(2007, version 5.2), Chapter 3, page 29

69.(2002), pages 174 to 175.

70.(2002), page 55.

71.A similar formulation may be used to introduce a series of amendments of the same provision of an Act: for example, paragraph 6(1) of Schedule 8 to the Transport Act 2000: “Section 88(1) of the Civil Aviation Act 1982...shall be amended as follows.”

### *Alternatives to “shall”*

89 “The X Act is amended as follows” is the usual alternative. Such provisions might then say “there is inserted”, “there is substituted” etc: see for example section 14(1) of the Inquiries Act 2005. Or - perhaps more commonly - they may just say “insert”, “substitute” and so on: see for example Schedule 1 to the Childcare Act 2006.

90 It is also possible to introduce an amendment to an Act or a provision of an Act by saying “Amend [section Y of] the X Act as follows”.<sup>72</sup> Some might feel that a proposition of this kind is too stark, and that it sounds odd to open a section or a series of repeals in a consequential amendment Schedule with a command of this kind.

### *Discussion*

91 What is the thinking behind “shall” here? Plainly it is not “shall” in the future tense, as the amendments are intended to have effect as soon as they come into force. It is possible that this use of “shall” originated as an obligation to read the provisions amended with the amendments in question. But it does not sound right to say either “The X Act *must be* amended as follows” or “The X Act *is to be* amended as follows.”

92 In the absence of a clearer justification for “shall” in this context, it might be argued that “is amended as follows” is shorter and plainer, and more consistent with the idea of an Act as a statement of the law. Similarly there is a case for “insert” and so on rather than “shall be inserted” or “is inserted” and so on in the provisions giving effect to the amendments. But a decision on that issue may have to wait for a more comprehensive paper on amendment styles.

93 It is sometimes necessary for provisions in the Finance Bill to attract the Provisional Collection of Taxes Act 1968, and so have effect at the end of the Budget Debates before introduction of the Bill, or even earlier. This requires the provision in question to be set out in a Budget Resolution. Previously it was the practice of this Office when drafting Resolutions containing textual amendments to use “shall” even where the Bill on which the Resolution was based did not take this approach. For the Finance Bill 2007 this practice was abandoned without any complaint from the Public Bill Office.

### *Conclusion*

**94 The Group recommends that there should be a presumption in favour of the use of “is amended as follows” in provisions introducing a series of textual amendments and also a presumption in favour of using alternatives to “shall” in the provisions giving effect to the amendments.**

## **Repeals**

### *Current usage by the Office*

95 This section focuses on stand-alone repeals of an Act or provisions of an Act. See for example: “The Inland Revenue Regulation Act 1890 shall cease to have effect” (paragraph 5 of Schedule 4 to the Commissioners for Revenue and Customs Act 2005) and “The following

<sup>72</sup>See for example section 88(1) of the Courts Act 2003.

shall cease to have effect – (b) section 111(2) of the Taxes Management Act 2005” (section 52(1) of that Act).

96 The formulation “shall be repealed” does not seem to be much used for such repeals.<sup>73</sup> It has been used to introduce repeal Schedules, as in: “The enactments and instruments specified in Schedule 6...shall be repealed to the extent specified in the third column of that Schedule” (section 34(3) of the Acquisition of Land Act 1981). But even here we are perhaps more likely now to say that the enactments specified in the Schedule *are* repealed: see e.g. section 19(2) of the Disability Discrimination Act 2005, or “Schedule X contains repeals” (see e.g. section 14(3) of the Fraud Act 2006: this form of words for introducing repeal Schedules is proposed in the Group’s provisional paper no.20 on that topic).

#### *Alternatives to “shall”*

97 The usual alternative to “shall cease to have effect” in a provision of this kind is “ceases to have effect”. See for example paragraph 37 of Schedule 6 to the Sexual Offences Act 2003: “The Sex Offenders Act 1997 ceases to have effect.” Another possibility is “Sections 24 to 31 of the Terrorism Act 2000 *are to* cease to have effect” (section 1(4) of the Anti-Terrorism, Crime and Security Act 2001).

98 But there are various way of expressing repeals.<sup>74</sup> “The X Act is repealed” is another one, see for example section 4(1) of the Government Trading Act 1990: “The Borrowing (Controls and Guarantees) Act 1946 is repealed”. More recently section 16(2) of the Prevention of Terrorism Act 2005 says “The following provisions are repealed”. A proposition of this kind may be expressed using “hereby”, for example: “The 1893 Act is hereby repealed” (paragraph 5 of Schedule 2 to the Trustee Act 2000). JUSTIS reveals 42 examples of “is/are hereby repealed” in the period 2000 to 2007. But as discussed above, the use of “hereby” is not recommended, nor does it seem to add anything.<sup>75</sup>

99 In a section or a Schedule with a number of textual amendments to an Act, we often say “omit” a particular section or sections of that Act: Schedule 2 to ITTOIA 2005 takes that approach. Similarly where a provision of an Act makes a number of amendments to (for example) a section of another Act, it is possible to say (for example) “omit subsection (2)”.<sup>76</sup> But even here it is possible to have “shall cease to have effect”: See e.g. section 2(1) of the Consumer Credit Act 2006: “In section 8 of the 1974 Act...(a) in subsection (1) for “personal” substitute “consumer”...(b) subsection (2) shall cease to have effect”.

#### *Discussion*

100 The issues in relation to repeals are similar to those arising in relation to amendments. There may be a feeling that to use “shall cease to have effect” makes it clear that the repeal is by virtue of the provision itself, rather than in consequence of anything else in the Act. But this distinction may not be clear to the ordinary reader. And if “is amended as follows” is

73.Though see for example paragraph 3(1) of Schedule 2 to the Northern Ireland Act 2006: “The 2000 Act shall be repealed on the day following the effective date.”

74.Bennion: Statutory Interpretation (4th edition), page 251. See also Geoffrey Sellers’s note on the case of *ex parte Simeon* (available on the intranet under Know-how/Know-how and main know-how sources/Repeals and in A36.01.01), which explains in detail why “shall cease to have effect” and “is/are repealed” are the same.

75.In the light of the DTG final paper no.9 on “here” words.

76.Or even “subsection (2) is repealed”. For example section 1 of the Council Tax (New Valuation Lists for England) Act 2006 uses “is/are repealed”.

acceptable, it is hard to see why “ceases to have effect” should not be.

101 The Group would go further and say that “is repealed” is a clearer and more direct way of effecting substantive repeals than “ceases to have effect”. The desire to use the latter expression in the body of an Act that also contains a repeal Schedule, and so to avoid the word “repeal”, may stem from discomfort at the idea of repealing a provision twice over.<sup>77</sup> This is relevant to the issue of the function of repeal Schedules raised in the Group’s provisional paper no.20 on that subject. But, whatever conclusion is reached on that issue, it seems hard to deny that a substantive repeal in the body of an Act *is* a repeal, which argues in favour of its being described as such.

102 This conclusion seems to hold whether one is considering a stand-alone repeal of a whole Act or of a particular provision or particular provisions of an Act. But where a section of or Schedule to an Act contains a number of textual amendments to another Act or provision of an Act, it is submitted that repeals of individual provisions are best effected by using “omit”. This is consistent with the conclusions above in relation to amendments.

#### *Practice elsewhere*

103 This issue does not seem to have much coverage in guidance from other jurisdictions, though the Plain English Manual of the Australian Parliamentary Counsel Office encourages the use of “ceases to have effect”.<sup>78</sup>

#### *Conclusion*

**104 For repeals of an Act or the provisions of an Act (other than in a section or Schedule containing other textual amendments) the Group recommends there should be a presumption in favour of saying “The Transport Act 2006 is repealed” or “Section[s] X [to Y] of the Transport Act 2006 [is]/[are] repealed”.**

#### **Other common provisions**

105 The provisions mentioned below are dealt with more briefly, either because the observations already made apply, or because provisions of that kind have already been the subject of a provisional or final paper by the Group.

#### *Provisions introducing Schedules*

106 For example “Schedule 1 shall have effect.” Clearly the alternative is “Schedule 1 has effect.”

107 The Group has published provisional paper no.8 on words introducing Schedules. To the extent that the paper proposes the “shall have effect”/“has effect” formula, it prefers “has effect”. The other options canvassed in the paper (“Schedule 3 contains minor and consequential amendments” and “For minor and consequential amendments, see Schedule

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<sup>77</sup>The idea that a double repeal has any particular *legal* effect (e.g. to displace section 16 of the Interpretation Act 1976) was dismissed by the House of Lords in *ex parte Simeon* [1983] 1 A.C. 234. Anyway, the defendant’s argument to the contrary in that case was founded on the combination of a proposition using “shall cease to have effect” and a repeal Schedule.

<sup>78</sup>(2003), page 20.

3”) would have the result of avoiding the issue altogether.

108 The arguments for choosing between “shall have effect” and “has effect” in this case are similar to those mentioned above in the case of provisions about application and effect. There is the further complication - discussed in the Schedules paper - that it is not clear whether the words introducing a Schedule have the legal effect of ensuring the Schedule forms part of the Act, or whether they are merely an inert aid to the reader. It seems unlikely that using “shall have effect” rather than “has effect” makes much difference to that point, and the paper on Schedules concludes that the “Schedule 3 contains minor and consequential amendments” formula also ensures the Schedule forms part of the Act, to the extent it is necessary to do so.

109 This final paper is being published before the final version of the Schedules paper. If that paper recommends the second or third option mentioned in paragraph 107, this issue falls away. The Group considers that as between “Schedule X shall have effect” and “Schedule X has effect” the latter is preferable. So if the Schedules paper recommends the first option mentioned in that paper, it will recommend “Schedule X has effect”.

**110 To that extent, the Group recommends that there should be a presumption in favour of the use of “Schedule X has effect” rather than “Schedule X shall have effect.”**

#### *Financial provisions*

111 For example: “Any expenses incurred by the Secretary of State in pursuance of this Act shall be paid out of money provided by Parliament.” The only feasible alternative seems to be to say that such expenses “are to be” paid out of money provided by Parliament (or “is to be” in the case of a reference e.g. to any expenditure incurred by virtue of the Act).

112 A JUSTIS search reveals that “shall be paid out of money provided by Parliament” was used in 87 provisions from 2000 to 2007, whereas “is/are to be paid out of money provided by Parliament” appears in only 22 provisions in the same period.

113 The Group’s final paper no.18 on financial provisions does not cover the drafting of such provisions, dealing only with their headings. Some may feel that these provisions have no legal effect, so that it does not matter too much whether they use “shall” or “is/are to be”, nor whether there is agreement within the Office on this point. On the other hand there might be something to be said for consistency here for its own sake, especially if the recommendation is to replace “shall” in other contexts.

**114 The Group therefore recommends that there should be a presumption that expenses provisions should use the “is/are to be” formula.**

#### *Provisions about orders and regulations*

115 For example –

- “Orders and regulations under this Act shall be made by statutory instrument”;
- “An order under section X shall be subject to annulment in pursuance of a resolution of either House of Parliament”;
- “No regulations shall be made under section X unless a draft of the regulations has been laid before and approved by a resolution of each House of Parliament.”

116 This issue is covered by the Group’s final paper no.15 on subordinate legislation, which

demonstrates that there are many other formulations, using “shall”, “must”, “may” and “is to be”.

117 The paper does not mention the “shall” issue specifically, though none of the formulations it recommends use the word. For propositions requiring orders/regulations to be made by statutory instrument, it recommends “are to be made”. The paper makes no specific recommendations about the use of “shall” or otherwise in relation to the negative or affirmative procedure. But the wording for catering for combined instruments recommends providing that a statutory instrument containing regulations *is* subject to annulment by Parliament in the former case, and such a statutory instrument *may not be* made unless approved by Parliament in the latter case.

118 These propositions all contain requirements to be obeyed by the person on whom the power to make the subordinate legislation is conferred. To that extent the discussion above on the appropriateness of using “shall” to impose obligations applies. However, it might be argued that “must” is too strong a word for standard matters of procedure. Arguably the recommendation in the paper on subordinate legislation about the wording of requirements to exercise powers by statutory instrument is more appropriate for this kind of proposition. In relation to the negative procedure “must be subject to annulment” does not sound right anyway, and it is submitted that “is” is the natural replacement in a provision of this kind. Finally, “may not be made unless” perhaps sounds less peremptory than “must not be made” in propositions about the affirmative procedure.

**119 The Group recommends that provisions about procedures applying to subordinate legislation should use the appropriate alternative to “shall” mentioned above.**

#### *Provisions about extent*

120 A JUSTIS search turns up only 12 provisions along the lines of “[This Act] shall extend to” in the period 2000 to 2007, but 177 examples of “[This Act] extends to” in the same period.

121 Some drafters make a distinction between provisions having legal effect and provisions included to satisfy a drafting convention, that is between “This Act shall not extend to Northern Ireland” (which needs saying) and “This Act extends to Northern Ireland” (which would be the case anyway).<sup>79</sup> Arguably that rule is mysterious to the uninitiated, and it would mean using “shall” wherever there were operative provisions in an Act. Again, the Group considers that the modern approach is to draft operative provisions in the present tense.

122 The Group’s provisional paper no.7 on extent mentions this issue. It does not otherwise specifically refer to the use of “shall” but it assumes that “extends” is better.

123 Apart from the specific issue discussed in the last but one paragraph, provisions about extent seem to be in the same category as other propositions about application and effect. Given that most members of the Office now seem to draft using “extends”, the Group is minded to recommend that this should be the Office’s practice.

124 This final paper is being published before the final version of the extent paper. If that paper recommends use of propositions like “This Act forms part of the law of England and Wales”, this issue falls away. The Group considers that as between “This Act shall extend...”

<sup>79</sup>Craies on Legislation (8th edition), page 403, note 10.

and “This Act extends...” the latter is preferable. So if the extent paper recommends the continued use of express references to extent, it will recommend “This Act extends...”.

**125 The Group recommends that propositions about extent should be expressed using “extends” rather than “shall extend”.**

*Provisions about commencement*

126 There is evidence that drafters are evenly split on the use of “This Act shall come into force” versus “This Act comes into force”. According to JUSTIS there were 51 provisions of the former kind and 53 of the latter kind in the period 2000 to 2007.

127 The Canadian document Legistics mentioned above bans “shall” for commencement.

128 The Group’s final paper no.16 on commencement recommends saying “comes into force” in place of “shall come into force”. This is on the basis that there is no difference in meaning but “comes into force” is shorter, and ties into the wording of section 4 of the Interpretation Act 1978.

129 The use of “shall” in this kind of provision might reflect a desire to refer to the future. But again that argument is defeated by the fact that the provision is “always speaking”, and will have effect on the day on which the Act comes into force in accordance with that provision. It is submitted that the arguments in the paper, coupled with the arguments above about provisions dealing with application and effect, suggest we can drop “shall” in commencement provisions.

**130 The Group recommends that “This Act comes into force...” should be used in place of “This Act shall come into force...” in commencement provisions.**

**Mixing “shall” and its alternatives**

131 It might not be a good idea to use “shall” and one or more of its alternatives to express the same kind of proposition in the same Act. The use in the same Act of “shall” for one kind of proposition and one of its alternatives for another kind of proposition may be acceptable. For example it seems unlikely that to say “(1) There shall be a body corporate to be known as the Drafting Techniques Authority. (2) The Drafting Techniques Authority must produce a paper on the use of “shall”” would give rise to any problems of interpretation.

132 This perhaps entails the use of “shall” in a particular kind of proposition in a textual amendment to an Act which already uses “shall” in that kind of proposition. But that may depend on how close the new proposition is to the existing proposition(s), or on whether there is any real risk of anyone thinking the two propositions mean different things. Arguably if (as the Group thinks) alternatives to “shall” should be encouraged, there should be a presumption of following that practice even where operating on an Act that already uses “shall”.<sup>80</sup>

**133 The Group therefore recommends that there should be a presumption in favour of alternatives which do not use “shall” in textual amendments unless (a) they involve**

80. One member of the Office described the practice of making textual amendments to an Act fit with the language of the rest of the Act as “distressing new wood”.

inserting text near existing provisions that use “shall” in the same sense or (b) the use of an alternative would otherwise raise a real doubt that a different meaning was intended in an existing provision.