

RGSL RESEARCH PAPERS

NO. 1

Is there a case for the abolition of '*shall*'  
from EU legislation?

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## Riga Graduate School of Law

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This is the publication of the author's distinction-awarded Master's thesis defended at the Riga Graduate School of Law in June, 2010.

St Paul's First Epistle to the Corinthians. 14:9

So likewise ye, except ye utter by the tongue words easy to be understood, how *shall* it be known what is spoken? For ye *shall* speak into the air.

King James' version (1611)

SO LIKEWISE YOU, UNLESS YOU UTTER BY THE TONGUE WORDS EASY TO UNDERSTAND, HOW WILL IT BE KNOWN WHAT IS SPOKEN? FOR YOU WILL BE SPEAKING INTO THE AIR.

New King James' version (1982)

That's how it is when you speak unknown languages. If no one can understand what you are talking about, you will only be talking to the wind.

Contemporary English version (1995)

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## ABBREVIATIONS

<b>ABC rule</b>	The rule of legislative drafting applied to <i>shall</i> in Australia, Britain and Canada
<b>ACT</b>	Australian Capital Territory
<b>ALJ</b>	Australian Law Journal
<b>App Cas</b>	Appeal Cases
<b>ChD</b>	Chancery Division
<b>CRS</b>	Congressional Research Service
<b>Cwlth</b>	Commonwealth (of Australia)
<b>FBA</b>	Fellow of the British Academy
<b>ILO</b>	International Labour Organization (A specialised agency of the United Nations)
<b>NI</b>	Northern Ireland
<b>NSW</b>	New South Wales
<b>NT</b>	Northern Territory
<b>NZ</b>	New Zealand
<b>OPC</b>	Office of Parliamentary Counsel (UK)
<b>PC</b>	Privy Council/Privy Councillor
<b>PCO</b>	Parliamentary Counsel Office (UK) or (Australia) or (New Zealand)
<b>PD</b>	Probate Division
<b>QC</b>	Queen's Counsel
<b>Qld</b>	Queensland
<b>SA</b>	South Australia
<b>Tas</b>	Tasmania
<b>Vic</b>	Victoria
<b>WA</b>	Western Australia
<b>WLR</b>	Weekly Law Reports

## SUMMARY

This Paper is a micro-study of the effect of one word in legislation – *shall*. The author examines the lack of precision caused by legislative drafters in using *shall* and challenges the European Union to follow the lead of many legal jurisdictions in the Common Law World, and remove it from legislative and regulatory text altogether.

In his study, the author reviews the linguistic function and meaning of *shall* in the general language and its deontic function in Legal English. He also considers its usages and concludes that it has effectively faded into non-use in the general language and, as such, has become an archaism; however, its use in both private legal and legislative texts is identified as being frequent. Of concern is the lack of precision caused by *shall* in a form of language that seeks precision in order to fulfil its function, and satisfy the needs of Society – regulation.

In considering the problems which *shall* presents in legal text, the Paper proceeds to survey legal jurisdictions throughout the Common Law World. The survey categorises those jurisdictions which have amended their legislative drafting guidelines to specifically address problems related to *shall* and discusses the impact of such amendments on clarity.

The Paper then turns to consider the question of whether legislation is written for lawyers, bureaucrats and politicians or for the ultimate user – the citizen. The arguments are seen to be strongly polarised. However the author takes the investigative process further by identifying with the proponents of the latter view, at least to the point that legislation should be understandable by those citizens likely to be affected by it. On this basis, it is submitted, clear modern language in legislative text should be favoured over language with obscure or duplicate meanings, or language of such complexity that professional interpretation is required.

Discussion then focuses on EU legislation, considering both the incidence and clarity of *shall* in EU regulatory texts. The author considers two expert analyses of EU Directives as to their clarity, and applies his own analysis to the *Unfair Commercial Practices Directive* of 2005, selected on the basis that it affects a broad range of citizens and should reasonably be understandable by those affected. Text analysis reveals that *shall* was used extensively throughout, and that the findings of the previous studies can be upheld, namely lack of clarity and consistency. In an applied test, the author replaces all incidences of *shall* with an alternative form, and suggests that the alternatives remove inconsistency and uncertainty.

Finally the Paper considers why those responsible for drafting legislation within the EU are so *shall-resistant*. Whilst it is not possible to be conclusive on this point, it is suggested that, given that there are a relatively small number of people involved in legislative drafting, and given the discretion given to drafters, there appears to be an element of resistance to the criticism that has been directed against them. In addition there seems to have become entrenched a *legislative shall* within the EU which is divorced from General English and which appears to have become part of the language labelled as *Euro-English*, *EuroSpeak* or *Brussels English*.

Against the background of the legislative use of *shall* in Common Law countries, it is suggested that the use of *shall* in EU legislation not only goes against the reform trend, but does not contribute to the declared objectives of clarity of communication within the EU, and of better integrating the citizens of Europe with their central regulators.

A final reflection looks at Legal English as part of the wider globalisation of the English language and suggests that the influence of clear legislative drafting on private legal texts would lead to improved commercial and general communications, together with considerable cost benefits.

# INTRODUCTION

The author first became curious about *shall* in EU legislation when working with Czech civil servants in language programmes preparing for the 2009 Czech Presidency of the European Union. These programmes exposed the author to the need for second language users to work in English, at a bureaucratic and legislative level, with legal and regulatory language that derived from neither a Common Law jurisdiction nor from an Anglophone country with English as its mother tongue and Legal English as the source language of its legislation and regulatory texts.

To the author, working since 2003 outside a monolingual single Common Law jurisdiction, *shall* suddenly identified itself as somewhat anachronistic. Outside its home jurisdiction the word glaringly showed itself for what it undoubtedly is - a chameleon. Thus some five years ago the author formed the question in his mind: Is there a case for abolition of *shall* from EU legislation?

The current study provided the author with an opportunity not only to gain some comprehension of the word *shall* in both general and Legal English, but to take an analytical approach to its understanding, rather than the reactionary approach taken by some<sup>1</sup>, or the traditional unthinking and uninformed approach of native-speakers. The author recalls the extent of his own use of *shall* in drafting private legal texts during the 1970s and 1980s, and his osmotic acceptance and unquestioning apparent understanding of its use in both private and legislative texts.

The investigative path proved to be complex. It is not possible to discuss the legislative use of *shall* without ranging widely over areas as diverse and seemingly unrelated as modal verb use in the general language; modal verb use in Legal English; the nature of statutes; statutory interpretation; the jurisdiction of the Common Law, Civil Law, and of the European Union; international law, comparative law, and conflict of laws; as well as the comments and pronouncements of general and legal grammarians, lexicographers, legislative drafters, judges, practising lawyers, and the singular and united voices of those advocating the use of plain English and plain Legal English. The influences on, and the implications of this single word – *shall* – are complex, emotional (for some), and far-reaching.

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<sup>1</sup> As an example, see generally the sniping between Eagleson, R. and Asprey, M. with Bennett, J.M. in the *Australian Law Journal* in 1989-90.



The investigation started with a review of the grammar and usage of *shall* in the general language. This was based on the premise that the language that regulates the behaviour of societies should match the language of the societies it purports to regulate.

In order to understand what was radiating from Brussels and Strasbourg, it was considered necessary to investigate the current thinking and practice in regulatory drafting across the Globe, from the home of the Common Law, to the jurisdictions of Australia, New Zealand and South Africa in the Southern Hemisphere, to Canada and the United States in the Northern Hemisphere.

It was considered necessary to research and analyse legal text in order to identify the incidence of the use of *shall* in traditional legal text; traditional here meaning text that has not been written taking into account guidelines of proponents of the *Plain Legal English Movement*. 'Extraordinarily high' is illustrated by comparing legal text with contemporary non-legal text.

Another area which reared its head along the investigative path was that of the readership of legislative text. Is the reader the average citizen affected by the legislation in question, or is it that legislation is far too complex for citizens and must be written with legislative experts in mind? Who is the reader is an important consideration in choice of language.

Turning to the European Union and its institutions, there is a clear distinction between its creation and the traditions of the Common Law. The EU neither derives from an Anglophone world, nor from the Common Law. Culturally it is disparate both externally, and within. It is a modern creation, a phenomenon. There is a different need for comprehension at all levels, both within multi-lingual Europe and for those from outside dealing with European businesses and institutions. It has a created legal system and to some extent a created language<sup>2</sup>. On a micro-level, can this justify what one might consider to be a unique EU *legislative shall*?

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<sup>2</sup> Crystal, D. (2003:182) speaks of Euro-English. The author's own work with Czech civil servants was in some part to improve their communication with the public, and across Europe, by heightening awareness of the problems of bureaucratic language, and within an EU context, awareness of what has also become known as 'Brussels English' or 'Euro-speak'.

To understand this argument the author draws on two case studies analysing EU directives<sup>3</sup>. To test the arguments further, and with *shall* as the focus, the author analyses a directive more recent than those in the earlier studies<sup>4</sup>.

The author believes that this Paper convincingly shows that *shall* remains a legislative weed within EU legislative and regulatory texts. Small as it may seem, its removal is justified on the many grounds identified throughout this Paper, and highlighted above, and the immediate clarity to text of its removal would be of benefit not only to the half billion citizens of Europe, but also to those from outside, and with further implications for private legal texts.

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<sup>3</sup> Cutts, M. and Wagner, E. (2002), and Tanner, E. (2006).

<sup>4</sup> Appendices C & D.

# BACKGROUND

## Plain language and the Plain Legal English Movement

This Paper is set against the background of two relatively recently movements, the *Plain Language Movement* and the *Plain Legal English Movement*. The call for plain language generally, calls for clear bureaucratic language for the benefit of citizens dealing with government at all levels<sup>5</sup>. It has extended to encompass bureaucratic-type organisations from the private sector, such as banks, insurance companies, and utilities. The movement for plain language is perhaps 30 or more years old, and is not limited to English-speaking countries.<sup>6</sup>

The *Plain Language Movement* acted as the catalyst for the *Plain Legal English Movement* in challenging the clarity of legal language, and seeking replacement language, or form, to give those being regulated the rights to understand that legal text, and particularly legislative and regulatory text, which governs their lives; rights that proponents demand (within reasonable limitations) without the necessity to resort to paid professional advisers.

Williams identifies<sup>7</sup> the history of the *Plain Legal English Movement* as starting with Melinkoff's<sup>8</sup> seminal work in 1963 which took ground in the US, followed by Australia, New Zealand, and later South Africa. Williams notes however<sup>9</sup> that: 'arguably the greatest successes in terms of reforming Legal English have been in Australia and New Zealand, where the respective Offices of Parliamentary Counsel are openly committed to endorsing the principles of Plain Language in drafting legislation.' He goes on to observe that:

Despite the fact that the Plain Language movement first became active in the United States and subsequently in the United Kingdom before spreading to Canada, Australia, New Zealand and ultimately South Africa, there have been few serious attempts by the American and British political establishments to reform legislative drafting.<sup>10</sup>

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<sup>5</sup> For a history, and further details, of the plain language movement in the United States, for example, see generally <http://www.plainlanguage.gov/>. For more detail see Shuy, R.W. (1998).

<sup>6</sup> See for example Ehrenberg-Sundin, B. (2004).

<sup>7</sup> Williams, C.J. 2007:2 (internet access).

<sup>8</sup> Mellinkoff, D. (1963).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

It seems trite to say that legal language, and hence legal texts, should be written in plain language so that those affected by their provisions can understand them. However many (lawyers) argue strongly against this view; these arguments are identified and discussed in more detail below. Williams<sup>11</sup> presents what is perhaps a middle ground (which he does not necessarily support) that legal language has a form of its own. Putting aside the argument as to its proximity to the general language, it is in fact, he observes, a relatively stable and standardised language form.

This Paper now proceeds with a micro-examination of the effect that one word can have on clarity and understanding – *shall*.

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<sup>11</sup> Williams, C.J. (2008:11).

# 1 SHALL IN GENERAL ENGLISH

As a modal auxiliary *shall* shares a role with *can, could, should, may, might, will, would*, and *must* in an area which Lewis describes as ‘complex, and potentially a minefield’<sup>12</sup>.

Essentially, a modal auxiliary is a verb form which cannot stand alone; it must be used in conjunction with another verb.

In the general language *shall* fulfils a number of roles:

First, *shall* can be used to refer to the future instead of *will*;<sup>13</sup> secondly, it can be used in making offers or suggestions or posing questions that require confirmation or advice;<sup>14</sup> and thirdly, in creating obligations and duties. Leech *et al.*<sup>15</sup> refer to *shall* as being used for formal instructions, and Swan<sup>16</sup> notes similar usage ‘In contracts and other legal documents’. In the latter two roles, *shall* is not functioning as a future tense.

From these usages, certain grammar rules have become established:

There is an argument that in General English *shall* is used only with *I* and *we*.<sup>17</sup> Murphy<sup>18</sup> directs that *shall* should not be used with *he/she/it/you/ or they*. However, when *shall* is used in its directive form (the third role identified above) it ‘misbehaves’ and is used with second and third person subjects<sup>19</sup>. Fowler notes that ‘...it is unlikely that this rule has ever had any consistent basis of authority in actual usage...’.<sup>20</sup>

Amongst native-speakers of English *shall* is withdrawing into the lexicon of a relatively small number of users. Parrott<sup>21</sup> observes that some teaching materials omit reference to the question form of *shall* altogether. Swan<sup>22</sup>, Leech *et al.*<sup>23</sup>, and Allen<sup>24</sup> all note that British people tend increasingly to use *will*, to the point whereby the use of *shall* is now

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<sup>12</sup> Lewis, M. (2002:99).

<sup>13</sup> Hewings, M. (1999:22).

<sup>14</sup> *Op.cit.*, p. 50.

<sup>15</sup> Leech, G., Cruickshank, B. and Ivanič, R. (2001:467).

<sup>16</sup> Swan, M. (1995:216).

<sup>17</sup> Murphy, R. (1997:64).

<sup>18</sup> Murphy, R. (1994:44).

<sup>19</sup> This can be seen in the sample sentence of Leech *et al.* ‘All students **shall** attend classes regularly’. *Ibid.*

<sup>20</sup> Allen, R. (ed.) (1999:528).

<sup>21</sup> Parrott, M. (2000:171).

<sup>22</sup> *Op. cit.*, p. 212.

<sup>23</sup> *Op. cit.*, p. 466.

<sup>24</sup> *Ibid.*

rare in Britain; and that *shall* is very rarely used in American English. Murphy<sup>25</sup> also notes that *shall* is unusual in American English; with Nunberg<sup>26</sup> quoting Richard Grant White<sup>27</sup> on the distinction between *shall* and *will* as being too subtle “... for persons who have not had the advantage of early intercourse with English people. I mean English in blood and breeding ...”. Nunberg<sup>28</sup> goes on to describe the rules for using *shall* and *will* as being ‘... as thorny and tangled as an English bramble...’ and notes that even Fowler (when editor of the *Oxford English Dictionary*) doubted whether his explanations<sup>29</sup> of the distinction between *shall* and *will* ‘... would be of much use to anyone who hadn’t had the advantages of a southern English upbringing;’ as he (Fowler) said, “Those who are not to the manner born can hardly acquire it<sup>30</sup>.”

Leech *et al.*<sup>31</sup> refer to the use of *shall* in statements, in place of *will*, as being ‘older or more formal’ and found used in this form in pre-1950 literature. Allen notes that in England (not the United Kingdom) ‘... *shall* half survives in ... old fashioned and affected ... uses’<sup>32</sup>. It would seem to have its origin in Old English and Williams<sup>33</sup> relates the word *ic sceal* to the meaning *I am obliged to*.

It would appear that whilst modal auxiliaries are grammatically complex in English, the use of *shall* does not cause native speakers problems, if for no other reason than it is rarely used, and when used, tends to be limited to particular fixed phrases.

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<sup>25</sup> Murphy, R. (1994:282).

<sup>26</sup> Nunberg, G. (2001:1).

<sup>27</sup> White, Richard Grant (1822-1885). An American lawyer and Shakespearean scholar.

<sup>28</sup> *Ibid.*

<sup>29</sup> Seven columns on *shall* in *A Dictionary of Modern English Usage* and forty-three columns in the *Oxford English Dictionary* Nunberg. *Ibid.*

<sup>30</sup> In Nunberg. *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Williams, C. (2007:115). See also Sinclair, J.M. (2001:1381).

## 2 SHALL IN LEGAL ENGLISH

In contrast to its use in General English *shall* is extensively used in Legal English. This Paper will focus on its use in legislative texts with occasional reference to contractual use.

Of the General English grammarians consulted, Lewis<sup>34</sup> identifies the usage of *shall* in legal and religious texts, and Allen<sup>35</sup> makes passing reference to its use in legal language; neither attempting to allocate meaning. Sinclair<sup>36</sup> identifies a prescriptive use as ‘indicat(ing) compulsion, now esp. in official documents’. His reference to ‘now’ suggests that in earlier times the prescriptive use may have been more common in the general language. In a Usage Note<sup>37</sup> he suggests that where *shall* ‘involves command, obligation, or determination ... *shall* has largely been ousted in favour of *will...*’ in the general language. He also notes that in this prescriptive use, *shall* is used with the personal pronouns other than *I* and *we*; thereby ‘breaking’ the grammar rule discussed above.

Of three English legal dictionaries consulted<sup>38</sup> on the meaning of *shall* in Legal English, none have entries for *shall*. Similarly in the US context there is no entry in that edition of Black’s<sup>39</sup> consulted. Whilst *shall* and other modal verb usage is extensively raised and discussed by legal linguists, and legal academics and practitioners, the main contributors offering detailed grammatical perspective are Foley (2001 and 2002), Tanner, E. (2004), Williams, C.J. (2006, 2007a), and Bázlik, M. and Ambrus, P. (2009).

Aitken and Butt, in Piesse<sup>40</sup> identify and discuss *shall* in Legal English. In addition to the usage identified (above) in the general language they note its use in definition clauses of legislative texts, and in the sense of ‘has the right to’. In that latter sense the meaning of *shall* is more closely aligned to *may*. The ambiguity introduced by such use is what Aitken and Butt tag as ‘false precision’ and is explored in more detail below.

However, a general consensus seems to have developed that *shall* should not be used in legislation to denote future action. As stated by Bennion<sup>41</sup> (and many others) the law is

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<sup>34</sup> *Op. cit.*, p. 120.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Woodley, M. (2005), Collin, P.H. (2004), Martin, E.A. & Law, J. (2006).

<sup>39</sup> *Black’s Law Dictionary* (1983).

<sup>40</sup> Aitken, J.K. and Butt, P. (2004:65-71).

<sup>41</sup> Bennion, F.A.R. (1975:52).

'always speaking' and is to be treated as the current law no matter when it was enacted. In support Bennion<sup>42</sup> cites the 'oft quoted words' of Lord Esher: "the Act must be construed as if one were interpreting it the day after it was passed"<sup>43</sup>.

Williams considers this somewhat false. He argues that by their very enactment statutes anticipate events to happen in the future, and in that respect they are 'always speaking'. He argues that the time factor is understood and that:

... using *shall* or *must* or *may* or *be to* or the present tense in a legal text generally makes no effective difference in terms of its collocation in time.<sup>44</sup>

Bázlik and Ambrus<sup>45</sup> extend the discussion from the general language into the legal sphere. They note<sup>46</sup> that future meanings aside, '*...shall* often expresses obligation in the positive form and prohibition in the negative form, roughly corresponding to the meanings of *must* (obligation) and *must not* (prohibition), which, though synonymous with *shall*, are not very common in Legal English' They then go on to identify that '*...One of the reasons for the use of shall rather than must is associated with the meaning of logical necessity (belonging to deontic modality), which shall does not express*'<sup>47</sup>. They also identify a grammatical usage not raised by the general grammarians, namely the use of the perfect infinitive after *shall* as denoting '*...events expected to be completed by a certain time in the future*' and give the example sentence: '*The Fund shall have performed all obligations required to be performed by it and Buyer shall have received a certificate on behalf of the Fund to such effect.*'<sup>48</sup>

They distinguish a form of futurity in Legal English that is not found in General English, namely where *shall* is used in a primarily modal form in situations where futurity is secondary. This is best illustrated in the example sentence:

Such notice **shall** be duly given or made **when it shall be delivered** by hand ... at such address as such party **shall have designated** by notice to the party giving or making such notice...<sup>49</sup>

Finally, they comment on *shall* in conditional clauses, noting that its usage '*... denotes the obligations of a party to act in the way stipulated in the instrument.*'<sup>50</sup>

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<sup>42</sup> *Op. cit.*, p. 53.

<sup>43</sup> *The Longford* (1889) 14 PD 34 at 36. In Bennion. *Op. cit.*, p. 53.

<sup>44</sup> Williams C.J. (2006:247). See also his discussion of use of the present simple generally in legal text in Williams (2007:150-155).

<sup>45</sup> Bázlik, M. and Ambrus, P. (2009:65).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Op. cit.*, p. 66.

<sup>49</sup> *Ibid.*



Certainly Bázlik and Ambrus' detailed discussion brings to mind, and magnifies Lewis' comment on the grammatical complexity of *shall*.<sup>51</sup>

Whilst the grammarians have identified, analysed and categorised these grammatical usages one asks to what extent they are able to be consistently constructed by native and non-native drafters of legal texts, or to be understood and applied by both English-speaking citizens and non-English speakers, recalling that *shall* is effectively unknown in general English usage. Are these not grammar rules for a synthetic language?

Segal warns<sup>52</sup> that '... grammar, punctuation, and syntax should be standard and correct'. With discipline, this may be possible under the auspices of official legislative drafting bodies, but how can this be assured when drafting spills over to the private sector, or indeed to institutional drafting that is conducted with lesser degrees of flexibility and control?

It may be of value to have some understanding of the *extent* of usage of *shall* in Legal English. Bázlik and Ambrus conducted text analysis of legal and non-legal texts to provide some authoritative data. From a general observation '... that *shall* is dominant not only in British legal usage but also in American (presumably legal) English..' they comment that this is '... regardless of the fact that in non-legal American usage *shall* is almost non-existent.'<sup>53</sup> They reported from a text analysis of the Texas Criminal Code and *Bridget Jones' Diary*<sup>54</sup> that *shall* was '... the verb with the highest frequency in legal English, ... (and) the second least frequent in the non-legal sample... In legal English the dominant modal verbs are *shall* and *may* ... (and)... the occurrence of *shall* represents approximately 60% ... twice as high as the most frequent modal verb (*will*) in non-legal usage.'<sup>55</sup>

Williams, in discussing the resilience of international organisations, such as the UN or the EU, to drafting change, notes that:

... in the English version of the EU Constitution of 2004, *shall* is the fifth most commonly used term in the entire text, occurring more frequently than the indefinite article.<sup>56</sup>

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<sup>50</sup> *Op. cit.*, p. 67.

<sup>51</sup> See FN12.

<sup>52</sup> Segal, M.E. (2010:83).

<sup>53</sup> *Op. cit.*, p. 65.

<sup>54</sup> Contemporary fiction by the English novelist Helen Fielding, published in 1996.

<sup>55</sup> *Op. cit.*, pp. 63-64.

<sup>56</sup> Williams, C.J (2008:5).

A further use of *shall* in a legal setting is one in which it effectively has no meaning; one that is stylistic and ritualistic. Williams<sup>57</sup> provides one such example where ‘legalistic flavour’ is added in the provision:

The Minister of Finance shall appoint all such officers, clerks and servants *as shall be necessary for the purposes of this Act ...*<sup>58</sup>

Williams suggests that in the clause *shall be necessary* ‘shall’ is superfluous, and *is necessary* would be sufficient.

In a further example, Nunberg<sup>59</sup>, in considering the legislative sentence *This Act shall be known as the Penal Code of California* asks ‘... does that mean that I could get into trouble if I call it something else?’.

If *shall* is to fulfil its grammatical deontic role there must be a notion of permission or obligation. In the above example *shall* is not fulfilling such a role as it seems clear that the Californian legislature is not giving permission to so name the Act, and there could logically be no penalty for calling it, for example, the *Criminal Code*. In the context *shall* is misused.

Discussion has identified that there is extensive ‘Legal English’ usage of *shall* without any particular demarcation between its application to legislative and regulatory texts, and private and contractual texts. Patent evidence shows its presence in both text forms despite its rarity in the general language. The role of this Paper is to proceed to identify whether the presence of *shall* in Legal English is a matter for concern.

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<sup>57</sup> Williams, C.J. (2006:240).

<sup>58</sup> *The Public Records Act (NI) [1923]* in Williams, C.J. (2006:241).

<sup>59</sup> *Op. cit.*, p. 2.

### 3 PROBLEMS WITH USE OF *SHALL* IN LEGAL ENGLISH

In connection with private documents Triebel comments that:

The proper use of auxiliary verbs is a constant source of confusion: ... In legal documents *shall* is generally not used to express future time but to express obligation. However, there is authority that *shall* necessarily implies futurity. Thus, there is ambiguity.<sup>60</sup>

He quotes Wydick<sup>61</sup> as commenting that ‘... *shall* is the biggest troublemaker; Triebel recommends: *Don't use shall for any purpose – it is simply too unreliable.* For the future tense, *will* and not *shall* should be used.’<sup>62</sup>

Can this also be said for the legislative use of *shall*? Is *shall* what one might regard as a ‘legislative weed’ to be removed on sight?

McLeod<sup>63</sup> provides a clear illustration of the problem of the use of *shall*. He refers to a statutory scheme which provides for the creation of new tenancies<sup>64</sup>. The legislative provision stated that ‘... no application *shall*<sup>65</sup> be entertained unless...’ it was made within a specified period.

Does this mean:

- If an application is made within the specified period the landlord must grant a new tenancy?
- If an application is made outside the specified period the landlord has no power to grant a new tenancy?
- If an application is made late the landlord may (has discretion to) grant a new tenancy?

Kilpatrick, in reporting to a private client on the redrafting of a new constitution for an incorporated society, remarked:

The 1979 constitution is riddled with the use of the word *shall* to express an obligation. The difficulty with this is that when *shall* is used in ordinary English, the primary use is to express something that is intended to take place in the future. ... when *shall* is used to express an obligation, it expresses that obligation only weakly. ... *Must* not *shall* is now the normal modal auxiliary to express an obligation. Parliamentary drafting now uses this model ...<sup>66</sup>

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<sup>60</sup> Triebel, V. (2006:9).

<sup>61</sup> Wydick, R.C. (1998).

<sup>62</sup> In Triebel. *Op. cit.*

<sup>63</sup> McLeod, I. (2009:106).

<sup>64</sup> S 29(3) UK *Landlord and Tenant Act*, 1954.

<sup>65</sup> My emphasis.

<sup>66</sup> Kilpatrick, G. (2004:17).

Perhaps at this stage we can state that use of *shall* in both private and normative texts increases the possibility that a situation may not be as absolute as was intended.

To render further discussion worthwhile however, it is necessary to establish both that *shall* potentially causes problems which go to the root of understanding of a text, or which causes unnecessary cost to parties or the public, or the expenditure of judicial time in interpreting text which could be made clearer by alternative drafting; namely that *shall* is readily replaceable with a clearer alternative.

Garner<sup>67</sup> is of the opinion that *shall* offends principles of good drafting. He notes that in well drafted documents a word needs to retain the same meaning throughout. He comments that *shall* has diverse meanings and that sometimes the meaning shifts, even within a single sentence; he records as many as eight senses which can be allocated to *shall* in drafted documents<sup>68</sup>. Finally he restates an oft-quoted principle of legislative drafting, namely that normative text should be drafted in the present tense, and notes that in such text *shall* is often used to refer to future actions or possibilities.

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<sup>67</sup> Garner, B.A. (1995:939).

<sup>68</sup> As the diverse meanings of *shall* and alternatives to *shall* are fundamental to this Paper, and to assist interested readers to better understand the problem, Garner's eight examples (Garner 1995:940) are set out in full in this Footnote as follows:

'... the following examples - all but the last two from a single set of court rules - illustrate the more common shades (of meaning):

1. "The court ... *shall* enter an order for the relief prayed for ..." The word imposes a duty on the subject of the sentence.
2. "Service *shall* be made on the parties ..." The word imposes a duty on an unnamed person, but not on the subject of the sentence ("service" an abstract thing).
3. "The debtor *shall* be brought forthwith before the court that issued the order." The word seems at first to impose a duty on the debtor but actually imposes it on some unnamed actor.
4. "Such time *shall* not be further extended except for cause shown." The word *shall* gives permission (as opposed to a duty), and *shall not* denies permission (i.e., it means 'may not'). This problem-*shall* being equivalent to *may* frequently appears also in the statutory phrase *No person shall*. Logically, the correct construction is *No person may*, because the provision negates permission, not a duty.
5. "Objections to the proposed modification *shall* be filed and served on the debtor." The word purports to impose a duty on parties to object to proposed modifications, though the decision to object is discretionary. This amounts to a conditional duty: a party that wants to object must file and serve the objections.
6. "The sender *shall* have fully complied with the requirement to send notice when the sender obtains electronic confirmation." The word acts as a future-tense modal verb (the full verb phrases being in the future perfect). Many readers of this sentence, however, encounter a MISCUE in reading the sentence, which confusingly suggests that the sender has a duty.
7. "The secretary *shall* be reimbursed for all expenses." The word expresses an entitlement, not a duty.
8. "Any person bringing a malpractice claim *shall*, within 15 days after the date of filing the action, file a request for mediation." Courts interpreting such a rule or statute often hold that *shall* is directory, not mandatory - that it equates with the softer word *should*.

Whilst acknowledging that lawyers seem to understand *shall* to require mandatory action, Garner<sup>69</sup> notes that ‘... courts in virtually every English-speaking jurisdiction have held -by necessity- that *shall* means *may* in some contexts, and vice-versa. He tenders evidence of the litigious and ‘promiscuous’ nature of *shall* in ‘76 pages of small-type cases reported in *Words and Phrases*, all interpreting the word *shall*.’<sup>70</sup>

Discussion of *shall* by legal linguists and within the legal profession is very extensive, and extends across time, continents and Common Law jurisdictions.

Mr Justice Crabbe expresses the problem clearly:

The basic problem in the use of the words ‘shall’ and ‘may’ in a legislative sentence is that *shall* imposes a duty or an obligation, *may* confers a discretionary power. Thus *shall* is mandatory while *may* is discretionary. ... But there have been situations where the words have been misused by Parliamentary Counsel. There are cases where the courts have construed *shall* to mean *may* and *may* to mean *shall*. Sometimes the court’s departure from the usual meaning or usage of the words has been convincingly explained. At other times the departure has been extremely difficult to understand.<sup>71</sup>

To Crabbe’s outline and discussion can be added the oft-expressed concern that it should not be necessary for meaning to be derived through the medium of litigation.

The dangers of mixing *may* and *shall* are further highlighted in Lord Cairns’ discussion of the words *shall be lawful* in *Julius v Lord Bishop of Oxford* in which he stated that the words:

... confer a faculty or a power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.<sup>72</sup>

Does this not mean then that *shall* means *may* unless and until it means *must*?

The UK Cabinet Office Paper on *Shall* identified an approach amongst some drafters that *shall* is not archaic as it is in current use within the medium of legislative drafting.

Paragraph 26, in its entirety, stated:

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* It is not clear whether Garner is referring to Stroud, F. (2003) *The Judicial Dictionary of Words and Phrases Judicially Interpreted*. New Jersey: Lawbook Exchange Ltd. or to Burrows, R. (1943) *Words and Phrases Judicially Defined*. London. Toronto: Butterworth & Co. Ltd., possibly the former. For other US judicial consideration, see also Foster, C.A., *Statutory interpretation: is “shall” mandatory or discretionary?*

<sup>71</sup> Crabbe, V.C.R.A.C. (1993:76).

<sup>72</sup> *Julius v Lord Bishop of Oxford* (1880) 4 App Cas 214 at 222-23. In McLeod, I. (2009:104).

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. 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.<sup>73</sup>

This approach however seems to circumvent the comments of Crabbe and others and seems based on a concept that *shall* is a legal term and can only be interpreted as a legal term. Further, the evidence seems to indicate that *shall* is not as 'clearly understood' as suggested.

Outside the field of legislative drafting, it is rare to find informed support for the retention and use of *shall* in private legal texts. Amongst the few supporters was J.M. Bennett<sup>74</sup> in a series of letters published in the *Australian Law Journal* in 1989-1990. Bennett's opponents were Asprey and Eagleson<sup>75</sup>. The debate seemed to disintegrate into something of an emotive bun-fight.

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<sup>73</sup> UK: Office of the Parliamentary Counsel. Cabinet Office. *Shall*. Drafting Techniques Group Paper 19 (2008:5).

<sup>74</sup> Whose arguments Garner (1995:941) regards as 'unpersuasive'.

<sup>75</sup> Eagleson, R. and Asprey, M. (1989a & b). Bennett, J.M. (1989 & 1990).

## 4 ADDRESSING THE PROBLEMS WITH USE OF *SHALL* IN LEGAL ENGLISH

An increasing number of Common Law jurisdictions are addressing the subject of clarity of legal language in the public domain. Some reform movements are politically driven, others come from those who draft normative texts, yet others from the legal profession itself, including the judiciary.

Garner<sup>76</sup> identifies three main approaches to addressing problems arising out of the use of *shall*. The first is what he calls 'the American rule', and this is to restrict its meaning to one sense, specifically where it means 'has a duty to' (the first of the examples footnoted above. See FN68). The second approach is what he calls the 'ABC rule' advocated in the late 1980s in certain jurisdictions in Australia, Britain, and Canada; this involves an abolitionist approach. The third approach is to do nothing.

With regard to the American rule he notes that in practice lawyers and judges have found themselves unable to apply the 'rule' consistently. As to the third practice he highlights the extent of litigation which has been outlined above. It is the ABC rule which he favours as that which has been gaining applied support in the US. He recites the case of the US Federal Government's *Style Subcommittee* which adopted the ABC rule in late 1992, a year after applying the American rule.

With regard to the ABC rule, Garner makes the point which is fundamental to this Paper that: '... legal drafters cannot be trusted to use the word *shall* under any circumstances. Under this view, lawyers are not educable on the subject of *shall* ...'<sup>77</sup> If Garner's position is to be accepted, then all the grammatical analyses and recommendations of Bázlik and Ambrus<sup>78</sup>, and the followers of the American Rule are perhaps of little value in practice.

As Bennion highlights<sup>79</sup>, the grammatical meaning is ambiguous when it is grammatically capable of more than one meaning. Where the text is obscure the reader first needs to determine what was the intended grammatical meaning. Not only can this lead to

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<sup>76</sup> *Ibid.*, p. 940.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Op. cit.*

<sup>79</sup> *Op. cit.*, p. 36.

interpretation problems for legal specialists and lay readers alike, but, as suggested by Segal<sup>80</sup>, it may lead to translation problems, thereby obscuring meaning further.

Williams<sup>81</sup> has identified that over the 15 years to 2006 there seems to have developed something of a 'North-South divide' between Australia, New Zealand and South Africa abandoning *shall* and what Williams refers to as the more 'conservative Northern Hemisphere' retaining it.

To provide some clearer understanding of the practical aspects of the debate, this Paper will consider some models and frameworks involving abolition of *shall* in selected jurisdictions outside the EU framework, together with the debate leading up to amended drafting rules. It will then attempt to offer some critical evaluation of the application of these models. Following Garner's reference to the ABC rule, consideration will first be given to Australia (and New Zealand), and then to Britain (including Scotland and Northern Ireland), followed by Canada. This survey is not intended to be a comprehensive review of practices and reforms in Common Law jurisdictions, but rather illustrative of what has happened, and what *can* happen in those jurisdictions which have been slow to react.

#### **4.1 Australia and New Zealand**

In 1990, Ian Turnbull QC, then First Parliamentary Counsel for the Australian Federal Government, reported<sup>82</sup> on the rationale behind recent changes to the Commonwealth's approach to legislative drafting. He noted that the style of drafting of the previous 40 years had become increasingly, and often unnecessarily, complex. He also observed that the style of drafting was traditional in form and used 'dignified language considered appropriate for Parliament'<sup>83</sup>. Aside from some structural reforms to legislative drafting in the early 1970s, it appears that little had been done until the Law Reform Commission of Victoria produced a report 'Plain English and the Law' in 1987. This document influenced drafting reforms at a Federal level under Turnbull's leadership. These reforms focused on three elements, two of which were linguistic, namely simpler writing, and identifying and avoiding 'traditional forms of expression that are unnecessarily long and obscure'<sup>84</sup>. By the time of Turnbull's

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<sup>80</sup> *Op. cit.*, p. 107.

<sup>81</sup> Williams, C.J. (2006:239-240).

<sup>82</sup> Turnbull, I.M.L. (1990).

<sup>83</sup> *Op. cit.*, p. 2.

<sup>84</sup> *Op. cit.*, p. 6.



1990 Paper, Parliamentary Counsel in all States and Territories of Australia were meeting regularly on issues of simpler drafting, *to which they were committed*.

Almost ten years later, Vince Robinson, First Assistant Parliamentary Counsel for the Australian Federal Government, reported on the experience gained in legislative rewrites over that period. In his Introduction he states:

Some of them (the rewrites) were undertaken in the early days when plain language practices were just beginning to be developed. Others were undertaken when those practices had become better developed, more fully articulated and more widely accepted.<sup>85</sup>

It perhaps indicates considerable advances in practice and policy in that Turnbull's steps taken eleven years earlier are referred to by Robinson as 'the early days'.

In a Paper in 2002, Edwin Tanner presented an independent review of the Commonwealth position, seeking to evaluate the impact of Turnbull's reforms of two years earlier.<sup>86</sup> Tanner analysed a number of pieces of legislation that had been subjected to Turnbull's guidelines and concluded that '... Drafters have shown considerable progress in their efforts to make Commonwealth legislation more comprehensible<sup>87</sup>'. Whilst neither Turnbull nor Tanner referred specifically to *shall*, Tanner commented on '... the importance in drafting of a sound knowledge of basic grammar<sup>88</sup>'. Further, of the many sample clauses cited by Tanner, not one included the word *shall* but rather the words *must* or *may* where *shall* might traditionally appear.

The reform process to date in the Federal sphere in Australia has resulted in the production of two Manuals, a *Plain English Manual* (March 2003) and a *Drafting Manual* (May 2006).<sup>89</sup> The latter document is principally concerned with policy and structural issues and does not concern this Paper. The *Plain English Manual*, on the other hand, deals specifically with *shall*<sup>90</sup> and as such contributes to our understanding of the legislative use of *shall* in contemporary drafting practice. The relevant sections are set out here in full (including the paragraph numbering from the Manual) as they will have implications for later discussion

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<sup>85</sup> Robinson, V. (2001:2).

<sup>86</sup> Tanner, E. (2002).

<sup>87</sup> *Op. cit.*, p. 557.

<sup>88</sup> *Ibid.*

<sup>89</sup> See Bibliography (*Manuals & Guidelines: Australia*).

<sup>90</sup> *Plain English Manual*. (May 2003) Australian Government. Office of Parliamentary Counsel, pp. 19-20.

and understanding of practices in other jurisdictions, including conclusions for the European Union:

83. The traditional style uses “shall” for the imperative. However, the word is ambiguous, as it can also be used to make a statement about the future. Moreover, in common usage it’s not understood as imposing an obligation.

Say “must” or “must not” when imposing an obligation, not “shall” or “shall not”.

If you feel the need to use a gentler form, say “is to” or “is not to”, but these are less direct and use more words.

We shouldn’t feel any compunction in using “must” and “must not” when imposing obligations on the Governor-General or Ministers, because “shall” and “shall not” were acceptable in the past.

84. The traditional style sometimes uses “shall” in declaratory provisions.

Example “This Act shall cease to have effect ...”

“An authority shall be established ...”

“The Authority shall consist of 10 members ...”

These are neither imperatives nor statements about the future, they are declarations of the law:

Example say:

“This Act ceases to have effect ...”

“An authority is established ...”

“The Authority consists of 10 members ...”

Even if the event is yet to happen, the law speaks in the present because an Act is “always speaking”.

In relation to *shall* Lanspeary<sup>91</sup> stated in 2005 that:

There is a rule of interpretation that ‘may’ means ‘shall’ in some circumstances. ... This is cumbersome ... Parliamentary Counsel never draft ‘may’ as meaning ‘shall’.<sup>92</sup>

(Note that this statement was not one in connection with abolition, or otherwise, of *shall* but rather to the relationship between *shall* and *may*.)

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<sup>91</sup> Paul Lanspeary. First Assistant Parliamentary Counsel. Australian Federal Government.

<sup>92</sup> Lanspeary, P. (2005:22).

As can be seen from the above, the Australian Federal jurisdiction has moved from a position of drafting traditionalism forty years ago to a plain language philosophy and policy today, supported by drafting and language manuals. Specifically, within our field of enquiry – *shall* – there is a clear direction to legislative drafters to avoid the word altogether.

What then of the position over the Tasman in New Zealand? Whilst a small jurisdiction, it is one that has, as we will see, been proactive in the field of language clarity. It is also a single federal state, and perhaps as such, is able to more effectively put change into place.

Plain legal language in New Zealand was the focus of *Clarity*<sup>93</sup> in November 2004. Burrows in reviewing changes to legislative drafting noted that:

... the archaic language has gone. Most significantly, the old stalwart “shall” is no longer used. ... No word ever so clearly marked off a document as “legal”. ... Since 1997 it has entirely gone from our statutes. Statutes are drafted in the present tense, and if an imperative is required, “must” is used.<sup>94</sup>

In the same edition of *Clarity* George Tanner QC, then Chief Parliamentary Counsel for New Zealand, reported<sup>95</sup> that ‘[I]n early 1997, the New Zealand Parliamentary Counsel Office ... made a number of modest changes in its drafting style (and that) they included ... use of “must” instead of “shall”.’

The current official position on the use of *shall* in legislative drafting in New Zealand is stated in the Parliamentary Counsel Office *Drafting Manual* of August 2009 in the Appendix to that Manual as follows<sup>96</sup>:

A3.33 Although “shall” is used to impose a duty or prohibition, it is also used to indicate the future tense. This can lead to confusion. “Shall” is less and less in common usage, partly because it is difficult to use correctly. “Shall” is now rarely used in New Zealand .... . “Must” should be used in preference to “shall” because it is clear and definite, and commonly understood.

A further contribution is that of Horn<sup>97</sup> who conducted an interesting survey of the use of *must* rather than *shall* in legislative drafting in Australia, New Zealand and Ontario. He

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<sup>93</sup> *Clarity*. Number 52, November 2004. The Journal of the international association promoting plain legal language.

<sup>94</sup> Burrows, J. (2004:4).

<sup>95</sup> Tanner, G. (2004:9).

<sup>96</sup> Ch3 of the PCO’s in-house Drafting Manual. *Principles of Clear Drafting*. (Version 6.0 August 2009:30).

found that with the exception of Ontario, *shall* effectively expresses obligation, and has been abolished in legislative drafting.<sup>98</sup>

## 4.2 United Kingdom

The modern reform process in the United Kingdom undoubtedly starts with the *Renton Report*<sup>99</sup> commissioned in 1973 by the Heath Government “With a view to achieving greater simplicity and clarity in statute law.”<sup>100</sup> The Report observed that:

In Britain the drafting of legislation remains an arcane subject. Those responsible do not admit that any problem of obscurity exists. They resolutely reject any dialogue with statute law users. There is resistance to change, and to the adoption (or even investigation) of new methods. The economic cost of statute law is enormous, yet official interest has been lacking.<sup>101</sup>

UK drafting has progressed considerably since the Renton Committee, looking into the future, spoke of their hope in the improvement of computers to enable revised legislation to be brought up on ‘a television-type screen’<sup>102</sup>. From the point of view of this present Paper, the Renton report was more the ploughing of the field of reform, rather than the sowing of seed.

In his 2008 review of plain language reform in legislative drafting in the UK, Tessuto noted that there is still:

an abundance of *shall* in the 1998 Acts (selected Acts the subject of his study) with fewer instances of the modal in the 2006 Act, where the flexibility of *shall* in imposing a duty, giving direction, creating conditions, expressing future and intention, might create a source of confusion particularly for ordinary readers in native or non-native contexts, when identifying which function of the modal lies behind the provision.<sup>103</sup>

Tessuto goes on to identify that *shall* is still used in practice for declaratory purposes. This, however, is not the concern of this Paper as it is unlikely to lead to lack of clarity of the normative provisions.

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<sup>97</sup> Horn, N. (2005).

<sup>98</sup> Horn’s survey results (2005:92) are replicated and set out in Appendix A.

<sup>99</sup> The first official committee to examine legislative drafting in 100 years.

<sup>100</sup> *Op. cit.*, p. 660.

<sup>101</sup> *Renton and the Need for Reform*. In Thomas, R. (1985:148. FN.21).

<sup>102</sup> *Ibid.*, p. 661.

<sup>103</sup> Tessuto, G. (2008:24).

Three key documents remain for our consideration in the UK context. These are the *Plain Language and Legislation* booklet produced by the Scottish Government in 2006<sup>104</sup>; the ongoing *Tax Law Rewrite Project* of the British Government<sup>105</sup>; and the relevant output of the *Drafting Techniques Group* of the Office of the Parliamentary Counsel, Cabinet Office of 2008<sup>106</sup>. Of these, only the Scottish document was in existence at the time of Tessuto's Paper.

With reference to the Scottish document Tessuto notes<sup>107</sup> that it was the '... only available plain drafting manual...' , in which '... the argument is made for the traditional, more formal *shall* auxiliary to be replaced by the clearer *must* auxiliary when imposing duties or obligations, because *shall* "is more commonly understood as a way of making a statement about the future than as a means of imposing an obligation"<sup>108</sup>.' It is arguable however that *must* also makes a statement about the future, and that both terms necessarily are imperatives about the future.

Notwithstanding these guidelines, and as Tessuto noted above, there was still considerable use of *shall* in post-1996 legislation, not only in Scotland, but also in England, Wales and Northern Ireland. Williams, in a text analysis of Scottish Acts passed in 2000 compared to those passed in 2006/2007, identified a drop in usage by the Scottish Parliament of almost 80 per cent.<sup>109</sup> Hunt noted<sup>110</sup> in 2002 that it was the private sector, rather than the Government, that was leading the movement towards the use of plain language. At this time the Irish Government was guided by a legislative drafting manual that heavily advocated the use of *shall*.<sup>111</sup> A Report of the Irish Law Reform Commission in 2000<sup>112</sup> led to the *Interpretation Act* 2005; this Act made no reference to the use of *shall* nor did it embody the word within its text.

In England, use of *shall* was considered in the UK *Tax Rewrite Project* in the following terms:

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<sup>104</sup> Scotland. *Plain Language and Legislation*. (March 2006).

<sup>105</sup> UK: Tax Law Rewrite Project. *Recommendations and policies on drafting matters*; Tax Law Rewrite Project. Chapter 2. *General Drafting Approach*; Tax Law Rewrite Project. Samples. *Rewritten legislation*.

<sup>106</sup> UK: *Recommendations and Policies on Drafting Matters; Clarity in Drafting: Principles and Techniques; Shall*. Drafting Techniques Group Paper 19 (final).

<sup>107</sup> *Op. cit.*, p. 23.

<sup>108</sup> See *Plain Language and Legislation*. Chapter 4 on Shall, Must, Is To, Will. (March 2006).

<sup>109</sup> Williams, C. (2008:8).

<sup>110</sup> Hunt, B. (2002b:1).

<sup>111</sup> *Legislative Drafting: A Commission Manual*. (Internal document. 1 January 1997).

<sup>112</sup> *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC61-2000).

17. Given the way it is normally employed in everyday speech to refer to the future, some users may find the way 'shall' is currently used in the legislation confusing. When rewriting that legislation we will minimise the non-future use of 'shall'. So we will generally avoid using 'shall' in a declaratory sense, i.e. rather than saying "There shall be substituted..." the legislation will simply say "Substitute...". But we feel there will be some cases, for example where legislation imposes a statutory duty, where the non-future 'shall' should remain. Would users be content with that approach? <sup>113</sup>

Note that this approach is not as prescriptive as in, say, the Australian and New Zealand jurisdictions.

However, the position of *shall* was given specific consideration by the Office of Parliamentary Counsel by the publication in March 2008 of a paper specifically entitled *Shall*.<sup>114</sup> This Paper flowed from a stated policy 'seeking to minimise the use of the legislative "shall"'.<sup>115</sup> The Paper identified 10 contexts in which there is a legal use of *shall* and:

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.<sup>116</sup>

In a detailed paper, the Group made the following recommendations pertinent to this Paper (paragraph numbers retained):

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.

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.

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.<sup>117</sup>

Notwithstanding the recommendations, the OPC did not intend the Paper to be prescriptive on drafters.

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<sup>113</sup> UK: Tax Law Rewrite Project. Chapter 2. *General Drafting Approach*. Para 17.

<sup>114</sup> UK: *Shall*. Drafting Techniques Group Paper 19 (final). (March 2008).

<sup>115</sup> UK: *Recommendations and Policies on Drafting Matters*. Drafting Techniques Group. (2008:8).

<sup>116</sup> *Ibid*. Drafting Techniques Group Paper 19 (2008:1. Para 4).

<sup>117</sup> *Ibid*.

### 4.3 Canada

As a dual lingual Country with Federal, provincial and territorial governments, Canada's legislative drafting needs have been given considerable attention. Reform is under the guidance of the *Uniform Law Conference of Canada* a national organisation comprising practising lawyers, legal academics and members of the judiciary. Amongst other ideals, the Conference pursues a policy of plain English. It is to be noted however, that the *Employment Insurance Act* 1996, rewritten under revised guidelines, has not written *shall* out of the Revision.

Peter Johnson QC, Chief Legislative Counsel from the Department of Justice in Ottawa commented in 1991<sup>118</sup> that there was general satisfaction with legislative drafting at a Federal level. This comment seemed to be based on a low level of debate on issues of readability and understanding of Canadian statutes. One reason for this, he felt, was that co-drafting in French and English tended to highlight inconsistencies. In effect, one might say, the language was being tested word-by-word. His comments were based on the 1989 *Drafting Conventions of the Uniform Law Conference of Canada* which, it is noted specifically retains *shall* for duties and prohibitions:

“Shall” is used to impose a duty or (with ‘not’ or ‘no’) a prohibition.

whilst

“May” is used to confer or indicate a power, right or choice.<sup>119</sup>

For those cognisant of French legislative drafting he distinguishes the requirements to express obligation in legal French.<sup>120</sup>

It would appear that 20 years later the position remains the same, as the 2008 UK Paper on *Shall* notes that guidance is given by the Canadian Department of Justice in 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. 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

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<sup>118</sup> Johnson, P.E. (1992).

<sup>119</sup> Johnson, P.E. *Op. cit.*, p. 10.

<sup>120</sup> Johnson, P.E. *Ibid.* For discussion of *shall*, *must* and the present tense in French in normative texts, including translated texts, see also Richard, I. (2006).

construed as imperative. But it advises against using “shall” and its alternatives interchangeably in the same Act or regulation.<sup>121</sup>

#### 4.4 The United States

Garner<sup>122</sup>, in his discussion above, referred to a shift in the US Federal jurisdiction from the American rule to the ABC rule in late 1992. This Paper now looks at the position of some US jurisdictions in the period post-1992.

Under the American rule he defines *shall* to mean ‘has a duty to’, and *must* to mean ‘is required to’.<sup>123</sup> Under the ABC rule there is, of course, only *must*. The latter, he submits<sup>124</sup> fixes the meaning more tightly in any given sentence than can be achieved by *shall*.

Certainly the American rule on the use of *shall* and *may*, as expressed in the Report to Congress of the Congressional Research Service<sup>125</sup> was unclear and lacked direction to drafters. To leave the reader of this Paper in no doubt, it is set out in full as follows:

Use of “shall” and “may” in statutes also mirrors common usage; ordinarily “shall” is mandatory and “may” is permissive. These words must be read in their broader statutory context, however, the issue often being whether the statutory directive itself is mandatory or permissive. Use of both words in the same provision can underscore their different meanings, and often the context will confirm that the ordinary meaning of one or the other was intended. Occasionally, however, context will trump ordinary meaning.<sup>126</sup>

From the first sentence one might ask what is ‘common usage’ given that *shall* is not in ‘common usage’ in the US. The balance of the paragraph would seem to invite litigation.

In 1996 a revised draft of the US Federal Rules of Appellate Procedure was published for comment. Garner was appointed as consultant to the Rules Committee. As might be expected from the discussion above, the revised Guidelines reflected the ABC rule.<sup>127</sup>

Of the 24 Bill Drafting Manuals accessible on the website of the National Conference of State Legislatures<sup>128</sup> 10 States<sup>129</sup> had not specifically addressed *shall* in their Drafting

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<sup>121</sup> *Op. cit.*, para. 49.

<sup>122</sup> *Ibid.* See also pp. 12 and 13 for further comment on bilingual legislative drafting.

<sup>123</sup> Garner (1995:942).

<sup>124</sup> *Op. cit.*, p. 941.

<sup>125</sup> *Statutory Interpretation: General Principles and Recent Trends*. CRS Report for Congress. Updated August 31, 2008.

<sup>126</sup> *Op. cit.*, p. 9.

<sup>127</sup> Garner, B.A. *Guidelines for Drafting and Editing Court Rules*. (1996:29) Chapter 4.2 *Words of Authority*.

<sup>128</sup> National Conference of State Legislatures, *Bill Drafting Manuals*. At <http://www.ncsl.org/default.aspx?tabid=15672> (accessed 4 April 2010).



Manuals or, from the face of it were clearly maintaining a traditional *status quo*; of the 14<sup>130</sup> which had, an analysis of their Drafting Manuals is set out in Appendix B.

From this analysis it can be seen that the position in the United States, at both a State and Federal level, is inconsistent and unclear. Even in some of those States which have specifically addressed the use of *shall* it is not always apparent in what ways it is recommended or prescribed to be used. It contrasts heavily with the position in Australia and New Zealand, as evidenced in Appendix A to this Paper.

It is clear from the above Common Law world survey, and the examples and analysis, that there is strong evidence that the abolition (or at least reduced and selective use) of *shall* is now preferred in a large part of the English-speaking Common Law world. The US position remains, surprisingly, given the effective non-existence of the word in the general language, indicating perhaps a long tradition, and inherent resilience, of its legislative use. Let us not dismiss however the earlier comments about the extent of judicial interpretation of misunderstanding caused by *shall*.<sup>131</sup>

In International Institutions, the International Labour Office has produced guidelines on the use of *shall* in drafting ILO instruments<sup>132</sup>. With regard to the pertinent modals it states<sup>133</sup>:

Obligation: The word “shall” is used for obligations set out in a convention ...

Guidance: In Recommendations the operative word “should” is used instead of “shall” ...

Discretion: The word “may” is used where the aim is to allow discretion;

However, the Manual appears to breach its own Guidelines in stating:

In the case of a revising Convention, the preamble *should*<sup>134</sup> state the effect it has on a previous Convention. The following wording is suggested:

“Having determined that these proposals *shall*<sup>135</sup> take the form of an international Convention revising the [short title of the Convention being revised]”.<sup>136</sup>

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<sup>129</sup> Arizona, Arkansas, Colorado, Connecticut, Hawaii, Maryland, Massachusetts Senate, New Mexico, South Dakota and West Virginia.

<sup>130</sup> Alabama, Alaska, Delaware, Florida, Illinois, Indiana, Kentucky, Maine, Minnesota, Montana, North Dakota, Oregon, Texas and Washington.

<sup>131</sup> See FN70.

<sup>132</sup> Manual for drafting ILO instruments. The Quick Guide. (2007).

<sup>133</sup> *Supra*, p. 40.

<sup>134</sup> My emphasis.

<sup>135</sup> My emphasis.

<sup>136</sup> *Ibid.*, p. 22.

In using *should* the Guideline seems to be making a recommendation. In making recommendations the guideline is not to use *shall*; yet it does. Confusion reigns.

## 5 LEGISLATIVE DRAFTING - OBJECTIVES

Before proceeding to consider the position in the European Union there should be some consideration of who is the 'consumer' of legislation, as this ultimately governs the choice of language, as one would logically not intentionally write language that your intended reader would be unlikely to understand.

Identifying the reader and choosing legislative language to suit the reader is an issue which is highly polarised. On the one hand are the protagonists of the view that traditional legal language must be reduced to the language most suited to the lay reader; on the other hand are those who identify legal language as serving legal professionals. Bennion, as a vocal and eminently well-qualified representative of the latter group<sup>137</sup>, has published a series of articles<sup>138</sup> in which he is strongly of the view not only that legislative readership is specialised, but also that the language of the law should not be simplified. He believes that legislation has its own language and that '... it should be a prime axiom of legislation that, unless there are over-riding reasons to the contrary, language which is destined to form part of the law should be framed solely with that end in view'<sup>139</sup>. In interpreting meaning, he comments that '... [N]o law can be directly comprehensible by non-experts because law is and has to be an expertise. It needs to be explained to the lay person, whether by officials or professionals in private practice'<sup>140</sup>.

Orban, in his Stockholm address in September 2009<sup>141</sup> refers to the launch in 1999 of the European Commission's campaign to 'foster better governance within the Commission and to ensure public accountability by increasing transparency'. He sees 'plain and clear writing' as being part of that process. Again, Orban echoes what has been said so many times before, that bureaucratic text (into which it is suggested legal text falls) should be written with the reader in mind, and should not need a lawyer to interpret it, where that text is intended for the European public. By 'European public', Orban includes those working

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<sup>137</sup> Francis Bennion's career has included practise at the English Bar, academic appointments, and notably in the context of this Paper as a constitutional and legislative draftsman, as well as the author of *Bennion on Statutory Interpretation* (2008) amongst other titles.

<sup>138</sup> See generally <http://www.francisbennion.com>.

<sup>139</sup> Bennion, F.A.R. 'Laws are not for laymen' *Guardian Miscellany*. *Guardian* 29 May 1975:11 at <http://www.francisbennion.com>.

<sup>140</sup> Bennion, F.A.R. 'Can non-lawyers understand legislation?' at <http://www.francisbennion.com>.

<sup>141</sup> Orban, L. 2009, p. 1.

outside their native tongue. As to drafting, he states that '[E]very sentence must be formulated with the purpose and target audience in mind'<sup>142</sup>.

In this context Bennion openly challenges CLARITY<sup>143</sup> and one of its leading proponents, Martin Cutts. With regard to the former he asks: '... what does CLARITY mean by "legal English"?' And suggests that rather than adopting simple language that '... we get nearer the object if we equate it to the language of legal documents generally'<sup>144</sup>. He substantiates his view by noting the limitations on the drafter in that '[O]ne of the inexorable constraints on legal language is the need to fit into the language of the existing law'<sup>145</sup>. As to its interpretation he comments that:

What is clear to a skilled professional cannot be expected to be always clear to a lay person. Indeed if the text is intended for a professional audience it would often be inappropriate, and in some cases impossible, to try to word it as if a lay audience were intended.<sup>146</sup>

To Cutts he throws the barb '... So reformers like Mr Cutts need to start by accepting that law is an expertise'<sup>147</sup>; and his advice to Lord Woolf<sup>148</sup> '... is this. Do not look for savings by trying to make the law easier for lay persons to understand. Instead make it easier for lawyers to use. Plain English and reducing jargon have only a small part to play in this'<sup>149</sup>.

The middle ground is perhaps neutrally expressed by commentators such as Thomas<sup>150</sup> who remarks that a statute '... is addressing several audiences; it is trying to

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<sup>142</sup> *Op. cit.*, p. 7.

<sup>143</sup> CLARITY's website states that it is:

"... a worldwide group of lawyers and interested lay people. Its aim is the use of good, clear language by the legal profession. We hope to achieve this by:

- avoiding archaic, obscure, and over-elaborate language in legal work;
- drafting legal documents in language that is both certain in meaning and easily understandable;
- exchanging ideas and precedents, not to be followed slavishly but to give guidance in producing good written and spoken legal language;
- exerting a firm, responsible influence on the style of legal language, with the hope of achieving a change in fashion."

See: <http://www.clarity-international.net>.

<sup>144</sup> Bennion, F.A.R. 'The Readership of Legal Texts' (1993:1).

<sup>145</sup> *Op. cit.*, p. 2.

<sup>146</sup> *Ibid.*

<sup>147</sup> Bennion, F.A.R. 'Don't put the law into public hands' (1995).

<sup>148</sup> Baron Woolf *PC. FBA*. Lord Woolf was Lord Chief Justice of England and Wales from 2000-2005. In 1999, when still Master of the Rolls he was appointed to head a committee to reform civil law, part of the work of which was legal language. The work of the Committee was probably the most extensive review ever of the civil justice system.

<sup>149</sup> Bennion, F.A.R. (1995). *Ibid.*

<sup>150</sup> Thomas, R. (1985:148).

achieve maximum certainty, often with highly complex subjects, in a variety of circumstances.’

Segal observes that:

... the current trend (21st century) is towards the “plain use” of language whenever appropriate, so that laws can be understood by all interested parties, including the general public.

and that

... whenever possible, the objective should be to draft legislation in plain, non-technical language, and in a clear and coherent manner, using words with common and everyday meaning, which are understandable to the average reader.<sup>151</sup>

These comments from an experienced legislative draftsman suggest that perhaps rules cannot be too prescriptive and that the drafter needs to be left with some room to manoeuvre.

What perhaps Bennion does not address here is where the text is not only unclear to a lay person, but is also unclear to a ‘skilled professional’. Further Bennion’s approach appears to rely somewhat on the interpretive skills of not only lawyers, but also ‘officials or professionals in private practice’ rather than text being clear on the face of it. He seems also somewhat dismissive of the concerns of CLARITY, Renton, Woolf and others of the costs to the public, as well as private individuals, in interpretation, extending even to litigation.

A detailed analysis of this controversial and emotive area of legislative readership is beyond the scope of this Paper. However it is one which would lend itself to impartial academic examination.

With regard to *shall* however one might ask whether a word that is not in common usage is “understandable to the average reader” if it is often not understandable to the specialist reader?

In reporting on 10 years of legislative rewrites in Australia, Robinson<sup>152</sup> observed that ‘... even legislation that deals with highly technical areas can be put into a much more readable form ...’ and that ‘... even expert readers can benefit from efforts to improve the readability of the legislation they work with.’<sup>153</sup>

Robinson contributes very specific comment on this point in connection with the rewrites the subject of his Paper. He states:

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<sup>151</sup> *Op. cit.*, p. 85.

<sup>152</sup> Robinson. *Op. cit.*, p. 3.

<sup>153</sup> *Ibid.*

Our rewrites have been pragmatic rather than ideological. We have aimed, by and large, to make the legislation more readable and easier to use for its actual current users. We have not tried to make the legislation accessible to people who, from a practical point of view, we believed were highly unlikely ever to read the legislation. We have sometimes factored in people who did not currently read the legislation but were likely to do so if it were easier to read.<sup>154</sup>

He goes on to comment that average citizens are more likely to encounter relevant legislation through brochures, information pamphlets and other secondary sources. Text aside, he notes that the average citizen also encounters problems connected with locating the latest version of legislation, and that done, understanding concepts of law. Thus whilst these comments may support the advocates of remote and specialised language for legislative purposes, Robinson believes that the benefits of increased readability of legislative text for actual users, flows down the line to other potential but unforeseen users.

Robinson makes a further comment in connection with another group of users – the judiciary. He says ‘... [J]udicial attitudes can change over time. Judges may even warm to plain language after giving it an initial frosty reception.’<sup>155</sup>

Thomas commented in 1985 that:

... there is a particular need to concentrate on improvements to those statutes which affect daily life – housing, employment, social security, consumer protection – where access to legal services is very limited.<sup>156</sup>

In support of this view he notes that ‘... The starting point is to be found in ...’ what he considers to be ‘... the most important (and most neglected) recommendation of the Renton Committee – that the interests of ultimate users should always have priority.’<sup>157</sup>

In connection with accessibility to law, Professor Burrows noted that:

... Parliamentary Counsel Office in New Zealand maintains a “best seller” list which shows that some statutes are in high public demand. High on the list are employment-related statutes. Plain drafting makes statutes much more accessible to those people.<sup>158</sup>

He goes on to say:

However, statutes will always be directed to lawyers as well. When difficulties arise lawyers get involved and take charge of what the language of the statute means, and how it applies to the case in question. However, lawyers read statutes differently from

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<sup>154</sup> *Op. cit.*, p. 8.

<sup>155</sup> *Op. cit.*, p. 15.

<sup>156</sup> Thomas, R. *Op. cit.*, p. 149.

<sup>157</sup> *Ibid.*

<sup>158</sup> Burrows, J. (2004). *Op. cit.*, p. 6.

non-lawyers. They read them in the context of the law as a whole, both past and present.<sup>159</sup>

In the context of plain legal language, George Tanner asks:<sup>160</sup>

Does it matter then how the statute is drafted? As long as lawyers and judges can make sense of it, does it matter whether anyone else can?

He responds to his own question by saying that:

There is not much force in these kinds of arguments. Legislation has a far wider readership than the plain language sceptics realise. Statutes and regulations that regularly show up on the list of “best sellers” deal with topics like early childcare centres, local government, holidays, employment law, health and safety in employment, privacy, fencing, and sale of liquor. None of this is necessarily “lawyers’ law”.

A strangely useful comment on the effectiveness of the changes in New Zealand drafting practices is that of the Right Honourable Sir Kenneth Keith of the Supreme Court of New Zealand (New Zealand’s highest court). His Honour asked<sup>161</sup>: ‘Have the changes helped make the law more accessible? Or have they introduced confusion and doubt?’ In response to his rhetorical question he replies<sup>162</sup>: ‘My sense is that many users of the statute book have barely noticed the change if at all. That is one measure of success.’

Williams has a similar response. In posing his rhetorical question ‘do *shall*-free texts work?’ he responds:

As far as it can be determined, they do work. To date (2006), a review of the literature on the subject would seem to suggest that there has been no strong objection from the legal communities where such texts have been drafted. Neither have I found cases to date where judges have had problems in interpreting these new-styled texts.<sup>163</sup>

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<sup>159</sup> *Ibid.*

<sup>160</sup> Tanner, G. (2004). *Op. cit.*, p. 10.

<sup>161</sup> Keith, K. (2004:14).

<sup>162</sup> *Ibid.*

<sup>163</sup> Williams, C.J. (2006:244).

## 6 EU LEGAL SYSTEM AND LEGISLATION

As a relatively new phenomenon, the EU has a relatively new legal system. Unlike the civil law and Common Law legal systems, the legal system of the EU is 'designed' whilst drawing from the traditions of Roman law, and particularly since accession of the United Kingdom in 1973, with some influence from the Common Law, particularly in the area of attention to precedent. English is the language for much, if not most, of the draft legislation of the EU, and thereby acts as the base of much of the post-enactment translation into the official languages. Further, all EU legislation exists in an English language version. Translation issues and reliance on English language versions, or use of English as a pivot language, or by legislative subjects without native-speaker mastery of the language, magnify the problems of clarity discussed above within the context of jurisdictions where English is the native tongue. Orban<sup>164</sup>, in speaking of text generally with the EU, comments that '... if a passage is ambiguous, translators have to verify if the ambiguity is intentional' and that '... the clearer the original, the easier the translator's job and the less risk of an incorrect rendering of what is written in the original text.' Glézl identifies<sup>165</sup> that '... the translation process necessarily creates mistakes and the final official language versions of the Community instruments are many times not identical in their meaning.' He suggests that this '... creates an environment of legal uncertainty for those who should benefit from Community law – i.e. individuals...' and that '... The results of such mistakes in legislation can have an impact on the rights and obligations of the addressees of Community law.'

In a reverse position EU legislation could become a part of the legislation of the United Kingdom by direct effect or transposition. In that way it is possible for the law to be adopted as drafted without alteration of the language; this method of adoption is known as 'copyout'. If copyout is adopted, the legislation is not harmonised and there is a risk that substantial effect will not be achieved. Further, in the event of a challenge to the interpretation of such law, the principles of construction to be applied are those of the Court of Justice of the European Communities and not those of the Courts of the UK. Thus there is an element of complexity added to legal regulation within the UK that is not present in those Common Law jurisdictions outside the direct influence of European Union law.

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<sup>164</sup> Orban, L. (2009:9).

<sup>165</sup> Glézl, A. (2007:3).



## 6.1 *Shall* in EU legislation

It has been identified above that *shall* is problematic in legislation within English-speaking Common Law jurisdictions. This Paper now considers the position of *shall* when extrapolated into the EU jurisdiction and legislative text. *Shall* is extensively used in EU legislation; its use is unquestionable.

By way of example, Williams<sup>166</sup> identifies that in the English version of the European Constitution there are 3190 instances of *shall*. He also notes that its use is increasing in EU directives from ‘... over 25% of all finite verbal constructions in texts from 1972-1975 to over 28% in texts from 2003-2005’<sup>167</sup>.

In a useful examination of legislative language in the EU, Foley<sup>168</sup> looks at the roles and needs of the lay reader, the legislator and the linguist, with particular focus on understanding deontic modals in legislation. He identifies<sup>169</sup> that the lay reader is concerned with readability, the legislator with unambiguous and consistent application of the law, and the linguist with the ability to describe the law. Perhaps to this should also be added the interests of the translator in translating the law.

Foley stresses the importance of the role of deontic modal verbs as they carry the essential legislative roles of obligation, permission, and prohibition. In discussing *shall* he identifies its legislative use both stylistically to give a legal *feeling* to text, as well as its modal use as conveying obligation, even though such use is now considered to be obsolete in the general language. Working from a personally compiled corpus of EU terms in legislation (which he has titled EULEG<sup>170</sup>), Foley identifies extensive stylistic use of *shall* such that it is so over-used as not to be realistically imposing an obligation, and that its stylistic use is such that it often has more than one meaning, or in fact lacks meaning altogether.<sup>171</sup> On this basis, he suggests that its use breaches fundamental drafting laws:

[T]he competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one

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<sup>166</sup> Williams, C.J. (2006:239).

<sup>167</sup> *Ibid.*

<sup>168</sup> Foley, R. (2002) ‘Legislative Language in the EU: The Crucible’.

<sup>169</sup> *Op. cit.*, p. 361.

<sup>170</sup> EULEG. A corpus of EU primary and secondary legislation (EULEG) compiled by Foley for research on modality in EU Legal English and described in Foley, R. (2001). ‘Going out in Style? *Shall* in EU legal English.’

<sup>171</sup> Interestingly this stylistic use of *shall* is not in Garner’s list (see FN68). Perhaps because it has no ‘meaning’.

sense ... In brief, he always expresses the same idea in the same way and always expresses different ideas differently.<sup>172</sup>

Foley identifies four uses of the modal *shall* which breach Dickerson's rules:

1. Where *shall* has no deontic force.
2. Where there is a conflict between *shall* and *may*.
3. Where there is a conflict between *shall* and *must*.
4. Where there is interpretive conflict.

As to the first, Foley considers the appropriate drafting guidelines to be as set out in Thornton, who states that *shall* should not be used in its temporal (future) meaning<sup>173</sup> and that it should only be used 'when an obligation is to be imposed on a person'<sup>174</sup>. Applying his EULEG corpus Foley found that whilst in British statutes some 45% of uses of *shall* were not imposing obligations on persons, the greatest misapplication of the legislative drafting rules in EU legislation related to temporal meaning, and was most commonly found in the definitions section of EU legislation. He comments:

Whereas the use of *shall* in definitions can be considered a formulaic 'bad habit', instances such as the following show a deeper carelessness:

(11) If it sees fit, the authority shall seek the views of data subjects or their representative.<sup>175</sup>

As Foley points out, the use of *shall* in this legislative text imposes no obligation, nor does it give permission; as such it has no deontic force, and 'seeing fit' is itself discretionary. He concludes that:

... semantically void, stylistic uses of *shall* pose a risk to transparency in that the reader may construe them as imposing obligation where none is intended.<sup>176</sup>

Perhaps it could be added to the comments of both Foley and Thornton that in order for *shall* to be truly deontic, not only should an obligation be imposed, but that it should in some way be punitively enforceable. It is difficult to envisage a situation in which enforcement action would be taken against the authority in the sample provision (11) above.

As to the second point, Foley takes as his drafting rule the meaning given to *shall* in Black's Law Dictionary<sup>177</sup>, namely that in legislative use *shall* denotes obligation. However

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<sup>172</sup> Foley, R. (2002:366) quoting Dickerson, R. *The Fundamentals of Legal Drafting*.

<sup>173</sup> Thornton, G.C. (2005:103).

<sup>174</sup> *Op. cit.*, p. 367.

<sup>175</sup> *Op. cit.*, p. 368.

<sup>176</sup> *Ibid.*

<sup>177</sup> Foley is referring to the 1998 edition.

commentary in Black's notes that in terms of usage, *shall* and *may* are interchangeably used, leading to ambiguity.

On the third issue – *shall* v. *must* – Foley introduces the debate between those who consider *shall* the appropriate modal to impose obligation on a person, and *must* for conditions precedent or subsequent. He gives the following sample sentences<sup>178</sup>:

For *shall*:        Upon your return, you shall report to the Agency your activities while abroad ...

For *must*:        The report must include details of your activities while abroad.

He notes that the counter-position is that this is not a valid distinction in legal text and that the appropriate choice is *must* in both categories; the basis being the general language.

As Foley suggests, if the position is unclear within the legal profession then lay readers have little chance of clear understanding.

Finally, Foley addresses a conflict between the legal profession's understanding of the meaning of *shall* and the understanding within modern linguistics. Some lawyers argue that *shall* can only be used where a human agent is the subject of the sentence; others argue that it cannot be used where the obligation is imposed on an abstract thing. The linguists argue that such views are not based on rules of syntax and semantics and that it is a further example of the legal profession detaching meaning and use from the general language.

Dickerson himself adds a further distinction, namely where the legal obligation invoked by *shall* has a punitive effect and where it is a precondition. This distinction is readily understood by considering Dickerson's sample sentences<sup>179</sup>:

1. 'The taxpayer shall file his return before April 16' – obligation with punitive effect;  
and
2. 'The Secretary of State shall be a Citizen of the United States' – precondition

The distinction is clearly important. Dickerson considers that the different usages between the general language and legal language are such that its usage in legal text needs a rule. His suggestion is to use *shall* where there is punitive effect, and to use *must* where there is a condition precedent. But does this really solve the problem, or is it artificial? It seems to lack clarity for the lay reader, and in fact also for the legal profession who may not be aware of the rules of legal drafting and, consciously or sub-consciously, take their cues from legislation. Dickerson goes on to consider a number of grammatical usages and guidelines,

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<sup>178</sup> *Op. cit.*, p. 369.

<sup>179</sup> Dickerson, R. (1990:144).

but once again, one asks if these distinctions really achieve the aim of clarity when so few native speakers of English are truly grammar literate.

Dickerson raises a further issue, namely the conflict that occurs in drafting guidelines, not only between State legislatures (in the US) but also often between regulatory bodies in the same State. It is suggested that his attempts to find a clear solution, and clear guidelines, seem only to further muddy the water.

More specifically, and perhaps more appropriately within an EU legislative context, Foley asks 'whether a modal is appropriate in the first place<sup>180</sup>. (This is perhaps echoing the view of Daigneault<sup>181</sup> who takes a circumventory approach.)

Foley considers Kimble's<sup>182</sup> review of US litigation of the modals *shall* and *must* in which the latter concluded:

In summary, I'm afraid that shall has lost its modal meaning – for drafters and for courts. Drafters use it mindlessly. Courts read it any which way.<sup>183</sup>

Kimble cites<sup>184</sup> the circuitous and unhelpful judgment of the Court in *Vale v. Messenger*<sup>185</sup> which only adds to the confusion, and as Foley suggests, to the cost of understanding the laws that bind us.

Like Glézl and Segal, Foley also considers the translation implications of modal verb use in legislation and notes that there has not been any interpretive challenge of the word *shall* in EU legislation at this stage. Consideration of the translation implications is clearly an important one within the EU, but it is also an area which has had little consideration outside the EU, simply because translation of legislative text tends not to be an issue in the effectively monolingual jurisdictions of English language Common Law legislative text (Canada of course excepted).

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<sup>180</sup> *Op. cit.*, p. 371.

<sup>181</sup> Daigneault, E.W. (2005).

<sup>182</sup> Kimble, J. (1992).

<sup>183</sup> Kimble, J (1992) in Foley, R. *Ibid.*

<sup>184</sup> The passage cited by Foley (Foley, R. *Ibid.*) is set out in full as it illustrates the oft-cited view that sometimes *shall* means *may* and sometimes *shall* means *must*:

The word *may* is construed to mean *shall* whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word *shall* may be held to be merely directory, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to the individual, by giving it that construction. But, if any right to anyone depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, when no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely.

<sup>185</sup> *Vale v. Messenger* 236 Iowa 669.

It is perhaps appropriate to consider the guidelines on use of *shall* and other deontic modals (as appropriate) within the EU together with commentaries on usage.

## 6.2 Legislative drafting guidelines for the EU

Within the EU there was a Policy commitment in 1998 to improved legislation. This was formalised by the *Institutional Agreement on better law-making*. This Agreement, amongst other things, undertakes ‘... to produce legislation that is clear, simple and effective.<sup>186</sup>’ Flowing from this Agreement is the key document for applied legislative drafting within the EU - the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions* (Joint Practical Guide). Its objectives are to make Community legislation ‘better understood’ and ensure that legislation is drafted:

... in an intelligible and consistent manner ... so that citizens and economic operators can identify their rights and obligations and the courts can enforce them...<sup>187</sup>

It seeks to achieve its objectives by providing common guidelines for the three main regulatory bodies of the EU. It looks beyond those boundaries by seeking to:

... serve as an inspiration for any act of the institutions, whether within the framework of the Community Treaties or within that of the titles of the Treaty on European Union relating to the common foreign and security policy and police and judicial cooperation in criminal matters.<sup>188</sup>

It is intended to be a document subject to ongoing revision and to be used in conjunction with existing manuals and guidelines of the various institutions.

Thus in general terms it addresses the problem identified by Dickerson (above) in connection with inconsistent guidelines being applied within a single jurisdiction.

As to the earlier discussion about the target reader of legislation the *Joint Practical Guide* states that:

1.1 The drafting of a legislative act must be:

- ...
- Precise, leaving no uncertainty in the mind of the reader.

and that

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<sup>186</sup> *Interinstitutional Agreement on better law-making*. Cl 25.

<sup>187</sup> *Joint Practical Guide*. Preface, p. 5.

<sup>188</sup> *Op.cit.*, p. 6.

1.2 This common-sense principle is also the expression of general principles of law such as:

- The equality of citizens before the law, in the sense that the law should be accessible and comprehensible for all

The stated intention and readership seems ambitiously clearly stated.

More specifically in connection with modal verb use the *Joint Practical Guide* is a document of some concern in light of the discussion above. The *Joint Practical Guide* itself contains 96 uses of *shall*. It does not include a section dedicated to modal verb use, but rather makes recommendations on legislative form. At the outset it states:

2.3.2 In the enacting terms of binding acts, French uses the present tense, whilst English generally uses the auxiliary 'shall'. In both languages, the use of the future tense should be avoided wherever possible.

However, from the earlier comments on contemporary Common Law legislation one is left to question the veracity of whether in fact '...English generally uses the auxiliary 'shall'.'

Further in conflict with Clause 2.3.2, the *Joint Practical Guide* appears not to heed its own recommendations. In connection with the implementation of directives at a future time it provides the following guideline:

20.16 ...

Example:

'Member States [shall take the necessary measures] [shall bring into force the laws, regulations and administrative provisions necessary] to comply with this Directive by ... at the latest.'

And again in a requirement to Member States to do something in the future, but before a certain set date, it recommends:

20.17 ...

Example:

'Member States shall adopt and publish before ...' (a future date).

Similarly, it recommends the following phrases to express dates in the future which mark commencement of validity:

20.19 ...

- ...
- shall take effect on ...
- shall have effect from ...
- shall enter into force on ...

and in connection with future dates of expiry:

20.26 ...

- ...
- shall expire on
- shall cease to apply on ...

A final issue is that the *Joint Practical Guide* appears to introduce a further use of *shall* and further complexity by recommending its use for retroactive application – a future provision for something to take effect from a past date. The sample provision is provides as follows:

20.11 ...

This Regulation shall enter into force on (the day/nth day following that of its publication in the *Official Journal of the European Union*). (a future date)

It ... shall apply from ... ( a past/retroactive date)

One questions whether in this respect the *Joint Practical Guide* is achieving its own objectives and those of the *Institutional Agreement*.

Given what appears to be a still-muddled situation at an institutional level within the EU it may be appropriate to consider commentary from two sources, first those within the EU bureaucracy, and secondly independent commentators looking at it from without.

Commentary from within is represented by the *Legal Revisers Group*, a team from within the Legal Service of the European Commission the members of which:

bear primary responsibility within the Commission for the quality of drafting of Community legislation ... The Legal Revisers check that the correct legal terminology is used and the legal implications are the same in each official language. They also provide guidance on drafting matters and offer drafting training<sup>189</sup>.

William Robinson, a coordinator of the Group, in a paper representing his personal views<sup>190</sup>, highlighted the translation issues mentioned above by Glézl and others, stating that ‘... [D]rafters have to avoid untranslatable expressions and elliptical constructions or short cuts that would entail explanation in other languages...’<sup>191</sup>. In relation to modal verbs he remarks:

In English, ... degrees of obligation may be expressed by a variety of verbs such as ‘shall’, ‘must’, ‘should’, ‘ought to’, ‘have to’, ‘are to’, or ‘will’ which do not all have direct equivalent in all other languages.<sup>192</sup>

Unfortunately Robinson did not offer any suggestions or solutions to either drafters or translators in this regard.

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<sup>189</sup> See [http://ec.europa.eu/dgs/legal\\_service/legal\\_reviser\\_en.htm](http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm) (last accessed 25 April 2010).

<sup>190</sup> Robinson, W. (2008).

<sup>191</sup> *Op cit.*, p. 13.

<sup>192</sup> *Ibid.*

Comment on drafting within the EU would not be complete without considering the views of Martin Cutts<sup>193</sup>, scathingly referred to by Bennion (above).

Cutts' starting point is that European law should be clear for two main reasons. The first is the translation issue; one which affects clarity in national law of Member States. Secondly he considers the reader, whom he identifies as '... every person of reasonable intelligence and literacy'<sup>194</sup>. The reader, he reasons, should have sufficient understanding of the law not to require interpretation by lawyers, and when legal advice is required, readers should have sufficient grasp of the issues to be in a position to adequately instruct their lawyers.

To put his general statements into practice Cutts applied his principles to rewriting the toy safety directive<sup>195</sup>.

In the process of the redraft Cutts identified *shall* and *must* being used in the original for the same purpose<sup>196</sup> and commented that *must* is becoming more common, repeating much of the argument identified throughout this Paper.

In a significant commentary on the Safety of Toys rewrite entitled *Clarifying EC Regulations*<sup>197</sup> the authors' subtitle is significant: '[W]e have to close the gap between Europe's institutions and its citizens. People want a Union they can understand.' Other issues aside, the redraft adopts *must* to impose obligation throughout and *is to be* or the present tense, for present intention. The language of the redraft was based on an overriding objective of clarity, using language, where appropriate, of contemporary use within the general language.

### 6.3 Testing *shall* in EU legislation

In a further applied approach, Dr Edwin Tanner<sup>198</sup> subjects an EU directive to a test of 'clear, simple, and precise legislative drafting', drawing from Cutt's experience with the *Safety of Toys Directive*. Tanner challenges the European Commission Legal Service which criticised

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<sup>193</sup> Cutts is a renowned advocate of plain language and plain Legal English and has written in depth on clarity in legislation within the EU, together with Emma Wagner, a head of department in the European Commission's translation service.

<sup>194</sup> Cutts, M. (2002a:11).

<sup>195</sup> Council Directive of 3 May 1988 on the approximation of the laws of the member States concerning the safety of toys (88/378/EEC).

<sup>196</sup> Cutts, M. (2001:13).

<sup>197</sup> Cutts, M. and Wagner, E. (2002).

<sup>198</sup> Tanner, E. (2006).



Cutts' redraft<sup>199</sup> on the basis that the Commission's plain language guidelines<sup>200</sup> post-dated the Directive which Cutts had selected for redrafting; the implication being that they now draft more clearly. To test this Tanner applied Butt and Castle's guidelines of 2001<sup>201</sup> to Directive 2002/2/EC and concluded that '... the drafters (within the EC) have not yet mastered the skill of writing in "clear, simple, and precise language"<sup>202</sup>.

In a detailed text analysis Tanner identified<sup>203</sup>, amongst other things, 22 deontic modal uses of *shall* and five non-deontic modal uses in Directive 2002/2/EC which are included in his list of 'flawed drafting practices'. Amongst his concluding remarks he comments:

The difficulty is compounded by ... the continued use of peculiar linguistic conventions. These include ... the use of 'shall' both as a deontic modal and as an indication of the future...<sup>204</sup>

In support of Cutts, Tanner comments that:

If Directive 2002/2/EC is typical of the European Commission's Legal Service drafting practise, then it has serious problems with 'legalese'. Worse still, Article 1.4.2, for example, is gobbledygook. All other criticisms made by Martin Cutts in his 2001 Paper apply equally to Directive 2002/2/EC.<sup>205</sup>

Foley comments that lawyer-linguists now check modal use in EU legislation and in the process '... would filter out spurious, stylistic cases of *shall*, such as those frequently found in definitions.'<sup>206</sup> Foley's comment would also seem a reasonable response to Clause 6.2.2 of the *Joint Practical Guide* which states:

6.2.2 Words must be used in their ordinary sense. If a word has one meaning in everyday or technical language, but a different meaning in legal language, the phrase must be formulated in such a way as to avoid any ambiguity.

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<sup>199</sup> This redraft and Cutt's commentary on it in Cutts, M. (2001) led to a defensive and emotional divide by the European Commission's Legal Service which refused to distribute Cutts' commentary.

<sup>200</sup> Issued by the Legal Services of the European Parliament, of the Council and of the Commission 16.3.2000.

<sup>201</sup> Butt, P. and Castle, R. (2001). Now in a 2<sup>nd</sup> edition (see References).

<sup>202</sup> *Op. cit.*, p. 150.

<sup>203</sup> *Op. cit.*, Table 1.

<sup>204</sup> *Op. cit.*, p. 175.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Op. cit.*, p. 372.

## 7 ANALYSIS OF THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE<sup>207</sup>

As a further applied test of the issues discussed above, this Paper now proceeds to analyse the use of *shall* in the *Unfair Commercial Practices Directive* which is attached as Appendix C<sup>208</sup>.

This Directive has been selected as not only does it show representative use of *shall* but also it falls within the category of legislative texts which affect non-specialist citizens of the EU. Such text might reasonably be expected to be readily understood by the average commercial consumer within Europe, together with non-European citizens dealing with EU businesses. The text includes 45 instances of *shall* thereby providing a useful representative sample to test and comment on meaning and use.

In addition, the chosen Directive post-dates Foley's comments above, and both Cutts' and Tanner's analyses.

The Directive is presented in Appendix C with a Text Analysis in Appendix D. The two Appendices have been interlinked by the footnotes in Appendix C. The footnoting discusses both the apparent intended use by the original drafters as well as the reasoning for replacement of *shall* with alternative forms by the present author.

From the Text Analysis it can be clearly seen that *shall* has been used inconsistently, and for different purposes in the legislative text. Of particular concern to clarity are the mixed function possibilities which represent 11/45 instances – almost 25%. By removing *shall* from the replacement text there is a clear division between *must* and *may* reducing some of the potential confusion caused by the use of *shall*. The non-deontic present tense replacements are in line with the drafting recommendations that legislation should speak in the present. Of concern however are the 11 identified instances where the text was not sufficiently clear. In these cases it may be that two or more options were possible. In some instances logic may rule. However the lack of clarity leaves either the reader, legal adviser,

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<sup>207</sup> DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

<sup>208</sup> The Preamble has not been annexed as it contained no instances of *shall*.

judge or another third party to guess or interpret the intention of the drafter.<sup>209</sup> Putting aside arguments for or against plain language in legislative drafting, replacement of the word *shall* seems immediately to contribute to precision. As Hunt<sup>210</sup> asks, 'Does Plain Language Equate with Clear Language?' and rhetorically responds '... [C]lear language is that which is unambiguous and is capable of only bearing the meaning intended by the author. Plain language in (*sic*) not necessarily clear language.'

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<sup>209</sup> Note that The *Unfair Commercial Practices Directive* is currently under review. No amendments have been made at 30 April 2010 in connection with use of deontic modals.

<sup>210</sup> Hunt, B. (2002:6).

## 8 WHY IS THE EU 'SHALL-RESISTANT'?

If then, time and again it is shown that the use of *shall* in EU regulatory texts is flawed, why is there not change?

Foley's comments on improved mechanisms with EU legislative drafting have implications both for deontic modal use and also for the wider issue of translation accuracy. He notes that within the current projects for machine translation there have been attempts to streamline and make accurate '... the deontic senses of permission, compulsion and obligation, the idea being that one form and one form only should be assigned to each for each language'<sup>211</sup>. Whilst this does not advocate its abolition, it does realign modal use with the drafting rule of ensuring that each word has a single meaning. However the analysis of The *Unfair Commercial Practices* Directive shows that what is being talked about is not being put into practice.

Perhaps akin to this, Glézl<sup>212</sup> discusses the concept of a '... single general reference language for Community legislation and for the Court's judgements...' and suggests that this '... could solve the existing problem of legal uncertainty...' He acknowledges however the idealism of this concept, at least in the foreseeable future, and concludes his discussion with a plea that '... it is most important that at least lawyers are trained to understand the most widely used drafting languages of Community legal instruments...'. However is a single general reference language inviting further lack of precision? Who, outside a small group are going to understand the nuances of a sort of EU legal Esperanto, if that is what Glézl is suggesting?

Williams, whilst acknowledging the arguments justifying the abolition of *shall* from legislative texts<sup>213</sup> advocates a compromise position of defining the semantic boundaries more precisely in order to remove some of the 'hostility towards it'<sup>214</sup>. One wonders however whether this softly, softly approach would in fact work? In a further comment Williams sees<sup>215</sup> much of the problem lying with poor drafting. Again one question whether training

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<sup>211</sup> *Op. cit.*, p. 373.

<sup>212</sup> Glézl, A. (2007:9-11).

<sup>213</sup> Williams, C.J. (2006:249).

<sup>214</sup> *Op. cit.*, p. 251.

<sup>215</sup> *Op. cit.*, p. 252.

alone will solve a problem, especially in light of positive results, or at least not negative results from the Southern jurisdictions of the North/South divide.

Is there a lack of vision and direction in Brussels? In the words of Sir Geoffrey Bowman QC a former First Parliamentary Counsel of the UK ' ... I know that the legislative 'shall' can arouse deep passions. Some drafters are sticking to it more than others. Perhaps I had better leave it at that.'<sup>216</sup>

In practical terms Williams<sup>217</sup> also shrugs his shoulders with the comment '... [I]n the notoriously conservative world of lawmaking, calling for reforms in legal drafting is one thing, yet seeing them enacted is quite another.'

Is there an immovable pride within the Drafting Unit as seen when a linguist such as Cutts dares to criticise EU legislation?

Whether or not drafters adopt a policy in connection with 'legislative shall' is one thing. What this Paper inevitably has concluded is that a case exists for its abolition from EU legislation.

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<sup>216</sup> Bowman, G. 2006:25.

<sup>217</sup> Williams, C.J. (2006:241).

## CONCLUSION

As a matter of general principle the law should be stated as precisely as possible. Proponents of language clarity would align legislative language to contemporary language. With this in mind this study analysed the word *shall* from the perspectives of usage, grammar and meaning. It found that the usage of *shall* is now so rare in the Anglophone world that it could be regarded as an archaism; on that basis it is reasonable to conclude that contemporary legislation should not use archaic language.

Whilst certain grammar rules were extracted from categorising modal verb use, they were seen to be extremely complex and confusing. The Paper provided evidence to show that legislative drafters do not apply the grammar rules consistently, and the Paper suggested that most lawyers are not grammarians and that it is unrealistic to expect such complex grammar rules to be applied as a matter of course. It was seen that using alternatives to *shall* removes the problem.

Analysis of regulatory text identified that there is an extraordinarily high incidence of the use of *shall* in traditional legal text. This alone showed that there is a case to better-align legal text with natural language if lay people are to understand it. One must also recall, that lawyers are generally not linguists, and legal language tends to be absorbed rather than taught within law courses.

The consideration of who is the reader of legal text found a middle ground represented by those who advocate that drafters can generally identify a likely non-expert readership. By broadening the readership beyond an expert group, the argument to reform *shall* strengthens in accepting that citizens (non-lawyers and non-specialists) are considered to be potential readers of regulatory text.

As to meaning, text analysis demonstrated that *shall* can have several meanings. Evidence was tendered of the confusion caused by the use and misuse of *shall* in legislative text. Alternative forms, especially *may* and *must* do not have dual or multiple meanings. Alternatively *shall* provisions can be rephrased, or sometimes the word can be merely excised. In all cases, it is possible to take an alternative approach, leading to immediate clarity.

A survey of Common Law jurisdictions showed that in many, especially in the Southern Hemisphere, drafting guidelines had changed. Some had limited the use of *shall*

whilst others had effectively banned its use. When *shall* had been brought under control in some way, litigation and confusion ceased. This alone gives call to replacing *shall* with alternative forms.

The problem of implementing change was seen to be inconsistent throughout the World. Unless directed by the authoritative voice of parliament, the approach to language reform is slow and often piecemeal. Language within society is constantly changing, yet legislative language, by its very nature, preserves language. Legislative text may remain in force for one hundred years or more without amendment or repeal. Language is also a matter of pride. Older generations abhor the language that emerges with each successive generation, and much modern language is never absorbed into the lexicon of their grandparents. Legal language shares this natural characteristic in that generally it is an older group of lawyers and civil servants who 'control' the legislative language.

Within the EU it is clear that *shall* remains a feature of legislative and regulatory drafting. Drafters within the EU claim that their Revisers check modal use, however testing Directives showed evidence of inconsistency and uncertainty. This would appear to conflict with the European Commission's stated objectives of clarity in communication, and more recently with the philosophies of the Lisbon Treaty in giving more rights to the citizens of Europe.

In reviewing the two case studies analysing EU directives, together with the author's own analysis, it was found that not only were the findings of the earlier case studies evidencing lack of clarity supported, but that flaws remain, together with continuing potential misunderstanding.

The author found himself unable to support the argument for a unique EU *legislative shall* when there are clear alternatives available.

The resistance to change cannot be said to be an oversight by EU drafters as *shall* has been the subject of much debate, and the drafting practices within the EU have been publicly criticised on a number of occasions. Certainly *shall* in a declaratory sense has generally been removed from EU directives, and in that way EU legal texts have been lightened. However, as illustrated in the text analyses, *shall* remains as a feature of EU regulatory texts, perhaps even with increased frequency.

Those jurisdictions which have eradicated *shall* appear to have made the change either by an internal recognition of the problems by committees of drafters themselves, or by inspired and strong leadership from department heads, or, as in the case of the State of

Victoria in Australia, by political direction. Within the EU this internal, or external impetus for change is not currently evident.

In broader terms it is suggested that private legal documentation follows and echoes the language of legislation. The repercussions of clarifying legislative text would be likely to lead to a wave of clarity in legal text generally throughout Europe. The impact on commerce alone could be considerable in both economic terms, and in reducing the volume and expense of commercial disputes.

This micro-study is set against the macro-phenomenon that one of the inevitable outcomes of 'globalisation' is that English is now undoubtedly the Global *lingua franca* and the momentum is such that it cannot be stopped. Similarly Legal English is set to become the global legal language for communication and commerce. This is in part evidenced by the fact that all EU legislation exists in English. In another instance we see Cambridge University initiating an *International Legal English Certificate* directed at second language users. Further, English is invariably the language of contract within Europe where the parties do not share the same mother tongue. Globalising Legal English will increasingly place a demand on legislators and linguists to review and amend legal language to maximise clarity and understanding, and minimise 'fuzziness' and ambiguity.



## AUTHOR'S NOTE

### Limitations and further research

This research aimed to provide a micro-examination of *shall* in legislative settings. It leaves open to others the opportunity to examine negative uses<sup>218</sup>, together with the use of other modal forms in legislative and other legal texts.

The Paper also refers to instances where translation issues may arise; as the author is not a translator, these too may offer scope for further research and comment.

This Paper's focus is on the European Union. On that basis the 'world review' has been no more than a brief overview. The analysis of the position in the US State jurisdictions revealed that further specific and detailed research of the use of *shall* (and other deontic modals) would provide further understanding of modal verb use and clarity in legislation. Finally, *Globalisation of Legal English* is suggested as a further area for future research.

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<sup>218</sup> Foley (2002:362) refers in Footnote 4 to third party discussions of *shall not vs, may not*.

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## APPENDICES

### APPENDIX A Survey of Australian, NZ and Canadian Drafting Styles

<p><i>5.7 Here are some of the markers associated with plain English [plain language] legislative drafting style. Give brief notes of office practice.</i></p> <p><i>5.7.1 Is “must” used rather than “shall”?</i></p>	
ACT	<p>“Yes. “Shall” is never used. But not all uses of ‘shall’ replaced by ‘must’ (alternatives: present tense for statements of law; passive ‘is to’ if imperative not appropriate). <i>Legislation Act 2001, s. 146 defines ‘may’ and ‘must’.</i>”</p>
Cwlth QLD	<p>“Yes. ‘Shall’ is never used. Replaced by ‘must’ wherever grammatically appropriate. Up to the legislative counsel to find an alternative otherwise.”</p>
Cwlth OPC	Yes, always.
NSW	“You must not use shall!”
NT	Yes
Qld	Yes. When appropriate, “shall” is also changed to “must” when principal legislation is amended.
SA	Yes
Tas	“Yes. <i>Acts Interpretation Act 1931</i> [s 10A] defines ‘must’, ‘is to’ and ‘may’.”
Vic	“Yes, 1985 (Attorney-General Jim Kennan’s insistence), for obligation. Most legislative counsel stopped using ‘shall’ entirely. But recently use of ‘shall’ for obligation is re-emerging.” <sup>219</sup>

<sup>219</sup> This ‘re-emergence’ may well be pruned back following a Press Release of the Attorney-General for the State of Victoria dated 17 December 2009 in which it was announced that laws in Victoria were to be written in plain English from 1 January 2010, including the abolition of Latin, and Norman French words. See *Letting go of the legalese*. The Information Access Group. At [http://www.informationaccessgroup.com/news\\_legalese.html](http://www.informationaccessgroup.com/news_legalese.html) (accessed 4 April 2010).

WA	"Shall" is avoided. "Must" or an alternative is used instead sometimes, but not always.
NZ	"Must" or alternative used instead of "shall", except for Royal Warrants and associated regulations for military medals.
Ontario	No. Disagree with Eagleson etc. rationale for change.

## APPENDIX B Analysis of US Drafting Manuals

### ALABAMA

Rule 8. Use of "Shall," "May," and "Must"

(a) A duty, obligation, requirement, or condition precedent is best expressed by "shall" rather than "must." In no event should "shall" and "must" be used interchangeably in the same bill.

(b) Use "may" to confer a power, privilege, or right.

#### Comment:

This is poorly expressed as it allows drafters to use *shall* for all of a 'duty, obligation, requirement, or condition precedent'. Broad application is likely to lead to misinterpretation as the meaning of *shall* is not restricted within the limits of the American Rule<sup>220</sup>.

Additionally, the recommendation does not state whether or not the duty is to be imposed on the subject.

### ALASKA

(g) "May," "shall," "must"

Use the word "shall" to impose a duty upon someone. The Alaska Supreme Court has stated that the use of the word "shall" denotes a mandatory intent. *Fowler v. Anchorage*, 583 P.2d 817 (Alaska 1978).

Use the word "must" when describing requirements related to objects such as forms or criteria. (Use "must" sparingly, however, because most sentences using it can probably be written more clearly to impose a duty on a person, in which case "shall" would be the proper word.) Use the word "may" to grant a privilege or discretionary power. *Rutter v. State, Alaska Board of Fisheries*, 963 P.2d 1007 (Alaska 1998), p. 5.

#### Comment:

Applies the American Rule.

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<sup>220</sup> As stated in the body of this Paper, Garner's 'American rule', restricts the meaning of *shall* to one sense, specifically where it means 'has a duty to'.

## DELAWARE

### RULE 8. USE OF "SHALL," "MAY," AND "MUST."

(a) A duty, obligation, requirement, or condition precedent is best expressed by "shall" or "must:"

(1) Use "shall" if the verb it qualifies is a transitive verb in the active voice.

**Example:** "The aggrieved party *shall file* the application."

(2) Use "must" if the verb it qualifies is an active verb in the passive voice, or is an inanimate verb, or if the subject is inanimate.

**Examples:** "Any prior convictions *must be set forth* [active verb in the passive voice] in the application." "The applicant *must be* [inactive verb] an adult." "The order [inanimate subject] *must state* the time and place of the hearing."

(b) Use "may" to confer a power, privilege, or right.

#### Comment:

As with Alabama, this recommendation allows drafters to use *shall* for all of a 'duty, obligation, requirement, or condition precedent'. Broad application is likely to lead to misinterpretation as the meaning of *shall* is not restricted within the limits of the American Rule.

Unlike Alabama, the recommendation is stated to be imposed on the subject (used with transitive verbs).

## FLORIDA

### Distinguish between "shall" and "may"

"Shall" imposes an enforceable duty and is generally mandatory. Don't use "will" when you mean "shall."

"May" authorizes or grants permission and is usually permissive.

#### Comment:

Effectively follows the American rule, though it uses the word 'generally'.

## ILLINOIS

Paragraph entitled: VANTAGE POINT

A bill is a proposal. What the bill proposes is that the General Assembly and the Governor

take the appropriate actions so that the language of the bill becomes law. Once the bill becomes law it is an Act of the General Assembly.

When a person drafts a bill, that person is tempted to assume the vantage point of what is then the present, the time at which the bill (a proposal) is being drafted. Thus, the drafter will write in the future tense having in mind that the bill will become law or the situation being written about will occur on a later date. For example, "A person who shall violate this Section shall commit a Class 1 felony." This is wrong.

An Act speaks continuously and should generally be written in the present tense. When an Act is applied years after it becomes law, it is something that speaks then and there. Thus, a drafter should write the language of a bill from the vantage point of any time when the Act is being applied (the then present) rather than from the vantage point of the time at which the bill is being drafted. For example, "A person who violates this Section commits a Class 1 felony."

The last example eliminates the use of "shall" in the future tense. "Shall" is properly used, however, to indicate that something is mandatory: "The court shall sentence the defendant to perform 10 hours of community service."

**Comment:**

By eliminating the future tense use of *shall* the Manual would appear to adopt the American rule, however it makes no mention of the other meanings of shall.

**INDIANA**

**(10) Commanding, Authorizing, Forbidding, and Negating**

To create a right, say "is entitled to".

To create discretionary authority, say "may".

To create a duty, say "shall".

To create a condition precedent, say "must".

To negate a right, say "is not entitled to".

To negate discretionary authority, say "may not".

To negate a duty or a mere condition precedent, say "is not required to".

To create a duty not to act, say "shall not".

[From: Dickerson, F.R., Legal Drafting, West Publishing Company (1981), p.182]

**Comment:**

Limits the use and meaning of *shall* thereby following the American Rule.

## KENTUCKY

### Sec. 303. Use of "Shall" and "May"

A duty, obligation, or prohibition is best expressed by "shall," and a power or privilege is best expressed by "may." "Shall" should never be used to express the future. Its proper function is mandatory, and generally its use is permissible only when "must" or "has a duty to" could be substituted. In statutory usage "shall" does not denote the future tense any more than "may" does.

#### Comment:

Similar to the position in Alabama, but without reference to the use of *shall* for conditions precedent. Some limitation of use, though not limited to a single meaning as is suggested by the American rule.

## MAINE

### Section 1. Legal action verbs: shall, must and may.

In stating the legislative objective, the drafter must pay particular attention to the verb forms used to direct, limit or permit action or inaction.

#### A. Mandatory and permissive language.

(1) **Shall.** Although "shall" is somewhat uncommon in general English usage, it may be used correctly in legal drafting. Drafters, however, must pay close attention to the proper use of "shall." Below are examples of the proper and improper use of "shall."

(a) **Imposing a duty.** "Shall" is properly used to impose a duty on a person or body or to mandate action by a person or body. Use it to say a person or a body "has a duty to" do something or "has to" do something.

(b) **Not in conditional sentences.** "Shall" should not be used in conditional sentences.

(c) **Not to confer a right.** Avoid using "shall" to confer a right when the recipient is the subject of an active sentence. A right should not be stated as a duty to enjoy the right.

(d) **Future law.** Similarly, don't use "shall" to say what the law is or how it applies in the future.

(e) **Definitions.** In drafting definitions:

**Do not write: Write:**

"Bottle" shall mean a container ... "Bottle" means a container ...

#### Comment:

Applies the American rule.

## MINNESOTA

### 10.8 Shall, Must, and other Verbs of Command

### **(a) Duties**

*Active voice:* To impose a duty to act, drafters have a choice between two auxiliary verbs: *shall* or *must*. Both *shall* and *must* are statutorily defined as mandatory, in Minnesota Statutes, section 645.44.

Here are two examples of their use:

The commissioner shall evaluate the report.

The commissioner must evaluate the report.

Either way, the sentence should be in the active voice, and the subject of the sentence should be a human being or a legal entity on whom a duty can be imposed.

*Passive voice:* No matter which verb is used, imposing duties with the passive voice is risky because the sentence might not make clear who has the duty to act. However, if the context makes clear who has to do it, a drafter can impose a duty in the passive voice with *must*:

"The application must be processed when the comment period has elapsed."

(This assumes that a previous sentence makes it clear who has the duty to process the application.)

Drafters should avoid using *shall* in the passive voice.

*Determining duties:* Not every sentence that has a human subject takes a *shall*. When drafters use *shall* to impose duties, they should be certain that what they are creating is really a duty.

Consider the sentence, "The board shall take any action it considers useful in overseeing investments." Does it really make sense to order the board to do what it wants to do? The statement makes more sense if it is drafted with *may*, as a permission. To test for this type of problem, try substituting *must* or *has the duty to* and see if the sentence still makes sense.

*Statements of Law and Requirements or conditions* (under this topic) are other types of sentences with human subjects that do not take *shall*.

### **(c) Permissions**

*May:* To permit an action, or to give someone discretionary authority, drafters should use *may*.

*May* is statutorily defined as permissive, in Minnesota Statutes, section 645.44.

To test whether *may* is really the right verb to use, a drafter should ask the question: Do I really intend to give this person the *discretion* to do this or not to do it? In sentences that give alternatives, *may* feels natural but can be ambiguous. For example, consider the following sentence:

The board may amend the list of wastes by adopting a resolution or by following the normal rulemaking procedure.

Does this mean that the board is free to decide to amend or not to amend? Or does it mean that the board *must* amend, but is free to choose one way to amend or the other? If the drafter really intends the latter meaning, *shall* or *must* is the better choice. *May* should be used only to leave someone free to do a thing or not.

Like *shall* and *must*, *may* in the passive voice is risky. To make clear who has the permission or authority, it is better to write in the active voice and to say that some person may seize the property than to say that it "may be seized."

Also, a passive *may* is susceptible to misreading. For example, consider the sentence, "An application submitted after the June 30 deadline *may be rejected*." Is this sentence just alerting the reader that a late application might not be approved, or is it specifically permitting the reviewer to reject it?



**Comment:**

It is hard to say how prescriptive this discursive approach is. The Manual would appear to be attempting to limit the use of *shall* but not necessarily to a single meaning.

**MONTANA**

**2-5. Shall, Must, and May.**

Avoid using will, should, and ought.

**Shall**

Use "shall" when imposing a duty on a person or entity. (Active)

*example* The licensee (department, judge, court) shall give the debtor a copy of the signed contract.

**Must**

Use "must" when the subject is a thing rather than a person or entity. (Passive)

*preferred* The information must be set forth in the application.

*avoid* The information shall be set forth in the application.

*preferred* The application must contain the applicant's name.

*avoid* The application shall contain the applicant's name.

Use "must" when the subject is a person or entity that is acted upon. (Passive)

*preferred* The judge must receive the application by the deadline.

*avoid* The judge shall receive the application by the deadline.

Use "must" to express requirements about what a person or an entity must be or have rather than what a person or entity must do.

*preferred* A candidate must be designated by the board and must be 18 years of age.

*avoid* A candidate shall be designated by the board and shall be 18 years of age.

*preferred* The nominee must meet the requirements of 37-3-305.

*avoid* The nominee shall meet the requirements of 37-3-305.

*preferred* The applicant must have a master's degree.

*avoid* The applicant shall have a master's degree.

*preferred* The members of the committee must include four physical therapists.

*avoid* The members of the committee shall include four physical therapists.

*preferred* The sheriff must become a member of the panel.

*avoid* The sheriff shall become a member of the panel.

**Comment:**

Limits the use of *shall* within the broad concept of the American rule.

**NORTH DAKOTA**

**USE OF SHALL, MUST, MAY, MAY NOT, AND IS ENTITLED TO**

**Shall** is used to qualify an active verb. **Must** is used to qualify an inactive verb or an inactive verb in the passive voice.

Use **shall** when you are imposing a duty on a person or body that is the subject in the sentence.

Use **shall** in a mandatory or imperative sense.

Example: "The licensee **shall** give the debtor a copy of the signed contract."

**Comment:**

Limits the use of *shall* within the broad concept of the American rule.

**OREGON**

6. Shall, Must and May. Generally "shall" and "must" are interpreted as imposing a duty, direction or command that something be done. "May" usually implies the presence of discretion or permission. "May" has been held to be directory where the statute prescribes a duty or grants a power to a public officer where the rights of public or third persons are affected. "Shall" has been interpreted to mean "may" where it was clear that the legislature wished discretion to be exercised. *Springfield Milling Co. v. Lane County*, 5 Or. 265 (1874); *King v. Portland*, 23 Or. 199, 31 P. 482 (1892); *Lyons v. Gram*, 122 Or. 684, 260 P. 220 (1927); 14 Op. Att'y Gen. 367 (1929); 21 *Oregon Digest*, Statutes §§199, 227.

**Comment:**

Attempts to impose the American rule, but with submission to judicial precedent. Use of the word 'generally' weakens any prescriptive force. The statement appears to be more discursive. Cannot really be said to be following the single meaning rule.

**TEXAS**

**Sec. 7.30. "SHALL," "MUST," "MAY," ETC.** Use "shall" only to denote a duty imposed on a person or entity.

...

A drafter may find the choice of whether to use "shall" or "must" difficult, particularly when using the passive voice. In general, "must" is used if the sentence's subject is an inanimate object (i.e., is not a person or body on which a duty can be imposed).

...

There are circumstances in which either "shall" or "must" is correct, and the better choice

depends on the context or point of emphasis.

**A report *must* be filed on the form provided by the agency.** (A required characteristic of a report is that it be on the form provided by the agency; a report not filed on the correct form is invalid.)

**A report *shall* be filed on the form provided by the agency.** (An unidentified person or entity has the duty to file a report on a form provided by the agency. A preferable, more direct way of emphasizing the duty would be to identify the actor, if the actor is known, and use the active voice. See Section 7.21 of this manual.)

A drafter might also choose a drafting approach that eliminates the decision of whether to use "shall" or "must." Under this approach, the provision simply states a legal fact.

**The appointee qualifies for office by taking the official oath and filing the required bond.** (The method by which the appointee qualifies for office is stated as a factual matter.)

**Comment:**

Too much discretion allowed to be able to say that the American rule applies and that meaning is limited to one meaning only.

**WASHINGTON – PART IV 1 (g)**

(g) "Shall," "may," and "must."

(i) A statute should be drafted in the present tense because it speaks at the time it is read.

Thus, the word "shall" should not be used to state a proposition in the future tense.

"Evidence is admissible . . ." is preferable to "Evidence shall be admissible . . ." See *Sutherland* § 21.10; 4 *John Marshall L.Q.* 204.

(ii) "Shall" should only be used to mean "has a duty to." That is, to require the performance of an act. For example, "the governor shall appoint a director . . ."

For a discussion of "may," "shall," and "must," see *Garner*.

(iii) To determine whether the use of "shall" or "may" is correct, a helpful test is to mentally substitute for the word "may" the words "has the authority to" and substitute for the word "shall" the words "has the duty to." This reading will make it readily apparent whether the usage is correct.

(iv) "Must" creates a condition precedent. Use "must" if the verb it qualifies is an inactive verb or an active verb in the passive voice. Examples: The applicant "must be" (inactive verb) an adult. Prior convictions "must be set forth" (active verb in passive voice) in the application.

**Comment:**

Follows the American rule. Specifically excises *shall* for future tense usage. Specifically refers to Garner's discussion.

<b>States making RECOMMENDATIONS on usage</b>	<b>States which PRESCRIBE usage</b>
<p><b>Alabama</b></p> <p><b>Delaware</b></p> <p>Florida (referred to as 'Guidelines')</p> <p>Illinois (it is not clear. However the document is headed as a 'Guide'. It's objectives are to ensure that drafters ' are not blinded by their own pride of authorship'.</p> <p><b>Minnesota</b></p> <p><b>Montana</b></p> <p><b>Oregon</b></p> <p><b>Texas</b></p> <p><b>Washington State</b></p>	<p><b>Alaska</b> (supported by case law)</p> <p><b>Indiana</b> (published under the authority of the Indiana Legislative Council. It would appear that drafters are required to follow the guidelines).</p> <p><b>Kentucky</b> (not entirely clear as to whether the Manual is prescriptive, though it aims to set standards and remove' unwarranted discretion' from drafters).</p> <p><b>Maine</b></p> <p><b>North Dakota</b> (Not stated, though the language of the Manual implies that it is prescriptive).</p>

<b>Recommend/prescribe the American Rule</b>	<b><i>Shall</i> not limited to a single meaning</b>
<p><b>Alaska</b></p> <p><b>Florida</b></p> <p><b>Illinois</b></p> <p><b>Indiana</b></p> <p><b>Maine</b></p> <p><b>Montana</b></p> <p><b>North Dakota</b></p> <p><b>Washington State</b></p>	<p><b>Alabama</b></p> <p><b>Delaware</b></p> <p><b>Kentucky</b></p> <p><b>Minnesota</b></p> <p><b>Oregon</b></p> <p><b>Texas</b></p>

## APPENDIX C Directive 2005/29/EC and Redraft

**DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 11 May 2005 concerning unfair business-to-consumer commercial practices in the  
internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC  
and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No  
2006/2004 of the European Parliament and of the Council  
(‘Unfair Commercial Practices Directive’)**

HAVE ADOPTED THIS DIRECTIVE:

**CHAPTER 1  
GENERAL PROVISIONS**

*Article 1*

**Purpose**

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests.

*Article 2*

**Definitions**

For the purposes of this Directive:

- (a) ‘consumer’ means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- (b) ‘trader’ means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;
- (c) ‘product’ means any goods or service including immovable property, rights and obligations;
- (d) ‘business-to-consumer commercial practices’ (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;
- (e) ‘to materially distort the economic behaviour of consumers’ means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken

otherwise;

(f) 'code of conduct' means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

(g) 'code owner' means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;

(h) 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

(i) 'invitation to purchase' means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

(j) 'undue influence' means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;

(k) 'transactional decision' means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

(l) 'regulated profession' means a professional activity or a group of professional activities, access to which or the pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions.

*Article 3*

### Scope

1. This Directive ~~shall apply~~ **applies to**<sup>221</sup> unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.
2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.
3. This Directive is without prejudice to Community or national rules relating to the health and safety aspects of products.
4. In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter ~~shall prevail~~ **prevails** **and** (shall) **apply** **applies to**<sup>222</sup> those specific aspects.
5. For a period of six years from 12 June 2007, Member States ~~shall be able to~~ **may**<sup>223</sup> continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.
6. Member States ~~shall~~ **must**<sup>224</sup> notify the Commission without delay of any national provisions applied on the basis of paragraph 5.
7. This Directive is without prejudice to the rules determining the jurisdiction of the courts.
8. This Directive is without prejudice to any conditions of establishment or of authorisation

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<sup>221</sup> B/G. This usage is clearly not imposing a duty, but rather appears to be fulfilling a declaratory role. Whilst this use no longer appears to be used in EU Directives (See Articles 1 and 2 of this Directive as an example), it is surprising to see its use here. Alternatively, it could be argued to be fulfilling a future role, again an unexpected use in a Directive of 2005. It can be seen to be having potential for multiple meanings. Redrafting in the present tense fulfils the modern accepted practice.

<sup>222</sup> B/G. As with FN221 the drafter may have a declaratory intention. In this case there is strong argument that *shall* is being used in a future sense as it may be referring to a future contingency. Again, drafting in the present tense removes the 'fuzziness'.

<sup>223</sup> A/E. *May* is more logical than *must* as the Paragraph appears to be giving Member States six years in which to harmonise their internal regulations. The redrafted Paragraph is clear and adds consistency.

<sup>224</sup> A/D. In this Paragraph the intention is clearly *must*. The redraft unambiguously reflects intention. Using *shall* with different meanings in each of Paragraphs 3:5 and 3:6 is an example of inconsistent drafting, even if the different meanings are clear by interpretation.

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- <sup>225</sup> B/G. Here there is clearly no deontic intention, but rather declaratory inasmuch as the drafter is defining the scope of the legislation. Again, the present tense is the practice adopted in contemporary drafting.
- <sup>226</sup> A/D. This paragraph uses a combination of a positive (*shall*) with a negative (*neither*). It is suggested that such combinations should be avoided as a matter of form. The redraft expresses the negative direction clearly.
- <sup>227</sup> B/G. The comments for FN221 apply, with the exception that it is unlikely that the drafter intended *shall* to have a future meaning.
- <sup>228</sup> B/G. The comments for FN221 apply. Unlike Paragraph 5:1 (FN227) it could be argued that a future meaning was also intended.
- <sup>229</sup> A/F. Unclear. Perhaps more likely to be *must*. Notwithstanding, it would be difficult to apply prescriptively as ‘...the perspective of the average member of that group’ is a somewhat nebulous concept. On the other hand if *may* was used it provides the subject applying the Article with an acceptable approach.
- <sup>230</sup> B/G. The usage appears to be declaratory and the comments in FN225 are also valid in this case.
- <sup>231</sup> B/G. Declaratory in the original. Present tense in the redraft. (See previous footnote discussion).
- <sup>232</sup> B/G. Declaratory in the original. Present tense in the redraft. (See previous footnote discussion).
- <sup>233</sup> C/F. In some senses this is declaratory, in which case the present tense is appropriate in the redraft. In another sense it is deontic and *must* is appropriate. The context would disallow *may*. Again *shall* contributes ‘fuzziness’.
- <sup>234</sup> C/F. Paragraph 6:2 adds further information to Paragraph 6:1 and the same comments apply as are outlined in FN233.
- <sup>235</sup> C/F. Article 7 is an extension of Article 6. The same comments apply to Paragraph 7:1 as are outlined in FN233.
- <sup>236</sup> C/F. The use of the word ‘also’ implies that Paragraph 7:2 provides further direction to Paragraph 7:1. Thus the same comments apply (FN233 & 235).
- <sup>237</sup> A/D. It would appear from the context that the deontic force of *must* is intended here.
- <sup>238</sup> C/F. The presence of the word ‘material’ implies a lack of discretion, and thus *may* would not appear to be the drafter’s intention. Further there are so many issues to take into account that Paragraph 7:4 does not seem to have the same deontic force as Paragraph 7:3. However *must* is a possibility. What seems to work best is the present tense on the basis that the drafter is defining characteristics.
- <sup>239</sup> C/F. The same logic applies as in FN238.
- <sup>240</sup> C/F. It is not clear whether this Article is intended to be deontic (in which case *must be* is appropriate), or definitional, in which case the present tense (which is recommended for declaratory meaning) would be more appropriate.
- <sup>241</sup> C/F. The same logic applies as in Article 8, and FN240 applies.
- <sup>242</sup> A/D. Whilst it would be possible here to use ... *is never to be deemed*.. the drafter appears to be imposing a strict limitation on use of alternative dispute resolution proceedings under codes of conduct, and the force of *must* would seem to be required.
- <sup>243</sup> A/D. This is clear deontic use of *shall* imposing a duty on Member States. *Must* has the same meaning.
- <sup>244</sup> C/F. The position here is the same as in Articles 8 & 9 and the comments in FN240 apply.
- <sup>245</sup> C/F. Very unclear as to whether each member State has an obligation to decide or a discretion to take action. See the use of *may* as a precursor to (a) and (b) followed by the subsequent requirement that at least one of the facilities *must* be in place. It is submitted that the Enforcement provision is poorly drafted and cannot be remedied by word substitution.
- <sup>246</sup> A/D – but see the comments to FN245 as the deontic requirement of *must* is weakened by *whether* to which implies discretion.
- <sup>247</sup> A/D. The words ‘regardless of whether’ show clear deontic force, and *must* is an appropriate substitution for *shall*.
- <sup>248</sup> A/D. At first glance the provision appears to be giving Member States discretion. However it is imposing a duty on Member States to make provisions even though Paragraph 11:1 leaves open to



regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals.

9. In relation to 'financial services', as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.

10. This Directive ~~shall~~ <sup>does<sup>225</sup></sup> not apply to the application of the laws, regulations and administrative provisions of Member States relating to the certification and indication of the standard of fineness of articles of precious metal.

#### Article 4

#### Internal market

Member States ~~shall neither~~ <sup>must not<sup>226</sup></sup> restrict the freedom to provide services ~~nor or~~ restrict the free movement of goods for reasons falling within the field approximated by this Directive.

#### CHAPTER 2

#### UNFAIR COMMERCIAL PRACTICES

#### Article 5

Member States what goes into their provisions. It is a strange provision on analysis and would be better totally redrafted.

<sup>249</sup> A/D. Paragraph 11:2 seems to highlight the paucity of drafting of Paragraph 11:1 by superimposing direction on the discretion granted in Paragraph 11:1.

<sup>250</sup> A/D. The comments in FN250 apply.

<sup>251</sup> A/D. The comments in FN250 apply.

<sup>252</sup> A/D. Clear imposition of a duty, in which *must* is appropriate.

<sup>253</sup> A/D. Clear imposition of a duty, in which *must* is appropriate.

<sup>254</sup> A/D. Clear imposition of a duty, in which *must* is appropriate.

<sup>255</sup> A/D. Clear imposition of a duty, in which *must* is appropriate.

<sup>256</sup> A/D. Clear imposition of a duty, in which *must* is appropriate.

<sup>257</sup> A/D. Sets a deadline by which a duty *must* be complied with.

<sup>258</sup> A/D This appears to impose a duty, but is a strange obligation by virtue of 'if necessary' as there is no suggestion as to when necessity applies.

<sup>259</sup> A/D Again, this appears to impose a duty but is a strange obligation by virtue of 'endeavour'.

<sup>260</sup> A/D. The Transposition requirements are obligatory and, as such *must* would be expected.

However, the final use of *shall* appears to grant discretion, in which case *may* would be appropriate. If this is a reasonable analysis, then it is a further example of mixed-meaning with the use of *shall*.

<sup>261</sup> A/D. See comments FN260.

<sup>262</sup> A/D. See comments FN260.

<sup>263</sup> A/D. See comments FN260.

<sup>264</sup> C/F. See comments FN260.

<sup>265</sup> B/G. This use could also be said to have a stylistic effect.

### **Prohibition of unfair commercial practices**

1. Unfair commercial practices ~~shall be~~ **are**<sup>227</sup> prohibited.
2. A commercial practice ~~shall be~~ **is**<sup>228</sup> unfair if:
  - (a) it is contrary to the requirements of professional diligence,  
and
  - (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.
3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, ~~shall~~ **must/may**<sup>229</sup> be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.
4. In particular, commercial practices ~~shall be~~ **are**<sup>230</sup> unfair which:
  - (a) are misleading as set out in Articles 6 and 7,  
or
  - (b) are aggressive as set out in Articles 8 and 9.
5. Annex I contains the list of those commercial practices which ~~shall~~ **are**<sup>231</sup> in all circumstances ~~be~~ regarded as unfair. The same single list ~~shall apply~~ **applies**<sup>232</sup> in all Member States and may only be modified by revision of this Directive.

#### Section 1

### **Misleading commercial practices**

#### *Article 6*

### **Misleading actions**

1. A commercial practice ~~shall be~~ **is/must be**<sup>233</sup> regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct,  
  
in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

- (a) the existence or nature of the product;
- (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
- (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
- (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- (e) the need for a service, part, replacement or repair;
- (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
- (g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (1), or the risks he may face.

2. A commercial practice ~~shall~~ **must/is**<sup>234</sup> also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
- (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
  - (i) the commitment is not aspirational but is firm and is capable of being verified, and
  - (ii) the trader indicates in a commercial practice that he is bound by the code.

*Article 7*

### Misleading omissions

1. A commercial practice shall ~~shall~~ **must/is**<sup>235</sup> be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
2. It shall ~~shall~~ **must/is**<sup>236</sup> also (be) regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall ~~shall~~ **must**<sup>237</sup> be taken into account in deciding whether information has been omitted.
4. In the case of an invitation to purchase, the following information shall ~~shall be~~ **must/is**<sup>238</sup> regarded as material, if not already apparent from the context:
  - (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
  - (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
  - (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
  - (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
  - (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, ~~shall be~~ **must be/is**<sup>239</sup> regarded as material.

## Section 2

### **Aggressive commercial practices**

#### *Article 8*

### **Aggressive commercial practices**

A commercial practice ~~shall be~~ **must be/is**<sup>240</sup> regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly **impair** the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

#### *Article 9*

### **Use of harassment, coercion and undue influence**

In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account ~~shall be~~ **must be/is**<sup>241</sup> taken of:

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
- (e) any threat to take any action that cannot legally be taken.

## CHAPTER 3

### **CODES OF CONDUCT**

#### *Article 10*

### **Codes of conduct**

This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organizations referred to in Article 11 if proceedings before such bodies are in addition to

the court or administrative proceedings referred to in that Article. Recourse to such control bodies **shall must<sup>242</sup>** never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.

CHAPTER 4  
FINAL PROVISIONS

*Article 11*

**Enforcement**

1. Member States **shall must<sup>243</sup>** ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers. Such means **shall includes/must<sup>244</sup>** include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

(a) take legal action against such unfair commercial practices;

and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It **shall<sup>245</sup>** be for each Member State to decide which of these facilities **shall must<sup>246</sup>** be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 10. These facilities **shall must<sup>247</sup>** be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.

~~It shall be for~~ <sup>248</sup>[E]ach Member State ~~to~~ **must** decide:

(a) whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector;

and

(b) whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements.

2. Under the legal provisions referred to in paragraph 1, Member States **shall must<sup>249</sup>** confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the

cessation of, unfair commercial practices;

or

(b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice, even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Member States **shall must<sup>250</sup>** also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

– either with interim effect,

or

– with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;

(b) to require in addition the publication of a corrective statement.

3. The administrative authorities referred to in paragraph 1 must:

(a) be composed so as not to cast doubt on their impartiality;

(b) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;

(c) normally give reasons for their decisions.

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions **shall must<sup>251</sup>** always be given. Furthermore, in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.

#### *Article 12*

##### **Courts and administrative authorities: substantiation of claims**

Member States **shall must<sup>252</sup>** confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:

(a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case;

and

(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.

#### *Article 13*

##### **Penalties**

Member States ~~shall~~ **must**<sup>253</sup> lay down penalties for infringements of national provisions adopted in application of this Directive and ~~shall~~ **must**<sup>254</sup> take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

#### *Articles 14-16 (inclusive)*

Omitted as they are amending provisions relating to an earlier Directive.

#### *Article 17*

##### **Information**

Member States ~~shall~~ **must**<sup>255</sup> take appropriate measures to inform consumers of the national law transposing this Directive and ~~shall~~ **must**<sup>256</sup>, where appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

#### *Article 18*

##### **Review**

1. By 12 June 2011 the Commission ~~shall~~ **must**<sup>257</sup> submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular of Articles 3(9) and 4 and Annex I, on the scope for further harmonisation and simplification of Community law relating to consumer protection, and, having regard to Article 3(5), on any measures that need to be taken at Community level to ensure that appropriate levels of consumer protection are maintained. The report ~~shall~~ **must**<sup>258</sup> be accompanied, if necessary, by a proposal to revise this Directive or other relevant parts of Community law.

3. The European Parliament and the Council ~~shall~~ **must**<sup>259</sup> endeavour to act, in accordance with the Treaty, within two years of the presentation by the Commission of any proposal submitted under paragraph 1.



*Article 19*

**Transposition**

Member States ~~shall~~ **must**<sup>260</sup> adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 12 June 2007. They ~~shall~~ **must**<sup>261</sup> forthwith inform the Commission thereof and inform the Commission of any subsequent amendments without delay. They ~~shall~~ **must**<sup>262</sup> apply those measures by 12 December 2007. When Member States adopt those measures, they ~~shall~~ **must**<sup>263</sup> contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States ~~shall~~ **must/may**<sup>264</sup> determine how such reference is to be made.

*Article 20*

**Entry into force**

This Directive ~~shall enter~~ **enters**<sup>265</sup> into force on the day following its publication in the *Official Journal of the European Union*.

## APPENDIX D Text Analysis: Directive 2005/29/EC

### DIRECTIVE 2005/29/EC

#### TEXT ANALYSIS

	Original
Instances of <i>shall</i>	45
Instances of <i>may</i>	16
Instances of <i>must</i>	5

Text analysis: Function in Original		
	Original	Instances in replacement
A	Deontic use	25
B	Non-deontic use	9
C	Mixed function possible	11

Text analysis: Replaced by		
	Original	Instances in replacement
D	Deontic modal - <i>must</i>	23 + 5 from original
E	Deontic modal - <i>may</i>	1 + 16 from original
F	Either D or E	12
G	Non-deontic: Present tense form	9

In an interesting comparison of *Shall-free* regulatory text (all from the Southern Hemisphere) and regulatory text containing *shall* (referred to in his study as 'World data'), Williams investigated how *shall* had been redistributed in the *Shall-free* data, and concluded as follows:

- a rise of almost nine per cent in the present simple, from over 43 per cent in the 'World data' to 52 per cent in the '*Shall-free* data';

- a massive increase in the use of *must*, from just over three per cent in the 'World data' to well over 13 per cent in texts where *shall* has been done away with;
- a significant rise in *may* in the 'Shall-free data', up from over 13 per cent in the 'World data' to over 18 per cent;
- a major increase in the use of the semi-modal *be to*, which constitutes less than one per cent in 'World data' but more than quadruples in the 'Shall-free data'.<sup>266</sup>

Whilst the author's text analysis differs from that of Williams, in that Williams was not himself replacing instances of *shall*, the author's analysis confirms the 'massive' increase in the use of *must* and a rise of about 20 per cent in use of the present tense. It is possible that there could be a 'significant' rise in the use of *may* if *may* was the ultimate destination of the almost 27 per cent of instances of *shall* which were not able to be clearly reallocated. The present author found no cause to resort to *be to*.

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<sup>266</sup> Williams, C.J. (2007:186).