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SETTLED PRACTICE IN STATUTORY INTERPRETATION

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ABSTRACT. *What use (if any) may be made of settled practice in statutory interpretation and what are the potential justifications for its use? Debate about the use of settled practice is often framed in terms of a tension between legal certainty, on the one hand, and legal correctness in giving effect to Parliament's will, on the other. That account presents a false choice. This article explores the use of settled practice and argues that it has a legitimate role to play in statutory interpretation and one that is consistent with the prevailing approach of the courts to statutory interpretation.*

KEYWORDS: *legislation, legislative intent, rule of law, settled practice, statutory interpretation.*

I. INTRODUCTION

This article considers what if any significance can or should be attributed to settled practice when interpreting an Act of Parliament.

A great many questions of statutory interpretation never reach the courts and, if they do, it may be years before they are authoritatively determined. In the meantime people affected by the legislation have to form their own view of what it means. Over time, a general body of practice and understanding may develop among those affected by the legislation and their legal advisers, sometimes supported by one or more decisions of the lower courts. The question that arises is whether or to what extent it is appropriate to have regard to that settled practice or understanding when interpreting a statutory provision.

While there is some judicial support for the use of settled practice in statutory interpretation, a number of reservations have been expressed by senior judges. The debate is often framed in terms of a tension between, on the one hand, the desire to promote legal certainty and protect those who have reasonably ordered their affairs on the basis of a settled understanding of

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the law, and, on the other, the fundamental duty of the courts to give effect to the legislative will of Parliament as expressed in its enactments.[1]

One of the purposes of this article is to show that it is possible to reconcile those aims. While the constitutional function of determining questions of statutory interpretation ultimately rests with the courts, that does not require them to ignore the interpretation adopted by others. The object of statutory interpretation is traditionally said to be to determine the intention reasonably to be attributed to Parliament in respect of the wording that it has chosen to enact, read in context. This article argues that settled practice provides evidence that an interpretation is sound and that it may therefore help to inform the court in determining the meaning reasonably to be attributed to the statutory text. On this account, settled practice has a legitimate role to play in statutory interpretation. The weight that settled practice deserves will, however, necessarily vary.

This article begins by considering the nature and scope of the settled practice principle. It then provides an overview of the prevailing approach of the courts to statutory interpretation and identifies the potential tension between that approach and the settled practice principle. Finally, it considers the arguments that have been or may be used to justify the use of settled practice and suggests how to resolve that tension.

II. Nature and Scope of the Settled Practice Principle

A number of contrasting views have been expressed about the nature and scope of the settled practice principle. This section considers those views and the circumstances in which the courts have sometimes been prepared to rely on settled practice. It is perhaps worth noting at the outset that the terminology used in some of the cases in this area is muddled, with the doctrine of contemporaneous exposition often being used to describe what amounts to settled practice.[2] The distinction between the two concepts is explored later in this article.

A. The Isle of Anglesey *Case*

It is helpful to begin with a discussion of the Court of Appeal's decision in *Isle of Anglesey County Council v Welsh Ministers*,[3] which illustrates the application of the settled practice principle and its potential practical significance in determining the outcome of disputes. The case also introduces

[1] This is apparent in Lord Carnwath's characterisation of the issue in *R. (N) v London Borough of Lewisham* [2014] UKSC 62, [2015] A.C. 1259, at [94]: "the debate … is about two important but sometimes conflicting principles – legal correctness and legal certainty. In drawing the balance between them, as in most areas of the law, pragmatism and indeed common sense have a legitimate part to play."

[2] E.g. in *Campbell College, Belfast v Valuation Commissioner for Northern Ireland* [1964] 1 W.L.R. 912, 941 (H.L.). For discussion of the confused use of terminology in this area, including in that case, see D.J. Hurst, "The Problem of the Elderly Statute" (1983) 3 L.S. 21, 23–29.

[3] [2009] EWCA Civ 94, [2010] Q.B. 163.

many of the conditions that have been suggested for the application of the settled practice principle.

In *Anglesey*[4] the claimants sought declarations that would have established their right to build a marina on parts of the foreshore within a local mussel fishery that had been created by an order under the Sea Fisheries Act 1868. One of the issues was the validity of that order.

The 1868 Act authorised ministers to make orders establishing oyster and mussel fisheries. Section 40 provided that an order conferred on the grantees a right of several fishery. "The grantees" were defined as "the persons obtaining the order". It became the practice for orders under the 1868 Act to be made in favour of district fisheries committees and for those committees to grant fishing permits to others. Fishery rights over the seabed off Anglesey had been granted under the Act to such a committee by the Menai Strait Oyster and Mussel Fishery Order 1962. The order provided that the fishing rights "shall not be exercised by the Grantees themselves" but instead through the grant of permits to others.

The claimants sought a declaration that the 1962 Order was ultra vires. They argued that since the Act provided for the right to be conferred on the "grantees", who were defined as the persons obtaining the order, the right was purely personal; so there was no power to provide for it to be exercisable by others through the grant of permits as contemplated by the 1962 Order. Against this, the defendants pointed to the ordinary incidents of a "several fishery" as a form of property right capable of assignment, and the improbability of Parliament creating a personal right intended to last 60 years.

The Court of Appeal in *Anglesey*, having acknowledged the strength of the conflicting arguments, held that doubts as to the meaning of section 40 of the 1868 Act should be resolved by reference to evidence of settled practice. For over 100 years the Act had been understood as conferring fishing rights that are capable of assignment and this was reflected in the wording of previous orders. Moreover, many of those orders had been approved by Act of Parliament (as had originally been required under the 1868 Act until it was amended in 1938).

Addressing the use of settled practice as an aid to statutory interpretation Carnwath L.J., with whom the other members of the Court of Appeal agreed, said:

> where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers …

[4] Ibid.

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> In my view that history points a clear way to the resolution of the ambiguity in the 1868 statute . . .[5]

B. Scope of the Settled Practice Principle

The *Anglesey* case highlights many of the conditions that have been suggested for the use of settled practice as an aid to interpretation: ambiguity, antiquity, a settled interpretation and reliance. However, as will be seen, the authorities do not disclose an entirely consistent view.

1. Ambiguity

The first condition that the courts have identified for the use of settled practice is some kind of ambiguity in the statutory text to justify reliance on later practice.[6] There is no place for reliance on settled practice, it is said, where the meaning of a statute is plain and free from ambiguity.[7] On this there would appear to be general agreement. It is hard to conceive of many points of construction arising where a provision is free from ambiguity. Nonetheless, there are, arguably, reasons why ambiguity should be treated as an issue going to weight rather than admissibility.

If the rationale for relying on settled practice is that it provides evidence that an interpretation is sound, as argued later in this article, the threshold requirement of ambiguity seems hard to justify. Anything that is likely to shed light on the legal meaning of the statutory text should in principle be considered. Ambiguity is, of course, used as a threshold requirement for the use of certain other external aids to interpretation (for example legislative debates or the use of statutory antecedents when interpreting a consolidation Act). Two justifications are commonly advanced for the use of ambiguity as a threshold requirement in the context of external aids to interpretation.[8] The first is that it helps to promote legal certainty and predictability by enabling people generally to rely on the statutory text, and the second is that it simplifies the interpretative process and avoids unnecessary cost and inconvenience in searching out other materials. Whatever the strength of these justifications in relation to other external aids, they would not seem to be particularly forceful reasons for excluding an entrenched settled practice, given that the very reason why the practice is

[5] Ibid., at [43]–[44].

[6] E.g. *R. (N) v London Borough of Lewisham* [2014] UKSC 62, at [53] (Lord Hodge), [95] (Lord Carnwath); *Millan v T Leith Developments Ltd.* [2017] CSIH 23, at [68] (Lord Carloway); *Campbell College, Belfast v Valuation Commissioner* [1964] 1 W.L.R. 912, 941 (Lord Upjohn); *Clyde Navigation (Trustees of) v Laird & Sons* (1883) 8 App. Cas. 658, 673 (Lord Watson). For earlier authorities to like effect, see W.F. Craies, *Statute Law*, 2nd ed. (London 1911), 154–55.

[7] *West Ham Union v Edmonton Union* [1908] A.C. 1, 4–5 (Lord Loreburn L.C.).

[8] J.M. Keyes and C. Diamond, "Constitutional Inconsistency in Legislation – Interpretation and the Ambiguous Role of Ambiguity" (2017) 48 Ottawa L. Rev. 319, 327.

of potential relevance is that it is evidence of the meaning that people have in fact attributed to the statutory text.

2. Antiquity

The second condition that has sometimes been suggested for the use of settled practice is that it is confined to the construction of "very old statutes".[9]

For example, in *Trustees of the Clyde Navigation v Laird*,[10] decided in 1883, Lord Watson held that settled practice when levying tolls was "of no value whatever" when construing a statute enacted a quarter of a century earlier. He did, however, acknowledge that settled practice may shed some light on "ambiguous expressions in an Act passed one or two centuries ago". By contrast, Lord Blackburn regarded the levying and payment of dues on a particular basis without objection for over a quarter of a century to be strongly indicative of "some legal ground" for exacting the dues.[11]

It is perhaps unsurprising that many of the authorities in relation to the use of settled practice involve statutes of some antiquity. Legislation enacted before the creation of the Office of the Parliamentary Counsel in 1869 tends to be drafted in a less rigorous style and to lack the qualities of clarity, precision and consistency generally found in modern legislation.[12] When faced with a question of statutory interpretation, the courts are required to determine the legal meaning no matter how confused, inconsistent or incomplete the legislative text may be. In difficult cases involving older statutes, where there may be less contextual material to go on, it is unremarkable that evidence of long-standing usage, if available, has been prayed in aid. The difficulty of construing older statutes might explain a greater tendency to rely on usage in cases involving very old statutes or to give it greater weight. Yet, if settled practice is illuminating, it is not obvious why its use should be confined to older Acts. A rigid test based on the age of the legislation also seems likely to give rise to arbitrary distinctions. How old is old enough?

Recent judicial comment would, in fact, tend to support the view that the use of settled practice is not confined to very old statutes. In *Anglesey* Carnwath L.J., while noting that there are conflicting strands of authority, expressed a preference for Lord Blackburn's more liberal view, although in the event it was unnecessary for the purposes of that case to resolve

[9] *Campbell College, Belfast v Valuation Commissioner* [1964] 1 W.L.R. 912, 941 (Lord Upjohn). As noted above, while reference is made in that case to the doctrine of contemporary exposition, what in fact seems to be under consideration is long usage. See Hurst, "Problem of the Elderly Statute", 23–29.

[10] (1883) 8 App. Cas. 658, 673. The point made in the previous footnote about the confused terminology is equally applicable to Lord Watson's judgment in this case.

[11] Ibid., at 670.

[12] *Rittson-Thomas v Oxfordshire County Council* [2021] UKSC 13, [2021] 2 W.L.R. 993, at [35] (Lady Arden and Lord Burrows).

the issue.[13] This is also supported by Lord Phillips's remarks in *Bloomsbury International Ltd. v Sea Fish Industry Authority*,[14] where the Supreme Court considered a novel construction of a statutory provision in the context of a levy imposed on those engaged in the sea fish industry. In a short judgment agreeing with the majority, Lord Phillips drew attention to the fact that for nearly 30 years everyone concerned in the sea fish industry and government had proceeded on the basis that the provision had a particular meaning. Having referred to *Anglesey*, Lord Phillips expressed the view that in circumstances such as these "there must be, at the very least, a powerful presumption that the meaning that has customarily been given to the phrase in issue is the correct one".[15]

3. Uniform practice for sufficient period

The third condition for the application of the principle is evidence of a practice that is settled. This goes to the core of the principle and requires practice that is both sufficiently uniform and that has been applied for a sufficient period of time. The settled practice may be defined by the conduct of any combination of private parties, public authorities, the courts or the legislature.[16] However, where the only or main evidence of settled practice is the conduct of public authorities or others with a particular interest, it seems open to question whether it would be sufficient to establish a settled practice.[17] Similar issues may arise where it is clear that a widespread settled practice has been heavily shaped by one or more public authorities, for example through the giving of guidance.

The need for sufficient evidence of an established practice may be illustrated by *Bourne v Keane*.[18] In that case the House of Lords, overruling authority dating back to 1835, held that the Chantries Act 1547 did not render a bequest of personal estate for the celebration of masses for the dead void as a gift to "superstitious uses". The majority rejected the argument that there was a sufficiently established understanding that ought not to be disturbed. For example, Lord Birkenhead pointed to the fact that "neither contemporaneous exposition of the statute 1 Edw. 6, c. 14, nor any doctrine closely related to it in point of date, placed upon it the construction

[13] [2009] EWCA Civ 94, at [43]. Carnwath L.J. also refers to *R. (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262, at [68]–[69] (Lord Nicholls), [171] (Lord Carswell), to support this view.
[14] [2011] UKSC 25, [2011] 1 W.L.R. 1546.
[15] Ibid., at [58].
[16] *R. (N) v London Borough of Lewisham* [2014] UKSC 62, [2015] A.C. 1259, at [95] (Lord Carnwath). For the use of subsequent legislative practice, see *R. (Jackson) v Attorney General* [2005] UKHL 56, at [69] (Lord Nicholls), [171] (Lord Carswell), and *Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94, [2010] Q.B. 163, at [39], [44] (Carnwath L.J.), [84] (Pill L.J.).
[17] Reliance on government conduct in interpreting subordinate legislation that has been made by ministers and drafted by government officials should perhaps be viewed with particular scepticism in this regard.
[18] [1919] A.C. 815.

adopted" by the case in 1835. The authorities were, moreover, "only uniform in result" and the reasoning depended on different factors.[19]

4. Not confined to particular kinds of legislation

There is a suggestion in some earlier authorities that the relevance of settled practice may be confined to cases where questions of title to property or transactions are involved, but it seems that this condition, if it ever applied, has since been dispensed with. For example in *Bourne v Keane*[20] Lord Buckmaster said that "decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue".

This may, however, be a convenient place to mention that many of the authorities stress the particular relevance of settled practice in cases where disturbing that practice may have a detrimental effect on people who have reasonably ordered their affairs on the basis of that practice. Indeed, this was a consideration in *Bourne v Keane*[21] where it was pointed out that by finding that the bequest for the celebration of masses was valid "no title or contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of the mistake". Although issues around reliance and inconvenience are touched on in many of the cases, it is suggested that this goes to one of the potential justifications for the settled practice principle and to the weight of the evidence in favour of a settled practice rather than to its admissibility.

C. Strength of the Settled Practice Principle

As with other external aids to construction, a distinction may be drawn between the admissibility of material and the importance or weight to be attached to it in any particular case.[22] In cases where settled practice is admitted, the use to which it is put varies considerably. While it is possible to identify cases where settled practice has played a significant or even determinative role in resolving a question of statutory interpretation, as in *Anglesey*,[23] elsewhere it has been used to confirm or support a conclusion that would likely have been reached in any event.

The varying weight given to settled practice is consistent with the approach of the courts to the use of external aids to construction more generally. The purpose of relying on an external aid is to help the interpreter

[19] Ibid., at 857.
[20] Ibid., at 874.
[21] Ibid. (Lord Buckmaster).
[22] See generally D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. (London 2020), section 24.4.
[23] For an earlier, particularly strong, example of reliance on settled practice, see *Hanau v Ehrlich* [1912] A.C. 39, 41 (Earl Loreburn L.C.).

to arrive at the proper legal meaning of the legislation, but it is always ultimately "for the court and no one else to decide what words in a statute mean".[24] When considering a statutory proposition it will be necessary for the court to consider all relevant interpretative factors and carry out a weighing and balancing exercise to arrive at the legal meaning of the words used. Questions of how much weight to attach to any given factor, including settled practice, will therefore necessarily depend on the particular circumstances.[25] Moreover, the process by which the courts arrive at the legal meaning involves sensitive evaluative judgments, which leaves scope for differing views as to the varying weight to attach to different factors.

The potential for differences of opinion as to the weight to be attributed to settled practice, even where it is accepted as relevant, may be illustrated by *R. (Jackson) v Attorney General*,[26] in which one of the issues concerned the relevance of Parliament's subsequent use of the 1949 amendments to the Parliament Act 1911. Lord Nicholls thought that the "general understanding" which had been reflected in Parliament's conduct of legislative business for over half a century provided a "strong pointer".[27] Lord Carswell was more cautious, noting that the use that may be made of settled practice in statutory interpretation is not clear cut, "but at its lowest one may obtain reinforcement of one's construction of legislation from the fact that the same interpretation has been adopted over a considerable period".[28] Both were clear to point out that the existence of a long-held error of interpretation did not preclude the courts from ruling it mistaken.[29]

The interpretative factors that go to determining the proper interpretation of legislation, and the relative weight to be given to them in any given case, reflects the different values and reasoning that underpin them. The justifications that have been put forward for the use of settled practice are therefore likely to be relevant to the question of what weight (if any) it should be given.

III. The Prevailing Approach to Statutory Interpretation and the Potential for Conflict with Settled Practice

As mentioned at the outset, the debate around the use of settled practice is often framed in terms of drawing a balance between the need to promote legal certainty, so that people today are able to arrange their affairs with

[24] *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenberg A.G.* [1975] A.C. 591, 637 (Lord Diplock).
[25] P. Sales, "Modern Statutory Interpretation (2017) 38 Stat. L.R. 125, 130.
[26] [2005] UKHL 56.
[27] Ibid., at [69]. Despite the dicta cited here, it is suggested that the settled practice relied on in *Jackson* was too remote from the interpretative question to be particularly illuminating. It seems a stretch to characterise general acceptance of the 1949 Act amendments as indicative of a settled practice in relation to the interpretation of the 1911 Act.
[28] Ibid., at [171].
[29] Ibid., at [68] (Lord Nicholls), [171] (Lord Carswell).

confidence that the law applied to them tomorrow will be the same law as it is now understood to be, and the need to ensure legal correctness in giving effect to Parliament's will. Presented in these terms there is the potential for the settled practice principle to come into conflict with the prevailing approach to statutory interpretation applied by the courts. This section provides an overview of what that approach entails so far as relevant to the treatment of settled practice, before going on to explore the potential tension between the concept of legislative intention and the use of settled practice.

A. Prevailing Approach to Statutory Interpretation

The central and guiding aim of statutory interpretation is often described as being to ascertain and give effect to the intention of Parliament as expressed in the words used.[30] This requires some elaboration. There is obviously no question of inquiring into the actual individual views of legislators, which are in any event likely to have been varied and conflicting. Parliament's constitutional authority to change the law is exercised through established procedures designed to distil a single authoritative legal text from the views of many.[31] Legislative intention is used by the courts as a shorthand to refer to the intention that it is reasonable to attribute to Parliament in respect of the enacted words, read in context and in light of the underlying legislative purpose.[32] That is the sense in which it is used in this article. The attributive nature of legislative intention means that the expectations of the reader necessarily play an important role.

The concept of legislative intention has, of course, been the subject of criticism from certain quarters over the years. For some, it is an unhelpful judicial construct that risks masking the court's true reasoning.[33] Others have questioned whether the word intention can meaningfully be applied to the collective actions of a modern multi-member assembly enacting legislation.[34] There are also some who argue for the reality of legislative intention, including Ekins who has argued that it refers to the legislature's capacity as a group to act on a rational plan, in accordance with established procedures, to change the law for the public good.[35] That wider theoretical debate is outside the scope of this paper. For present purposes it is sufficient

[30] E.g. *R. (Spath Holme Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349, 388D (Lord Bingham). See also the collection of materials discussed in R. Ekins and J. Goldsworthy "The Reality and Indispensability of Legislative Intentions" (2014) 26 Sydney L. Rev. 39, 39–41.

[31] P. Sales, "Legislative Intention, Interpretation, and the Principle of Legality" (2019) 40 Stat. L.R. 53, 58.

[32] *R. (Spath Holme Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349, 396G (Lord Nicholls).

[33] See e.g. A. Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge 2018), 17–19, who proposes focussing on "purpose" rather than "intention".

[34] See e.g. R. Dworkin, *Law's Empire* (Cambridge, MA 1986), 313–54; J. Waldron, *Law and Disagreement* (Oxford 1999), 119–46.

[35] R. Ekins, *The Nature of Legislative Intent* (Oxford 2012), 13, 112–13.

to accept the orthodox approach as articulated and applied by the courts, which is described above. This is the yardstick against which it is proposed to measure the admissibility, potential relevance and utility of settled practice in statutory interpretation.

While the concept of legislative intention informs and underpins the approach of the courts to questions of statutory interpretation, in itself it tells us very little about their interpretative methodology. In the vast majority of cases statutory language is clear, and on an informed interpretation there is little doubt as to its application to a particular case. The plain meaning will be taken to reflect the legislative intention and the interpretative exercise is straightforward and largely subliminal. Yet in other cases the interpretative choices that face the courts and other interpreters are significant and far from straightforward.[36] In either situation, the basic method is the same: "the legal meaning of a statutory text is the meaning one infers the legislature intended to convey in uttering the semantic content of the text in the particular context of enactment."[37]

This process of inference involves identifying objective indications of meaning, weighing them against one another, and reasoning from those indications about which of the constructions that have been put forward is most likely to have been intended by the enacting legislature. As Leggatt J. explained in *R. (N) v Walsall Metropolitan Borough Council*: "In essence, the courts interpret the language of a statute . . . as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has."[38] Established principles of interpretation (including interpretative presumptions) support this process by reflecting general expectations that interpreters may be expected to bring to the text. These expectations may be based on the ordinary use of language, the values underpinning our legal system or any number of other factors that inform inferences about intention. The element of constructional choice available to the judge, when confronted with a difficult question of interpretation that is open to more than one reasonable answer, means that a judge's own values and judgment will play their part in the decision of what inferences it is reasonable to draw. Those choices take place within the overall framework of common law principles of interpretation.

This brief account introduces one of the hallmarks of the modern approach to statutory interpretation, namely its emphasis on context. "The language in all legal texts conveys meaning according to the

[36] On the nature of these interpretative choices and the framework within which they are made, see J. Dharmananda, "Certainty, Choice and Text in Statutory Interpretation" in J. Barnes (ed.), *The Coherence of Statutory Interpretation* (Sydney 2019), ch. 11, 118.

[37] R. Ekins, "Statutes, Intentions and the Legislature: A Reply to Justice Hayne" (2014) 14 O.U.C.L.J. 3, 6. Cited with approval in P. Sales, "In Defence of Legislative Intention" (Lincoln's Inn 2019), available at https://www.lincolnsinn.org.uk/wp-content/uploads/2020/11/2019-Denning-Society-Lecture-In-Defence-of-Legislative-Intention.pdf (last accessed 19 July 2021), on which this paragraph draws more generally.

[38] [2014] EWHC 1918, [2015] 1 All E.R. 165, at [65].

circumstances in which it was used"[39] and it follows that context is relevant from the outset and regardless of whether the statutory text is overtly ambiguous. Moreover, the word "context" is used in its widest sense to convey not only the Act as a whole but also the wider social, legal and historical context and all other matters or materials from which one might reasonably infer the intention of the enacting legislature.[40] The background and legislative history of a provision are relevant because they provide information within the actual or potential contemplation of Parliament at the time at which the legislation was passed and may therefore help us to understand the intended meaning.

B. The Potential Conflict Between Legislative Intention and the Use of Settled Practice

While there is no doubt that a statute must be read in light of the external context before or during the legislative process, the use that may be made of subsequent developments, such as the emergence of a settled practice, is less clear. At first sight, reliance on subsequent developments is problematic.

If the object of statutory interpretation is to determine and give effect to the intention of Parliament as expressed in its enactments, it follows that the focus must be on what Parliament intended (or, perhaps more accurately, what it may be taken to have intended based on the text that it has chosen to enact) at the time that the statute was enacted. This is reflected in Lord Nicholls' comments in *In re Spectrum Plus Ltd. (in liquidation)*:

> the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book . . . Statutes express the intention of Parliament. The courts must give effect to that intention from the date the legislation came into force. The House, acting in its judicial capacity, must give effect to the statute and it must do so in accordance with what it considers is the proper interpretation of the statute.[41]

The timing point is significant because it is relevant to the proper selection and use of external aids to construction. Prior materials are relevant to interpretation because the circumstances in which a statement is made will necessarily shed light on the meaning that the speaker or writer intended to convey.[42] As Lord Blackburn said in *River Wear Commissioners v Adamson*:

[39] *R. (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 W.L.R. 2956, at [5] (Lord Steyn). See also *A-G v Prince Ernest of Hanover* [1957] A.C. 436, 461 (Viscount Simonds).

[40] See generally Bailey and Norbury, *Statutory Interpretation*, section 11.2 (text of enactment to be read in context).

[41] [2005] UKHL 41, [2005] 2 A.C. 680, at [38]. See also *R. (N) v London Borough of Lewisham* [2014] UKSC 62, at [167] (Lady Hale: "Parliament's failure to act tells us nothing about what Parliament intended when the legislation was passed, which is what this court must decide").

[42] Ekins and Goldsworthy "Reality and Indispensability of Legislative Intentions", 58.

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.[43]

The same argument cannot be made to justify the use of settled practice or other later developments because they are manifestly not matters that Parliament had in view at the point of enactment. If there is a justification for the use of settled practice it must lie elsewhere.

The focus on the intention to be attributed to Parliament at the time when it enacted the legislation does not, of course, require a court to engage in the hypothetical question of how the legislation would have been interpreted at the time at which it was passed. Legislation is now generally taken to be "always speaking", meaning that it must be interpreted and applied in light of current circumstances. The limits to this interpretative approach are neither clear nor free of controversy but, at least in its more moderate form, the idea that legislation should be treated as always speaking is entirely consistent with giving effect to the legislative intention of the enacting legislative body. It is just that the intended meaning is one which allows the statutory language to have a changing application.[44] The justification underpinning this approach is that a rational legislative body may be taken, at the point of enactment, to intend its enactments to be read in a way that allows for changes that occur over time. To "act as if the world had remained static since the legislation was enacted … would usually be perverse and would defeat the purpose of the legislation".[45]

It is also worth touching on later legislative intervention. Although the emphasis is usually on the intention of the enacting legislature, where a later Act modifies the meaning or operation of an earlier Act the focus necessarily shifts onto the legislative intention underlying the later Act. This may arise where, for example, the later Act makes textual amendments or lays down propositions about the meaning or effect of the earlier Act or about the interpretation of legislation more generally. An example of the latter is the interpretative obligation in section 3 of the Human Rights Act 1998 to construe legislation in a way that is compatible with the Convention rights, so far as it is possible to do so.

[43] [1877] 2 App. Cas. 743, 763.

[44] *R. v G* [2003] UKHL 50, [2004] 1 A.C. 1034, at [29] (Lord Bingham: "Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change"). See also J. Goldsworthy, "Lord Burrows on Legislative Intention, Statutory Purpose, and the 'Always Speaking' Principle" (2022) Stat. L.R. 79.

[45] *R. (on the application of ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin), [2015] 1 All E.R. 165, at [45] (Leggatt J.).

Although the use of settled practice is sometimes viewed as an aspect of reading legislation in its wider contextual setting, it is clear from the discussion here that the justification for relying on earlier materials does not apply to later developments. This poses the question of what, if any, justification can be found for the use of settled practice.

IV. Justifications for the Use of Settled Practice

This part of this article explores the justifications that have been or may be given for reliance on settled practice in statutory interpretation and assesses their merit by reference to the prevailing approach to statutory interpretation outlined above.

A. Certainty, Predictability and Reliance Interests

A common justification given for the use of settled practice is that it tends to promote the values of legal certainty and predictability central to the rule of law.[46]

Absent any authoritative determination by the courts, people have to form their own opinion about what a statute means. Where a generally accepted body of understanding and practice emerges, it seems likely that people will organise their affairs on that basis. If the practice becomes widespread, there is an argument for protecting the integrity of acts and transactions which have taken place in reliance on what the law is generally understood to be at the time.

To overturn an entrenched settled practice would be to pull the rug out from under the feet of those who have reasonably ordered their affairs on a particular basis. This suffers from similar objections to retrospective lawmaking. People cannot follow the law unless it is knowable at the time when they act, and a reasonable degree of predictability and stability is required for the law to serve one of its basic functions of guiding behaviour.[47] An unexpected rejection of settled practice risks destabilising the basis on which people plan for the future.

Settled practice cannot, of course, be viewed as law or even as definitively settling what the law means. It is no more than action based on a common understanding of what the law is thought to be. In the case of a statute, the law is embodied in the text enacted by Parliament, and the role of making binding determinations about what it means is for the courts and the courts alone.

[46] For recent examples, see *Isle of Anglesey v Welsh Ministers* [2009] EWCA Civ 94, at [43] (Carnwath L.J.); *Bloomsbury International Ltd. v Sea Fish Industry Authority* [2011] UKSC 25, [2011] 1 W.L.R. 1546, at [57]–[58] (Lord Phillips); *R. (N) v London Borough of Lewisham* [2014] UKSC 62, at [94] (Lord Carnwath).

[47] J. Raz, "The Rule of Law and Its Virtue" in J. Raz (ed.), *The Authority of Law: Essays on Law and Morality* (Oxford 2009), 214.

Those who would reject the use of settled practice sometimes point to the fact that anyone relying on settled practice must therefore be taken to understand that it is liable to rejection by the courts at some future stage.[48] This may well be correct in principle, but it suffers from an air of unreality.

A statute may reasonably be open to more than one meaning, and where this is the case people have no choice but to do the best they can. The cases where settled practice is in issue tend to be those where other interpretative criteria do not produce a clear answer. People can and do reasonably base their actions on the law as it is now generally interpreted to be, even if, as a matter of principle, there is always a risk that the interpretation will later be rejected by the courts. This is recognised in Lord Carnwath's observations in *Anglesey* that the need to protect reliance interests, "applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers".[49] In any event, the fact that settled practice may be rejected by the court does not diminish the potential harm caused by frustrating the expectations of those who have put in place arrangements on the basis of current practice, not least because it risks destabilising general confidence and future trust in the legal system.

If the protection of reliance interests is a consistent feature of the cases where settled practice has been used, the reverse is also true. In cases where the courts have been prepared to overturn a settled practice, they have sometimes pointed to the lack of any likely detrimental effect. An example is *Bourne v Keane.*[50] As explained, the House of Lords decision to reject a long line of authorities and practice based on those authorities meant that a bequest for the celebration of masses would be saved from invalidity. Lord Buckmaster said:

> I cannot find, however, that they compel acceptance as accurate of a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake. For over eighty years Roman Catholics have been unlawfully restricted in the disposal of their property; that seems to me no reason why the restrictions should continue to be imposed.[51]

While the courts are understandably often reluctant to disturb settled practice, the arguments in favour of certainty and predictability go in no way to reconciling its use with the prevailing approach of the courts to statutory interpretation articulated above, based as it is on legislative intention.

[48] A variant of this argument may be found in Lady Hale's observations in *R. (N) v London Borough of Lewisham* [2014] UKSC 62, at [168].
[49] *Isle of Anglesey v Welsh Ministers* [2009] EWCA Civ 94, at [43].
[50] [1919] A.C. 815.
[51] Ibid., at 874. See also *Campbell College, Belfast v Valuation Commissioner* [1964] 1 W.L.R. 912, 918 (Lord Reid), 930–31 (Viscount Radcliffe).

This seems to be recognised in Lord Carnwath's suggestion in *R. (N) v London Borough of Lewisham*[52] that the debate is about where to draw the balance between "legal correctness and legal certainty". Presented in these terms, the use of settled practice must surely be rejected. The constitutional role of the courts is to determine and give effect to the meaning of a statute, not to decide whether it would be more just for the law to reflect the subsequent practice of those affected by it or to reflect other values however important. But the choice offered is a false one for two reasons: first, if the use of settled practice is permissible in statutory interpretation, there is no gap between legal correctness and legal certainty; secondly, if settled practice is allowed to stand notwithstanding its inconsistency with the proper interpretation, any certainty it provides is not legal certainty.[53]

B. Parliamentary Acquiescence

An alternative justification that has sometimes been put forward for the use of settled practice is parliamentary acquiescence. Where legislation has been interpreted in a particular way for a long period of time by the judiciary or others it is, of course, open to Parliament to reverse that interpretation by enacting further legislation. Parliamentary acquiescence arguments proceed on the basis that a failure by Parliament to reverse an interpretation may be taken as an indication that it is satisfied with that interpretation.

While arguments from parliamentary acquiescence have a certain attraction they are for the most part fundamentally flawed.[54] The nature of the legislative process and pressures on parliamentary time mean that the reasons for parliamentary inaction are many and varied, ranging from ignorance and indifference to party politicking. There are also fundamental conceptual and constitutional problems with relying on legislative inaction as a justification for drawing inferences as to legislative intent. Attributing legal significance to the supposed *unenacted* intentions of Parliament runs contrary to the "cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments".[55] An Act derives its legal authority from its proper enactment by the Queen in Parliament. The actual or imagined intentions of members of Parliament individually or collectively do not, without more, have any legal authority.[56] The prevailing approach to interpretation, instead, involves drawing inferences about the intention of the enacting legislature based on a contextual reading of the legislative text.

[52] [2014] UKSC 62, at [94].
[53] I am grateful to Professor David Feldman for pointing this out to me.
[54] D. Bailey, "Interpreting Parliamentary Inaction" [2020] C.L.J. 245.
[55] *Wilson v First Country Trust* [2003] UKHL 40, [2004] 1 A.C. 816, at [67] (Lord Nicholls).
[56] D. Feldman, "Statutory Interpretation and Constitutional Legislation" (2014) 130 L.Q.R. 473, 481; J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), 232.

Parliamentary acquiescence may therefore be discounted as a sound justification for the use of settled practice.

C. Legislative Evolution and Later Legislative Intervention

Arguments from legislative acquiescence must be distinguished from cases in which settled practice is relevant because it forms part of the context for later legislative developments. It is worth briefly mentioning two cases in which this may arise. Although not strictly applications of the settled practice principle as articulated at the start of this article they are clearly closely related.

The first case is where a statute re-enacts or borrows wording from an earlier statute. Where the statutes operate in the same or a similar field, the way in which the earlier statute was interpreted and applied may be viewed as part of the contextual material from which inferences may reasonably be drawn as to the likely meaning that Parliament intended to convey through its choice of words in the later legislation. This is in part founded on the idea that Parliament may be taken to be an informed body. This line of argument typically arises in cases where the earlier interpretation is a binding judicial authority, but it would not appear to be confined to those cases.[57]

A clear example of this kind of reasoning may be found in Lord Macnaghten's obiter comments in *Tax Special Purposes Commissioners v Pemsel*:

> the Income Tax Act . . . has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered . . .
>
> The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning.[58]

The use of settled practice in these circumstances does not suffer from the same objections as legislative acquiescence, since the settled practice is used as evidence from which to reason about the proper construction of

[57] The general principle of construction is often referred to as "*the Barras Principle*" after *Barras v Aberdeen Sea Trawling and Fishing Co. Ltd.* [1933] A.C. 402. For relatively recent statements as to the breadth of its application, see *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305 (Q.B.), at [52] (Andrew Smith J.: the principle "is not confined to statements of law made by way of binding precedent"); *R. v Chief Constable of the Royal Ulster Constabulary, ex parte Begley* [1997] 1 W.L.R. 1475, 1481 (Lord Browne-Wilkinson relying on the "clear statement of the prevailing view and practice in Northern Ireland" evidenced by an official report).

[58] [1891] A.C. 531, 591.

the words that Parliament has enacted, rather than to conjecture about, and attribute legal significance to, Parliament's unenacted intentions.

The second and related case in which settled practice may form part of the relevant context for later legislative developments is where a statute builds upon a particular understanding of an earlier statute that is supported by that settled practice. The beliefs and assumptions of Parliament are not the same as its enactments.[59] But the enactment of later legislation may, depending on the circumstances, be viewed as modifying or giving rise to an implied declaration as to the meaning of the earlier law or as having some other bearing on its interpretation.[60] Such cases are, however, likely to be relatively rare and do not justify the use of settled practice more generally.[61]

D. Contemporaneous Exposition

It is sometimes suggested that the use of settled practice is legitimate because it provides a "contemporaneous exposition" of how the statute was understood at the time at which it was enacted. The doctrine of contemporaneous exposition is not without its own difficulties, partly owing to the inconsistent use of terminology.

The doctrine of contemporaneous exposition is of considerable antiquity and encapsulates the idea that the best construction of an instrument is that placed upon it in contemporaneous sources.[62] The classic explanation was given by *Maxwell on the Interpretation of Statutes*:

> It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed; and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions.[63]

Underpinning this explanation is the view that was historically very common of statutory interpretation as an exercise in determining the meaning that the statute would have been given if interpreted on the day on which it was passed. Under this historical approach, meaning and application are fixed at the time of enactment and must generally be determined solely

[59] *IRC v Dowdall, O'Mahoney & Co. Ltd.* [1952] A.C. 401, 426 (Lord Radcliffe).

[60] See *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 K.B. 403. See further Bailey and Norbury, *Statutory Interpretation*, section 24.19.

[61] See also *R. (N) v London Borough of Lewisham* [2014] UKSC 62, at [95] (Lord Carnwath: "[the settled practice principle] should not necessarily depend on the degree or frequency of Parliamentary interventions in the field.").

[62] The doctrine, traditionally expressed in the Latin maxim *contemporanea expositio est optima et fortissinia in lege*, is referred to several times by Coke in the *Institutes*. See e.g. 2 Co. Inst. 11. The doctrine is also sometimes referred to in the abbreviated form *contemporanea expositio*.

[63] P. St. J. Langan, *Maxwell on The Interpretation of Statutes*, 12th ed. (London 1969), 264. The passage in an earlier edition of that book was approved by the Court of Criminal Appeal in *R. v Casement* [1917] 1 K.B. 98, 138. It is also cited by J. Bell and G. Engle, *Cross on Statutory Interpretation*, 3rd ed. (London 1995), 137; and F. Bennion, *Bennion on Statutory Interpretation*, 5th ed. (London 2008), 913.

by reference to the circumstances then existing. It is an approach that is typified by Lord Esher's comments, in 1889, in *The Longford*:[64] "[t]he first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed".[65]

It is clear that a fixed historical approach that involves inquiring into how a statute would have been interpreted and applied the day after it was passed is not now of general application. As discussed earlier, legislation is generally viewed as "always speaking" so that at very least the context or application of a statutory expression may change over time. Under the more moderate view of the always speaking doctrine there is "no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking".[66] The meaning of the statutory words remains the same but the circumstances and contexts in which they are applied may change over time.

The concept of contemporaneous exposition is often identified with the interpretative approach articulated by Lord Esher, and sometimes used as a label for it. Yet while contemporaneous exposition might acquire heightened relevance if one were to adopt the historical approach, it is suggested that they are logically distinct ideas. Lord Esher was articulating a general approach to statutory interpretation to be applied in determining the legislative intention or legal meaning to be attributed to the statutory text. The doctrine of contemporaneous exposition, by contrast, is simply one of evidence that may, in an appropriate case, be used to support a particular conclusion adopting that interpretative approach.[67]

In recent times the use of settled practice as a contemporaneous exposition derives some support from *Bloomsbury International Ltd. v Sea Fish Industry Authority*.[68] Lord Phillips in that case observed that the arguments about reliance interests have more of an air of pragmatism than principle about them and went on to suggest that a more principled justification would be that of contemporaneous exposition: "An important element in the construction of a provision in a statute is the context in which that provision was enacted. It is plain that those affected by the statute when it comes into force are better placed to appreciate that context than those subject to it thirty years later."[69] Leaving aside the fact that many of the settled practice cases do not involve a contemporaneous practice, the contemporaneity of an interpretation in itself seems to be a very slender basis for concluding that it is the interpretation most likely intended by the enacting

[64] [1889] 14 P.D. 34, 36. See also *Sharpe v Wakefield* (1888) 22 Q.B.D. 239, 241 (Lord Esher).
[65] For further examples see D. Meagher, "The Principle of Legality and *Contemporanea Exposition est Optima et Fortissima in Lege*" (2017) 38 Stat. L.R. 98, 101.
[66] *R. (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 A.C. 687, at [9] (Lord Bingham).
[67] Hurst, "Problem of the Elderly Statute", 24, 30.
[68] [2011] UKSC 25.
[69] Ibid., at [61].

legislature.[70] Contemporaneous exposition is simply evidence of what people initially thought that a statute meant without any indication of their reasoning or the materials on which they were drawing. To give it interpretative significance by reason of its contemporaneity alone would seem to involve a series of leaps of faith. It involves an assumption that those interpreting the legislation at the time knew something about the context that we do not know today, or that they were better able to read the context than we are today, and further that we should attach weight to the constructional choices that they made on the basis of that context. The exercise becomes too speculative to be of any real value.

E. Soundness

The final rationale that may be given for the use of settled practice is that it provides some evidence that an interpretation is sound. This rationale is one that does not appear to have received any judicial or academic discussion within this jurisdiction,[71] yet provides an argument for the use of settled practice that is entirely consistent with the prevailing approach of the courts to statutory interpretation, including the concept of legislative intent.

The fact that a statute has been understood and applied in a particular way manifestly provides evidence that the words are capable of conveying that meaning.[72] Moreover, where a consistent or settled practice has prevailed without dissent for a prolonged period of time, this may be persuasive evidence that the better interpretation of the statutory text is that which the settled practice attributes to it. In other words, settled practice is evidence from which an inference may reasonably be drawn as to the meaning that Parliament intended to convey through its enactment of the statutory text – on the basis that it is the meaning that has in fact been communicated by the text to those affected by it. Further, where an interpretation has survived for a long period of time without serious difficulty, settled practice may provide evidence that the interpretation is sound in the sense that it works in practice, which is a further argument in its favour.[73]

Legislation serves the dual purpose of establishing the law and communicating it to others. As a form of communication it does not simply mean whatever Parliament intended it to mean.[74] The reader's perspective must also be taken into account. The object of statutory interpretation is to determine the meaning of the text that Parliament has in fact enacted, rather than

[70] If the interpretation endures it may form part of the body of evidence that the interpretation is a sound one. This justification for the use of settled practice is discussed below.

[71] For discussion in the US, see M.P. Healy, "*Communis Opinio* and the Method of Statutory Interpretation: Interpreting Law or Changing Law" (2001) 43 Wm. & Mary L. Rev. 539, 583.

[72] H.M. Hart and A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, edited by W.N. Eskridge and P.P. Frickey (New York 1994), 1379, 1270.

[73] For the need to have regard to consequences when approaching questions of interpretation, see Bailey and Norbury, *Statutory Interpretation*, section 11.6.

[74] Goldsworthy, *Parliamentary Sovereignty*, 247.

what members may have believed they were enacting. Or, to put it another way, the object is to determine the meaning that may reasonably be attributed to the text that Parliament has enacted based on a reading of that text in light of publicly available evidence. This is important because laws should be something that citizens can readily understand. What better evidence of the meaning reasonably to be attributed to the text than the meaning widely attributed to it by those affected? The point is therefore not that the meaning to be attributed to a statutory text is to be determined by a subjective inquiry into the meaning conveyed to individual readers any more than it is determined by inquiring into the subjective intention of individual legislators. Rather it is that a long-standing practice that has been widely accepted provides information from which inferences may properly be drawn as to the meaning that the reasonable reader may be expected to extract from the statutory text and, therefore, as to the meaning that the legislature may reasonably be taken to have intended that text to have.

This also provides the answer to one of the main concerns that has been expressed about the use of settled practice, namely that it is inconsistent with the court's duty to give effect to the law laid down by Parliament and to perform its own independent assessment of the validity of an interpretation. For example, in *R. (N) v London Borough of Lewisham* Lord Neuberger said:

> I have even greater reservations about the so-called "customary meaning" rule. As just mentioned, a court should not lightly decide that a statute has a meaning which is different from that which the court believes that it has. Indeed, so to decide could be said to be a breach of the fundamental duty of the court to give effect to the will of parliament as expressed in the statute.[75]

There is no suggestion of a court giving a statute a meaning which is different from that which the court believes it to have. The proper role of settled practice, on the basis of the account given here, is not to induce the court to breach its duty to give effect to the will of Parliament, but to help it in discharging that duty. The fact that the court's role is to decide what meaning to attribute to Parliament in respect of the statutory text does not require it to ignore the meaning that others have attributed to that text. Consideration of the perspective of readers and users of legislation assists the court in arriving at an informed interpretation.

Of course, settled practice will only ever be one of the many interpretative factors that must be weighed against one another in order to determine which of the rival interpretations most likely reflects the meaning intended by the enacting legislature. In carrying out this exercise it is inevitable that wider rule of law values and the desire to promote legal certainty and predictability will play some part. In most cases the actions and views of those

[75] [2014] UKSC 62, at [148]; see also at [168] (Lady Hale).

to whom a statute is addressed are unlikely to have any significant probative value. Other interpretative factors will weigh more heavily in the evaluative process. This is borne out by the fact that attempts to rely on settled practice are relatively few and far between. The courts will no doubt also be astute to guard against government practice (such as the issuing of guidance) exerting a disproportionate influence over the interpretative process, especially in cases where the Government has a particular interest.

But there are occasions where settled practice has a significant role to play, as in *Anglesey*. In practice, these occasions seem particularly likely to arise in relation to very old Acts, given that they were often drafted in a less precise or rigorous style than Acts are today, and there may be less contextual evidence to go on.[76] The passage of time also means that it is more likely for a uniform and entrenched settled practice to emerge. Tasked with the duty to decide between rival contentions with little else to distinguish them, the court may legitimately take the view that settled practice provides particularly cogent evidence that the statutory wording bears the meaning that the practice attributes to it.

V. Conclusion

While many of the justifications that have been articulated for the use of settled practice are insufficient or unsatisfactory, the choice that is sometimes presented between legal correctness and legal certainty is a false one.

It is suggested that settled practice is of potential relevance because it is evidence of the meaning that the words of the statute have in fact communicated to those affected by it and therefore of the intended meaning that may reasonably be attributed to Parliament in respect of the words used. It is an objective indication from which one may reasonably draw inferences as to the meaning that Parliament intended in enacting the statutory text. This justification is consistent with the prevailing approach of the courts to statutory interpretation and locates the settled practice principle firmly within the conception of legislative intention. The arguments from legal certainty and predictability complement and strengthen the case for using settled practice in an appropriate case.

In practice the cases where settled practice is of significant probative value are likely to remain relatively rare. I have argued against adopting rigid admissibility criteria based on whether legislation is ambiguous or of a particular age, which seems unnecessary and likely to give rise to unhelpful arbitrary distinctions. Settled practice, however, seems most likely to play a significant role in hard cases where the practice is

[76] While settled practice is more likely to have relevance in relation to older Acts, I am not advocating that antiquity should be viewed as a threshold test for the use of settled practice (see Section II above).

particularly entrenched, and such features are perhaps more likely to be prevalent in relation to older legislation that is drafted in a less rigorous style and where there may be a lack of other contextual information to go on. In any event, settled practice will only ever be one of a range of potentially relevant interpretative factors. As with other aids to construction, the proper weight to be given to settled practice must necessarily vary according to the circumstances of the particular case.