

Chapter 14

The Uncertainty of Certainty in Legislation

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For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes ... Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law.¹

That law must be certain in its application is one of the hallmarks of a mature and sound legal system. A society cannot hold itself out as governed by the rule of law unless its members can act in a way that they are confident will enable them to comply with the requirements of the law. Enforcement at the arbitrary whim of those empowered to enforce the law is anathema to a society based on the rule of law. Likewise, persons who are entitled to the benefits of governmental welfare arrangements need to be able to understand what their rights are. Government servants charged with carrying out the edicts of the law, whether that be by imposing obligations on people or ensuring that their rights are recognised, need to be able to know that they are acting in accordance with the law. Lord Bingham said that the rule of law requires that among other things the law must be accessible and so far as possible intelligible, clear and predictable.²

So what is this ‘certainty’ that is crucial to the upholding of the rule of law? The basic element is that he or she who has to comply with, or apply, a law or who is entitled to take the benefit of a law, should be able to understand the message that is conveyed in the law. That said, both the common law and legislation can be so complex that its understanding will require the assistance of a skilled professional.³ There are

1 Quoted in *Coquillotte*, Francis Bacon pp 244 and 248, from *Aphorism 8* and *Aphorism 39* – *A Treatise on Universal Justice* (c 1600). Endorsed by Lord Bingham in *R v Rimington* [2006] AC 463, [32]. Cited also by Heydon J in *PGA v The Queen* (2012) 245 CLR 355, [129].

2 Thomas Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67. See also Justice Dame Susan Glazebrook, ‘Do They Say What They Mean and Mean What They Say?’ (2015) 14 *Otago Law Review* 61.

3 Cf Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279: ‘Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.’ Elsewhere, Lord Diplock seemed to think that the advice of a solicitor, much less a court, was surplus to requirements: ‘The effect of the failure [by a public authority to give a person an adequate hearing before deciding to exercise a statutory power in a manner which will affect him or his property] is to render the exercise of the power void and the person

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